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General Abridgment

OF

LAW and EQUITY

Alphabetically digeſted under proper TITLES

WITH

NOTES and REFERENCES

to the WHOLE.

By CHARLES VINER, *Eſq;*

Favente Deo.

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FH
MVSEVM
BRITANNICVM

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(B. a) Modus Decimandi. In what Caſes a Man may *preſcribe in Modo Decimandi*; And How.

Modus Decimandi *is*, when Lands, Tenements, and Hereditaments have been given to the Parſon and his Succeſſors, or an annual certain Sum, or other Profit, always Time out of Mind, kind in ſuch

1. A Dmitting that Tithes of Graſs de Jure ought to be made into Hay by the Pariſhioner, yet it ſeems a Pariſh may preſcribe, without any Conſideration given to the Parſon to pay the Tithes of this in Graſs-Cocks, before any Tedding thereof. Contra, *Barham* v. *Gooſe*. Hill. 14 Ja. B. R. per Curiam, præter Houghton, who ſeemed e contra them, becauſe this Preſcription is Non Decimando for this Part.

to the Parſon and his Succeſſors, in full Satisfaction and Diſcharge of all the Tithes in a Place. 13 Rep. 40. Trin. 7 Jac. in the Caſe of Modus Decimandi.——See (Y) pl. 1. 2. S C.

2. So it ſeems a Pariſhioner may make ſuch Preſcription. Contra, H. 14 J. B. R. *Barham and Gooſe*, per totam Curiam, becauſe it is in Non Decimando for this Part.

3. So a Pariſh may preſcribe without any Conſideration, to pay Tithes of Graſs-Cocks after tedder and making thereof in Weekes and Wainrows, and putting into Graſs-Cocks, then out of the Graſs-Cocks to ſet out the Tithes, and not to make it into perfect Hay.

4. Contra, 15 Ja. B. R. between *Poppinger and Johnſon*, a Prohibition denied. But nota, That only Houghton moved it as Doubt to him, to which no Anſwer was given, but the Prohibition denied notwithſtanding.

See (Y) pl. 2. S. C.

5. If a Man preſcribes, that if he hath under 10 Fleeces of Wool, that he ſhall pay one Penny to the Parſon for each in lieu of Tithes, and that if he hath more, (*) that he ſhall deliver to the Parſon the tenth Part of his Wool, upon his Conſcience, without Fraud and Covin, ſine Viſu vel tactu of the Parſon; this is not a good Modus, becauſe it is unreaſonable. M. 12 Ja. B. per Curiam, between *Wilſon* and the Biſhop of *Carliſle*. Vide the ſame Caſe, Hobert's Reports, 149.

Hob. 107. pl. 130. S. C.

* Fol. 648.

6. If a Man preſcribes to pay to the Parſon for the Tithes of the tenth Sheep, as it falls out, and the tenth Swarth, this is not any Modus, becauſe he does not preſcribe to pay other Things than what was due, but a full Tenth. M. 13 Ja. B. between *Barker and Boſwell*, per Curiam.

7. A Man may preſcribe to pay the tenth Acre of Wood ſtanding, and ſo to pay the tenth Acre of Graſs ſtanding for the Tithe of Hay. Hobert's Reports, Caſe 328.

Hob. 250. pl. 330 Hill. 12 Jac. —— Hill. 16 Jac. in Caſe of Hide v. Ellis, S. P. obiter.

8. A Man cannot preſcribe *in the Negative to be quit of Tithes, but in the Negative with an Affirmative*, viz. *That he and all* &c. *have uſed to be quit of Tithes*. Br. Preſcription, pl. 17. cites 7 H. 6. 32. and 8 H. 6. 3.

Gibb. 120. 121 Monſon v. Chapman, S. C & S. P. accordingly.

9. Modus's *were* real Compoſitions by Parſon, Patron, and Ordinary, the written Evidence of which is loſt; but the Law preſumes by the long interrupted Uſuage that there was ſuch; Agreed unanimouſly by Ld. Chancellor and Reynolds and Forteſcue, Judges Aſſiſtants. Barnard. Rep. in B. R. 292, 293. Hill. 3 Geo. 2. in Canc. Munſon's Caſe.

10. If Tenants Time out of Mind have uſed to pay a certain Price for a Tithe Lamb, ſo that the *Cuſtom is fully ſettled*, though the *Parſon incroach more*, or the Tenant pay the Lamb in Specie this does not break the Cuſtom; But if one has paid 1 d. for a Lamb for 50 Years, and *after pays Tithe in Specie* before the Cuſtom is ſettled, though he pay his 1 d. again for 20 Years, he can't preſcribe in Modo Decimandi. Savil. 13. pl. 34. Hill. 23 Eliz. in Scacc. Fleming v. the Tenants of Dudly, and there ſaid to be ſo reſolved Mich. 25 Eliz. in Cam. Scacc. Beake v. Maine.

11. Parſon libel'd againſt A. for Tithes, A. for a Prohibition ſhew'd, That within the ſaid Pariſh of D. there is a *Hamlet* in which A. inhabited, that the ſaid Inhabitants within the ſaid Hamlet had had Time out of Mind a *Chapel of Eaſe* within the ſaid Hamlet, becauſe the ſaid Hamlet was diſtant from the Church of the ſaid Pariſh; and *with Part of their Tithes have found a Clerk* to do divine Service within the ſaid Chapel; and alſo had paid a *certain Sum to the ſaid Parſon and his Predeceſſors for all manner of Tithes*, and it was held a good *Preſcription*, and a Prohibition was granted. 4 Le. 24. pl. 77. Trin. 26 Eliz. B. R. Saer v. Bland.

12. Where a Man preſcribes 1 *s. for the Tithes of all Willows cut down by him in the Pariſh of D.* it is not good. For thereby if he cuts all the Willows of other Men alſo, he ſhould pay but 1 s. for all. But he ſhould have preſcribed for all Willows cut down by him *on his own Land*, and then it had been good. But as it is laid, it is unreaſonable. Godb. 60. pl. 73. Mich. 28 & 29 Eliz. B. R. Anon.

13. A Modus was ſuggeſted in this Manner, viz. *That the Proprietors and Occupiers of ſuch a Manor, or any Parcel thereof, ſhould pay a Groat to the Parſon for Herbage Tithes*; Adjudged an ill Modus, becauſe if a Man had but two or three Feet of Ground in the Manor, he was to pay a Groat; But it ſhould have been laid, *that the Proprietors and Occupiers of ſuch a Manor for themſelves and their Farmers had us'd to pay* 4*d.* 1 Vent. 3. Mich. 20 Car. 2. B. R. Anon.

But if the Parſon be tied to find ſuch a Clerk, and

14. A Preſcription to pay 5 s. to the *Pariſh Clerk* in lieu of the Tithes of certain Land is not good, becauſe he is dative and removable; Cro. E. 71. pl. 26. Mich. 29 & 30 Eliz. B. R. Savell v. Wood.

ſuch a Sum has been uſed to be paid to the Pariſh Clerk in Diſcharge of the Parſon, it had been a good Preſcription, and ſo by way of Compoſition. Le. 94. pl. 122. S. C.—— Mo. 908. pl: 1274 S. C. & S. P. accordingly.

15. Libel for Tithe of Corn, Hay &c. the Defendant ſuggeſted a Preſcription *to pay a third Part of the* 10*th in one Part of the Land, and in another Part, a Moiety of the* 10*th for all manner of Tithes*; The Court inclined that it was a good Preſcription, and a Prohibition was granted. Godb. 120. pl. 139. Hill. 29 Eliz. Rooke's Caſe.

16. The Parſon of North-Lynn libelled for Tithes, the Defendant *ſuggeſted, that he is an Inhabitaut of South-Lynn, and preſcribed in the Inhabitants there, having Paſtures in North-Lynn, to pay Tithes in kind to the Vicar of South-Lynn, where he is not reſident; and that the Vicar hath paid to the Parſon of North-Lynn* &c. *two Pence for every Acre.* The whole Court was againſt the Prohibition; For Modus Decimandi ſhall never come in Debate upon this Matter; But who ſhall have the Tithes,

Tithes, whether the Vicar of South-Lynne, or the Parſon of North-Lynne? Beſides, the Preſcription is not reaſonable. Le. 128. pl. 175. Trin. 30 Eliz. B. R. Gateſield v. Penn.

17. The Defendant alleged a Cuſtom, *that the Parſon ſhould have* for his Tithe Corn *the tenth Land ſown with any manner of Corn, and that he ſhould begin always at the firſt Land next the Church &c.* The *Parſon ſhew'd*, That the Defendant by *Fraud and Covin* ſowed every tenth Land which belonged to the Parſon very ill, and with ſmall Quantities of Corn, and did not dung or manure it as he did the other nine Parts, ſo that it produced not half in proportion of what the other nine Lands did. And the Opinion of Wray J. was, That the Cuſtom was againſt common Reaſon, and ſo void. But if it be a good Cuſtom, then the Parſon ſhall have an Action on the Caſe. Le. 99, 100. Paſch. 30 Eliz. B. R. Stebbs v. Goodlack.

Mo. 913. S. C. ſays, that the Suit by the Parſon in the Spiritual Court being for Tithes in Kind, viz of every tenth Cock by reaſon of the Covin, a Prohibition was granted notwithſtanding the Covin, becauſe the Fraud is to be remedied in an Action on the Caſe at the Common Law.——— S. C. cited Arg. and there it is ſaid, that the Defendant at firſt got a Prohibition on account of the Cuſtom, but the Parſon afterwards had a Conſultation, Wray Ch. J ſaying, that this Cuſtom was againſt common Reaſon. 2 Wms's Rep. 569. cites 1 Le. 99.———[But I do not obſerve this Matter there.]

18. The Defendant ſurmiſed *that he was an Inhabitant of S. and that* Time out of Mind *every Inhabitant there, who had Paſtures in N. had paid Tithes for them to the Vicar of S. and that the Vicar of S. had paid to the Parſon of N. 2d. for every Acre*; and the Court held, that Prohibition lay, and that Plaintiff ſhould declare, and the Defendant (in the Prohibition) might demur if he will; For it is as if he preſcribed to pay 2d. for every Acre. Cro. E. 136. Trin. 31 Eliz. B. R. Cotelord v. Peace.

S C cited Arg. 2 Wms's Rep. 571. in Caſe of Chapman v. Monſon.

19 In a Prohibition the Plaintiff *preſcribed to pay the 10th Sheaf of Grain growing on 60 Acres after it was reaped, in full Satisfaction of all Grain being upon the ſaid 60 Acres*, and which hath been accepted &c. The Court held this Preſcription not good, for it is no more than to pay ſo much for the 10th Part when the Owner pleaſeth; becauſe he may chuſe whether he will make the Corn into Sheaves or not, or as much into Sheaves as he will, and ſo for the 10th Part he may not have the 3d Part, which is not reaſonable. And. 199. pl. 234. Trin. 31 Eliz. Adams's Caſe.

Roll Rep. 173. S. P.

20. Libel for Tithe of Calves &c. the Defendant ſuggeſted a *Cuſtom* in the Pariſh of B. *to pay for the Milk of every Cow* 2d. *in ſatisfaction of Calves.* The *Proof was, That there was ſuch a Cuſtom* in the Pariſh *for all the Land except five Farms*, and for this Cauſe it was held that he had failed in his Preſcription; For it may be theſe Lands were Parcel of the five Farms; But had it been proved that the Lands were not Parcel, it had been otherwiſe; and therefore a Conſultation was granted. Cro. E. 206. pl. 41. Mich. 32 & 33 Eliz. B. R. Bennet v. Shortwright.

21. Preſcription to be diſcharged *of Locks of Wool* ought to be ſhewn of Locks *caſually loſt*. Mo. 911. pl. 1283. Mich. 37 and 38 Eliz. B. R. in a Nota there.

22. A Prohibition was pray'd on a Suit in the Spiritual Court for Tithes in Kind of a *Park now converted into Tillage*, upon a Surmiſe De modo Decimandi, to pay a Buck and a Doe for all Tithes, and allow'd per Cur. and agreed, 1ſt. Though they are Feræ Naturæ, yet they may be given for Tithes. So to pay Pheaſants &c. 2dly, Though they are not tithable of themſelves, yet they may be given for Modus Decimandi, as a great Tree may be given for Tithe of Trees tithable. 3dly,

Ibid Coke Ch. J. cited one Shipden's Caſe, that ſuch a Modus Decimandi generally for the Park is

not good, if it be diſparked, but it ſhall be particularly for all the Acres contained in the Park.

3dly, That that is a Diſcharge to the very Soil, and the Park is only a Liberty, and the Owner may furniſh it with Game when he pleaſes. Noy. 148. Sharp v. Sharp.

22. Whether a Modus Decimandi may *accrue after Endowment* of a Vicarage? Quære, But Prohibition deny'd on producing Endowment by Vicar by which it ſeems it cannot. See Godb. 180. pl. 254. Trin. 8 Jac. C. B. Anon.

23 In a Prohibition the Plaintiff declared, *That he for ten Years laſt paſt held and occupied* 100 *Acres of Land in the Pariſh of S. lying within, and being Part of a Park there, called Ungar-Park, and that he, and all the Occupiers of the ſaid Park, Time out of Mind, have uſed to pay to the Parſon of S.* 4 *l. yearly, in full Satisfaction and Diſcharge of all Tithes of the ſaid Grounds, which* 4 *l. the Parſon had ſo accepted. After Verdict for the Plaintiff, it was moved in arreſt of Judgment, that the Park was not alledged to be Antiquus Parcus,* and ſo to bear Preſcription, and that the Preſcription was laid in the Occupiers, when it ſhould have been in the Owners of the Park, nor by Way of Cuſtom in the Place; but reſolv'd, that this was no Matter of Intereſt and Inheritance, but only in Part of Diſcharge; for every Modus is a Diſcharge of the natural Tithes, and ſo works by Way of Diſcharge. Hob. 118. pl. 148. Hill. 13 Jac. Shelton v. Mountague.

Roll Rep. 121. in pl 4. Arg S. P. where the Hay belonged to the Vicar, the Corn to the Parſon.

24. If a Modus be *for Hay in Bl. Acre*, and the Party *ſows it with Corn* ſeven Years together that does not deſtroy the Modus, but whenſoever it ſhall be made into Hay the Modus ſhall *revive*; and when it is ſown with Corn the Parſon ſhall have Tithe in Kind. Godb. 194. Trin. 10 Jac. C. B. Brown's Caſe.

——S. C. cited 2 Show. 462. Arg. ——S. C. cited Equ. Ab. 368. — When no one Year can paſs without ſome certain Duty, this is a *permanent* Modus, though it be that the ſame piece of Ground being ſown ſhall pay the great Tithes to the Parſon, and being converted into Meadow ſhall pay the ſmall Tithes to the Vicar. Arg. Gibb. 120. cites Godb. 194. [pl. 278. Trin. 10 Jac. C. B.] Brown's Caſe, and Cro. E. 136.

25. A Libel was for Subſtraction of Tithes upon the Statute of 2 E. 6. the Defendant ſuggeſted, That as to that Farm, whence the Tithes in queſtion aroſe, there was a *Cuſtom to take back thirty Sheaves* of the Tithe-Corn growing on ſuch a Farm; Per Cur. It ought to be averr'd to be a great Farm, and if there were but thirty Tithe-Sheaves in all, the Owner ſhan't have them; becauſe that would be an unreaſonable Cuſtom, and Day given to the other Side to ſhew Cauſe why the Prohibition ſhould not be awarded. Godb. 234. pl. 324. Mich. 11 Jac. C. B. Jucks v. Cavendiſh.

If the Preſcriber lets the Land to Farm, and the *Farmer pays Tithes in Kind*, this does not deſtroy the Preſcription as to the Leſſor. Roll Rep. 176. per Coke Ch. J. in S. C.

26. If there was a Preſcription, Time out of Mind, for a Modus Decimandi, if this Modus be *not paid for a certain Time*, yet this alters not the Preſcription for this Modus, but he may pay it when he will. Per Coke Ch. J. 2 Bulſt. 240. Trin. 12 Jac. Price v. Maſcall.

Roll Rep. 176. pl. 14. S. C. & S. P. held accordingly by Coke Ch. J. the Preſcription being to pay ſo much Money.

27. Preſcription, Time out of Mind, for Modus Decimandi for Land when it was a *Park*, it ſhall continue for Payment of this Modus only after that ſuch a Park be diſparked and converted to another more profitable Uſe; Per tot Cur. 2 Bulſt. 240. Trin. 12 Jac. Price v. Maſcall.

——The Difference is, when the Preſcription is to pay *Money* for all the Tithes of ſuch a Park, and it be diſparked, there peradventure Tithes ſhall not be paid;

paid; But where it is to pay the *Shoulder of a Buck* or a Doe at Chriſtmas for all Tithes of the Park, there, if diſparked, Tithes ſhall be paid as of other Land; per Popham Ch. J. Cro. E. 467. (bis) pl. 25 Paſch. 38 Eliz. B. R. in Caſe of Bedingfield v. Freak.——Mo. 909. pl. 1277. S. C. and ſame Diverſity.——Ow. 74. S. P. by Popham.

28. If an *Orchard*, for which there is a Modus, be *plow'd* and afterwards it be *made an Orchard again*, the Modus ſhall be paid. Arg. 2 Show. 462. in Caſe of Hill and Harris, cites it as agreed 1 Roll 121. Cooper v. Andrews. Roll Rep. 121. Hill. 12 Jac. in Caſe of Hooper v. Andrews.

29. Preſcription that the *Parſon had two Acres of Meadow given in Diſcharge of all Tithes of Hay Ground*, viz. of all the Meadow in the Pariſh, if any *arable Land* be *converted into Meadow*, it extends not to diſcharge that. Hutt. 58. cites 14 Jac. Conyer's Caſe.

30. A Cuſtom in the Pariſh of B. *that all Lambs engendered, fallen, and bred upon any one Tenement or Living in the ſaid Pariſh, tho' they belonged to ſeveral Perſons, were reckoned together*, as it they were one Man's, that the tenth, or Tithe-Lamb of them ſo counted together, hath been paid for Tithe; The Court held, That all Cuſtoms againſt Common Right are triable at common Law; and that this Cuſtom is unreaſonable, becauſe it may happen, that one Man may have but one Lamb, and that may be taken for Tithe, and they that have more ſhall pay nothing. Hob. 329. pl. 405. Mich. 18 Jac. Barker v. Cocker.

31. The King's *Leſſee* ſhall hold diſcharg'd, tho' his Feoffee ſhall not. Hetl. 60. Mich. 3 Car. C. B. Comins's Caſe.

32. Libel for Tithes *of Milk and Calves*; the Defendant ſuggeſted a *Modus, that every Inhabitant, &c. ſhall pay 4 d. for every Cow, and 2 d. for every Calf*; Iſſue was taken upon the Modus, and at the Trial the *Proof was, that the Tithes were never paid in Kind, but that every Inhabitant, &c. ſhould pay 6 d. and ſome 7 d.* ſo that this was not the Proof of the Suggeſtion, and a Conſultation was granted; but if a *Modus* had been ſuggeſted *to pay* 20 *s.* and the *Proof* had been *that* 40 *s. was uſually paid*, that had been good, it being to intitle the Court to Juriſdiction; but in the principal Caſe no Modus is proved; ſo, it is merely uncertain. Hetl. 100. Trin. 4 Car. Goddard v. Tiler. Litt. Rep. 151. Toddard v. Tiler, S. C. in totidem Verbis.

33. A Cuſtom to pay the *20th Fiſh*, in Satisfaction of the Tithe *of all Fiſh taken in the Sea*, is good, for the Tithe thereof is payable only by Cuſtom, it may by that Cuſtom be leſs than a Tenth; adjudged. Lev. 179. Paſch. 18 Car. 2 Sheppard v. Primroſe. By the Common Law the Parſon cannot have the Tithes of *Fiſhes taken in the Sea*, becauſe it is not within any Pariſh, and then, when the Parſon, by the Cuſtom ought to have the Tithes of them, he ought to take them according to Cuſtom, and that the tenth of the Moiety may be a good Diſcharge of the whole; and the Parties went to Iſſue upon the Cuſtom in Cornwall. Noy 108. Hill. 1 Jac. Holland v. Heale.

36. But a Cuſtom to pay the *Twelfth Sheaf, in Satisfaction of the Tithe of all Sheaf Corn*, is not good, becauſe the Tenth of the Corn is due de Jure; per Cur. Ibid. Sid. 278. pl. 2. Sheppard v. Penrows, S. C. & S. P. agreed, but adds a Quære if it had been that he ſhould pay the 12th part *after ſtitching* &c. and it ſeems that it had been good.

37. A *Modus* was alleged in this Manner; *That the Proprietors and Occupiers of ſuch a Manor, or Parcel thereof, ſhall pay a Groat to the Parſon for Herbage-Tithes.* The Court held that this could not be, for if a Man had but two or three Feet of Ground in the Manor he ſhould pay a Groat; but it ought to have been laid; *That the Proprietors and Occupiers of ſuch a Manor, for themſelves and their Farmers, had paid* 4 *d.* Vent. 3. Mich. 20 Car. 2. B. R. Anon.

38. A Parſon libell'd againſt J. S. for Tithes, who in a Declaration for a Prohibition ſuggeſted a *Compoſition by Deed made in* 1125, which was excepted to, for being before R. II's Time, was before Time of Memory, and ſo no Iſſue could be taken, or could it be tried. 2. That if they did veſt by the Grant, yet that they reveſted in the Parſon *by the Council of Lateran in* 1215, or elſe by the Diſſolution of Monaſteries. 3. Becauſe 'twas not ſhewn that the *Biſhop was Party*; 'Twas anſwer'd, that the Concurrence of the Biſhop was not neceſſary; for as this Caſe was he had nothing to do with it, it being *a Priory*, which had an abſolute Eſtate, which a *Patron* hath not. And, per Cur. The ſole Objection againſt this Preſcription is, becauſe it ſhews the Reaſon of the *Preſcription*, if they had *relied on the Deed* it might be otherwiſe. The Court of Lateran can affect nothing in this Matter &c. and Judgment affirmed. 2 Show. 439. pl. 403. Mich. 1 Jac. 2. B. R. James v. Trollop.

The Caſe was, that the Prior of &c was ſeiſed of a *Portion of Tithes* in &c. *and of the Manor of &c. ſimul & ſemel*, and that in the Reign of H. 1 he *granted the Manor* to W. F. in theſe Words, viz. Dedit W. F. Norburiam *in feodo*, and afterwards *pro Decimis Dominii & duabus Carucatis Terræ, he ſhould pay to the Prior* 5*l. per Ann.* and the Family of the F's had ever ſince held the Lordſhip diſcharged of Tithes, paying 5s. a Year to the Prior and his Succeſſors until the Diſſolution, and ſince to the King. It was objected, that the Land whereof the Tithes were demanded was Parcel of the Demeſnes of the Manor; But per Cur. the Lord at that time might have enfeoffed another to hold of himſelf, and ſo it might have been *Part of the Demeſne when the Prior granted it, and be afterwards granted and held of the Manor*, and as to an Objection that the Modus was not good becauſe *not paid to the Parſon*, the Court ſaid it might well enough be paid as a Modus *to one who has a Portion of Tithes*, and that then he has Quid pro Quo. Skin. 51. S. C.

39. Whenever a Modus *runs high* it is a ſtrong Preſumption that it is no Modus; per Holt Ch. J. And the Court refuſed a *Prohibition* becauſe it appeared (as the Modus was pretended to be) that it *was of nigh the full Value.* 11 Mod. 60. pl. 37. Trin. 4 Ann. B. R. Startup v. Doderidge.

Gibb. 121. cites 2 Roll 265.

40. A Modus was ſet forth *to pay on or about ſuch a Day* ſo much &c. it is ill, for the Day muſt be alleged certain. And the Bill further was, that the Pariſhioners of &c. *conſtantly paid, or ought to pay*, ſo much which ſhould have been conſtantly paid, *and* ought to pay. 8 Mod. 375. Trin. 11 Geo. and cites it as lately reſolved in the Caſe of Harriſon v. Clerk.

41. Though every Modus muſt be ſuppoſed to have a reaſonable Commencement, which the Court admitted; yet as to the Neceſſity of *ſhewing now that the Modus is reaſonable*, that ſeemed not to be ſo clear; for theſe Modus's having been *from Time immemorial*, none can know but that there were ſuch Circumſtances in thoſe ancient Times as might have made ſuch a Compoſition reaſonable tho' not diſcoverable now; And that it was ſufficient to ſatisfy us now that Parſon, Patron and Ordinary might then bind the Revenues of the Parſon, but tho' ſuch Inſtrument be loſt, yet the Modus is not. Per Ld. C. King aſſiſted by Reynolds and Forteſcue J. 2 Wms's Rep. 572. Hill 1729, in Caſe of Chapman v. Monſon.

42. *But* if an *Inſtrument* had been *made* by Patron, Parſon or Ordinary, *to a Layman to diſcharge his Farm of all Tithes*, (tho' it would be good ſo long as the Inſtrument could be ſhewn) and the ſame ſhould once be loſt this being a Privilege in Non Decimando, the *Privilege would be loſt by Loſs of the Deed*; ſo far the Law went in favour of the Church; Per Ld. C. King, aſſiſted by Reynolds and Forteſcue J. 9 Wms's Rep. 573. Hill. 1729. in Caſe of Chapman v. Monſon.

43. A Bill was brought to eſtabliſh a Modus, which was, That *in Conſideration the Pariſhioners, at their own Expence, made Tithe-Graſs into Hay, the Inhabitants were to pay no Tithes for dry and unprofitable Cattle.* It was proved, that the Pariſhoners had not paid ſuch Tithe Time out of

of Mind, but not that ſuch Non-payment was in Conſideration as aforeſaid. On the other Side it was proved, That Foreigners living out of the Pariſh made the Tithe-Graſs into Hay, as well as the Inhabitants, and yet paid Tithe-Herbage, which Ld. C. King thought a material Objection againſt the Cuſtom, and made it ſeem to be the Uſage of the Pariſh for the Pariſh to make their Graſs into Hay of Courſe; And likewiſe that the Pariſhioners did not divide the Graſs into ten Parts, when cut down, nor till made into Hay, ſo that the Parſon could not have any Opportunity of making the Tithe-Graſs into Hay himſelf; and diſmiſſed the Bill with Coſts, but without Prejudice as to any Litigation at Law. 2 Wms's Rep. 521. Paſch. 1729. Fox v. Ayde.

44. A Modus, that the Pariſhioners *making Tithe-Graſs into Hay ſhould excuſe not only the Herbage of the ſame Ground, but alſo all Tithe-Herbage for all other Land depaſtured by him within the Pariſh*, tho' it might be a great Parcel of Paſture Land, and tho' the ſame might be fed all the Year, is ſuch a Modus as would be too much for a Court of Equity to eſtabliſh. 2 Wms's Rep. 523. Paſch. 1729. per Ld. C. King. Fox v. Ayde.

45. A Modus was laid to be *that every Perſon not inhabiting within the Pariſh of B. occupying any Meadow or Paſture Land within the Pariſh of B. had Time &c. paid 4d. an Acre* yearly, and ſo proportionably for any greater or leſſer Quantity. And this was held by Ld. C. King, aſſiſted by Reynolds and Forteſcue J. to be a good Modus and certain enough. 2 Wms's Rep. 565. 572. Hill. 1729. Chapman v. Monſon.

46. Every Modus *muſt be certain*, otherwiſe no *Length of Time* will make it good. Admitted by Ld. C. King, aſſiſted by Reynolds and Forteſcue J. 2 Wms's Rep. 572. Hill. 1729. in Caſe of Chapman v. Monſon.

(C. a) Modus Decimandi.

[*Good. What is.*]

1. **IT is a good Modus Decimandi, that,** in conſideration the Pariſhioners hath Time out of Mind &c. paid Tithe-Wool of all his Sheep which he hath ſhorn, as well of thoſe as he bought two Days before the Shearing, as of others that he had kept through the whole Year, he hath uſed Time &c. to be diſcharged of Tithe-Wool of ſuch Sheep that he ſold two Days before the Shearing; **for by the Spiritual Law they ſhould have Tithes of him, and de Reſiduo pro Rata which he ſold before Shearing, and therefore, in conſideration that he here pays Tithes of thoſe which he bought ſo ſmall a Time before the Shearing for the whole Year, which is not due by the Spiritual Law, it is therefore Good. M. 14 Ja. B. adjudged.**

2. **It is a good Modus** for the Tithes of Calves to pay a Calf for the Tithe if he hath ſeven in one Year, and if he have under ſeven, to pay an Halfpenny for every Calf **for the Tithe,** and if he ſells any Calf, that he ſhall pay the Tenth of that for which he ſells it. **M. 14 Ja. B. R. between** *Lee and Collins* **reſolved, and a Prohibition granted.**

3. It

S. C. cited per Cur. 2 Salk. 656. pl. 2. Mich. 10 W. 3.

3. **It is a good Modus for Tithe** of Eggs, to pay in Lent 30 Eggs for all Tithe of Eggs **M. 14 Ja. B. R. between** *Lee and Collins*, **a Prohibition granted thereupon.**

B. R. in Caſe of Hill v. Vaux, that he is bound to pay if he has Hens or not, and he muſt pay them at a certain Time.—Ld. Raym. Rep 360. S. C. cited by Holt Ch. J. accordingly; but if the Cuſtom was that he ſhould *pay* 30 *Eggs of his own Hens*, the Cuſtom would be ill.

4. **It is not a good Modus** to pay every tenth Pound of Wool for the Tithes of Wool, **if he doth not** ſhew that he hath paid ſomething, if his Wool does not amount to ten Pound, **for otherwiſe it is in Non Decimando if it be under ten Pound. M. 7 Ja. B. between** *Delman and Barton*, **per Curiam, for the tenth Part of this is due.**

5. Note, by the Serjeants that in the *Spiritual Court*, they *will not admit any Plea in Diſcharge* againſt Tithes, quod nota. Br. Diſmes, pl. 11. cites 8 E. 4. 14.

6. In preſcribing *to be diſcharged of Locks of Wool*, it ought to be ſhewn of *Locks caſually loſt*; Nota. Mo. 911. in pl. 1283. Mich. 37 & 38 Eliz. B. R.

7. Prohibition was ſued upon a Cuſtom *to pay an Halfpenny for the Wool of Sheep ſold after ſhearing*, and before Mich. and adjudg'd a good Cuſtom. Mo., 911. pl. 1283. Mich. 37 & 38 Eliz. B. R. Anon.

Mo 910. pl. 1280 S. C. & S. P. cited to be adjudged.

8. A Cuſtom was alleged *to pay Tithe-Wool at Lammas Day*, and ſays, that he ſet it out at that Day; It was objected that this is not good; for that this is not Modus Decimandi, but for the Time only which is to be tried in the Spiritual Court; But the Court held it good; For it is de Jure when it is clipp'd, but by Preſcription in may be ſet out altogether at another Day, and that is good; Per Cur. Cro. E. 702. pl. 21. Mich. 41 & 42 Eliz. B. R. Green v. Hun.

9. Libel &c. by the Vicar of D. for Tithes, the Defendant ſuggeſted a Modus to pay ſo much to the Parſon of D. in diſcharge of his Tithes. The whole Court agreed, that a *Modus to pay ſo much to the Parſon will not diſcharge him from paying Tithes to the Vicar*; And therefore a Conſultation was granted. 3 Bulſt. 220, 221. Mich. 14 Jac. Wintell v. Child.

10. A Cuſtom was ſuggeſted, That if one has *Lambs under the Number of ſeven*, he ought *to pay an Halfpenny for every Lamb* in Lieu of all Tithes of Lambs, *if he has but ſeven the Parſon* to have the ſeventh, and *ſhould pay* 3 *d.* if he had eight he ſhould pay 2 d. if he had ten the Parſon ſhould have the tenth, without paying any Thing. Agreed that this being a Cuſtom which they refuſed to allow of in the Spiritual Court, that a Prohibition ſhould be awarded. Cro. C. pl. 2. Paſch. 10 Car. B. R. Anon.

11. Cuſtom to pay *Tithes in Kind for Sheep if they continue in the Pariſh all the Year*; *but if* they are *ſold before ſhearing Time*, *then to pay but an Halfpenny for every one* ſo ſold; This was held an unreaſonable Cuſtom. Mar. 79. pl. 128. Paſch. 17 Car. C. B. Weeden v. Harding.

12. *A Vicar libelled for Tithes of Willow Faggots.* The *Defendant ſuggeſted* for a Prohibition *a Modus of paying 2 d. per Ann. to the Rector for all Tithes of Willows.* The Court held. that a Modus to the Rector is a good Diſcharge againſt the Vicar. Mod. 216. pl. 3. Trin. 28 Car. 2. C. B. Anon.

Keb 602. pl. 76. Baudink v. Buſhell, S. C. held

13. Prohibition was pray'd upon a Cuſtom alleged, *That all Perſons who had Lands in ſuch a Village, but lived out of the Village ſhould pay* 4 *d. per Ann. only, in Satisfaction of Tithes.* But this was held an unreaſonable Cuſtom, that Foreigners ſhould have greater Privilege than thoſe who

who dwelt in the Village, and are at greater Charge in reſpect of their Reſiancy, and ſo the Prohibition was denied. Lev. 116. Mich. 15 Car. 2. B. R. Bawdry v. Buſhell.

accordingly; and Keeling ſaid, that there is no Precedent of any Modus ſo variable and dancing.——Modus for *Foreigners to pay 4d. per Acre yearly for Herbage and Tithe-Hay* held good, per King C. and two Judges. Gibb. 120 Hill. 3 Geo. in Canc. Monſon v. Chapman.——But *theſe two Caſes were exploded, and the Court held it a good Modus*, and ſaid, that all Modus's were at firſt upon an Agreement between the Parſon, Patron, and Ordinary, and by ſome Deed or Inſtrument in Writing, in the Nature of a Contract or Agreement, which though now loſt, yet being run out into a Preſcription continues good; that here is no Uncertainty in the Modus, for the Parſon is always ſure to have the 4d. per Acre, or elſe the Tithes in Kind, nor is there any Burthen on the reſt of the Pariſhioners by one or two going out of the Pariſh, and a leaping or *dancing Modus is* where the Modus itſelf varies, and is ſometimes more, or ſometimes leſs, which is not the preſent Caſe, and decreed accordingly by the Lord Chancellor, aſſiſted by Mr. J. Reynolds, and J. Forteſcue Ld. Chancellor ſaid, the Caſe in Keble might perhaps be the Occaſion of this Suit. Abr Equ. Caſes 369. Trin. 1730. Chapman v. Bp. of Lincoln. —— Ld. C. King diſapproved of the Reaſon in Lev. 116. that the *Inhabitants* ought to be *more favoured* in a Modus *than Foreigners*, becauſe liable to Repairs and Veſtments of the Church; whereas by the Reſolution in Jeffrey's Caſe, 5 Rep. 66. b. a Foreigner occupying Lands within the Pariſh, though living out of the Pariſh, is liable to Repairs, and even Ornaments, and ſaid it was a ſudden Opinion upon a Motion. 2 Wms's Rep. 565 to 567 Hill. 1729 S. C. by Name of Chapman v. Monſon, and e contra.—— Ibid. 574. Ld. C. King, aſſiſted by Reynolds and Forteſcue J's, diſliked that Caſe in Lev. 116. and it was then ſaid, that in the ſame Pariſh in which the Modus was inſiſted upon in Lev. 116. the very Modus, notwithſtanding that Opinion, had been obſerved, and Tithes paid in Kind, which ſhewed that no regard was had to that Opinion, and the Parſon not adviſed to rely upon it. —— Gibb. 121. in Caſe of Monſon v. Chapman, that Caſe in Lev. 116. was denied to be Law.

14. A Cuſtom was alleged, That *all Perſons in the Pariſh who had Sheep on their Grounds on Candlemas-Day, ſhould upon full Payment of full Tithes for ſuch Sheep* which were there on that Day, *be diſcharged of Tithes of all Sheep* that afterwards ſhould be *upon their Ground in that Year*; But this was held an unreaſonable Cuſtom. Mod. 229. pl. 18. Trin. 28 Car. 2. C. B. Moor v. Field.

15. A Prohibition was pray'd upon a Suggeſtion of a Modus *to pay for all Tenants and Occupiers of the Land in Diſcharge of Tithes*; but upon the firſt Motion of the Preſcription in the Occupiers was doubted by the Court; tho' at Length, inaſmuch as it goes only in Diſcharge, and not in claiming of an Intereſt; the Prohibition was granted upon Conſideration of the Caſe of Cowper v. Andrews Hob. [39] & Ibid. 188. [118 148] Shelton v. Montague, and 1 Cro. Baker v. Breteman. 3 Lev. 386. Hill. 5 W. & M. in C. B. Stopp v. Peacock.

16. *11 & 12 W. 3. cap. 16. S. 1. Enacts, That every Perſon who ſhall ſow Hemp or Flax ſhall pay to the Parſon, Vicar or Inpropriator of ſuch Pariſh or Place, yearly 5 s. for every Acre of Hemp and Flax, before the ſame be carried off the Ground; for the Recovery whereof the Parſon &c. ſhall have the uſual Remedy.*

S. 2. This Act ſhall not extend to charge any Lands diſcharg'd by any Modus Decimandi, Ancient Compoſition, or otherwiſe.

Made perpetual by 1 Geo. 1. cap. 26.

17. A Modus to pay *2 s. in the Pound out of the Rent reſerv'd from Time to Time* is no Modus. Ld. Raym. Rep. 696. 697. Mich. 13 W. 3. Byne v. Doderidge.

18. Bill was brought to eſtabliſh a *Modus* which was laid thus; *For Payment of ſuch a Sum of Money*, [while the Lands are in the Hands of the Proprietors] *but if in the Hands of any other Perſon, to pay Tithes in Kind, or the Money, at the Election of the Parſon.* Ld. Chancellor ſaid, that he would never eſtabliſh a Modus againſt a Parſon, without a Trial at Law, if he deſires it; but this Modus is clearly ill, for a Modus cannot be deſultory. Sel. Caſes in Canc. in Ld. King's Time. 52. 53. Mich. 11 Geo. Webber v. Taylor.

19. Note; The Court unanimouſly agreed, That *the ſame Land may at one Time pay Tithe in Kind, and at another Time a Modus, where there are different Circumſtances*; the only Thing eſſential to a Modus is, that the ſame Land ſhould not pay Tithe in Kind and a Modus both, where there are the ſame Circumſtances. Barnard. Rep. in B. R. 293. Hill. 3 Geo. 2. in Munſon's Caſe.

Gibb. 119. Monſon v. Chapman, S. C. held accordingly.

20. Bill ſet forth that there was a Cuſtom in the Pariſh of B. *that all Perſons occupying Paſture and Meadow there, ſhould be diſcharged of Tithes in Kind by paying* 4 *d. an Acre, unleſs they were Inhabitants of that Pariſh or of the Pariſh of* ——. The Plaintiffs were Occupiers of Paſture and Meadow Ground in this Pariſh, but Inhabitants in the Pariſh of W. And whether this Modus was good or not, was the Queſtion. Reynolds and Forteſcue J. aſſiſted the Chancellor in determining this Queſtion. They all unanimouſly agreed, That Modus's were real Compoſitions by Parſon, Patron and Ordinary, the written Evidence of which is loſt; but the Law preſumes there was ſuch by the long uninterrupted Uſage. Undoubtedly, they ſaid, there would have been no Diſpute about this Modus if it had been without Reſtrictions; and as *the Reſtriction is for the Benefit of the Parſon*, they thought the Reſtriction could make no Difference. They all allowed however that ſomething muſt be due from the Modus, and that too every Year; for as *no Preſcription can be in a Non Decimando generally and at all Times, ſo neither can it be for ſo long a Time as a Year together*, They ſeemed to allow too, that a *Modus would not be good where it depends upon the Will of the Occupiers, whether it ſhould be more or leſs.* But here they ſaid, The Rule for the Payment of this Modus is as uncertain as the Rule for the Payment of any other Modus poſſibly can be; the only Variation is as to the Perſons paying the Modus, and that they ſaid was never in Objection. Accordingly the Chancellor was going to decree for the Modus, but tho' the Proof was very clear to ſupport it, he gave the Defendant's Counſel a Day to talk with their Client whether they would have the Modus tried or not, as it did concern the Inheritance. Barnard. Rep. B. R, 292, 293. Hill. 3 Geo. 2. in Chancery. Munſon's Caſe.

(D. a) Modus Decimandi.

What ſhall be a *good* Modus Decimandi.

* Cro. E. 660. pl. 7. S. C. adjudg'd a good Preſcription, that they had uſed to make the Hay of the firſt Moaths into Cocks, and to ſet forth the tenth Cock for the Vicar.—— Mo. 910. pl. 1280. Awberie's Caſe, S. C. but mentions the making the firſt Moath into Hay, and adjudged good. —— S. C. cited per Cur. by the Name of Awbrey v. John as adjudged. Cro. J. 42. pl. 7.

† Cro. C. 403, 404. pl. 2. Anon. S. P. and ſeems to be S. C. and a Prohibition granted.

1. **It is a good Modus Decimandi, if,** in conſideration that he hath uſed &c. to make the Tithes of the firſt Moath into Hay for the Parſon, at his Labour and Coſt, he hath been diſcharged of Tithes of the After-Moath. **Tr. 36 El. B. R.** *Johnſon and Kebleſthwayte*, 37 **El.** * *Johnſon and Awberry*; **in theſe two Caſes it was ſo reſolved, and a Prohibition** † **granted. P. 41. El. B. R. P. 11 Car. Banco Regis,** *Langford's* **Caſe reſolved, and a Prohibition granted.**

2. It

2. **It is a good Modus Decimandi, that,** in conſideration of the cutting of the Graſs, and ſpreading and putting it into Wenrews, **ſcilicet, tedding,** and after making the Tithes of the Parſon of the firſt Moath into Graſs-Cocks at his own (*) Coſts **and Charges, he hath been** diſcharged of Tithes of the After-Graſs. **Mich. 42 & 43 El.** *Johnſon and Poppinger*; **1 Jac.** *Eeles and Vachin*; **3 Jac.** *Eeles and Winterbolt*; **In all theſe Caſes Prohibitions were granted in B. R. And Mich. 14 Jac. Johnſon moved for a Conſultation upon the ſaid Prohibition granted in the 43 El. againſt Poppinger, but it was denied. Paſch. 41 El. B. R. between** *Aubrey and Johnſon*; **Paſch. 11 Car. B. R.** *Langford's* **Caſe, a Prohibition granted upon ſuch Surmiſe for the After-Moath. Paſch. 14 Car. B. R. between** *Manning and Clapham*, **a Prohibition granted for the fatting of Sheep upon the After-Paſture.**

See pl. 1. and the Notes there.

* Fol. 649. ——S. P. adjudged accordingly. Hob 250. pl. 330. Hill. 16 Jac. Hide v. Ellis. — And Ibid. ſays the like Judgment was given upon the like Cuſtom Paſch. 2 Jac. B. R. Rot. 192. or 292. Hall v. Simmonds. —— Cro. J. 42. pl. 7. Mich. 2 Jac. B. R. Hall v. Fettyplace. S. P. adjudged a good Cauſe of Diſcharge of Tithes of the latter Mowth, and Prohibition ordered to ſtand. —— Mo. 758. pl. 1048 S. C. but takes a Difference between making it into little Cocks and into great Cocks, that the laſt is a good Preſcription but not the firſt; and that a Preſcription to carry it into his Barn for the Parſon is good, and for this cites Johnſon's Caſe. —— A Preſcription was laid for the After-graſs in Conſideration that every one ſhall preſerve Primam Tonſuram, by which the Parſon ſhall have the better Tithe, and therefore to be diſcharged of the After-Crop for the Tithe of it, and this is called (rewine) is good; for by this the Parſon has the greater Benefit 2 Bulſt. 238, 239. Trin. 12 Jac. 239. the 4th Point in Caſe of Price and Maſeall. — Roll Rep. 38, 39. S. C. & S. P. adjornatur.

3. **It is a good Modus Decimandi, that, in conſideration** of the making the Tithe-Graſs of the Parſon of certain Land into perfect Hay at his Coſts, **he hath been** diſcharged of Tithe of the Paſture of the ſaid Land for the whole Year after. **Paſch. 16 Jac. B. between** *Nichols and Hooper*, **reſolved, and a Prohibition granted.**

4. **It is a Modus Decimandi, that, in conſideration** that they who ſow the Land ought to reap it, and bind and ſever the tenth Part from the nine, and ſet it up in Hillocks **or Heaps, that the Parſon ſhall** not have any Tithe of this Land the next Year following; the Land lying ley, **and not tilled nor converted into Meadow, for of Common Right the Parithioner is not bound to gather and ſet up the Tithe in Hillocks &c. but it is a good Manner of Tithing to throw the Shocks out. Hill. 6 Jac. B. pl. 13. per Curiam.**

5. **It is a good Modus, that, in conſideration** that he hath Time **&c.** wound up the tenth Fleece of his Wool at his Shearing for the Parſon, at his Coſt **and Charges,** and paid it to the Parſon, **he hath been** diſcharged of Tithes of the Necks of his Sheep **when he ſhore them about their Necks for their preſervation** two Weeks before Michaelmas, and two Weeks after **Michaelmas. Mich. 14 Jac. B. R. between** *Joys and Parker* **Parſon of** *Northmolton* **in** *Devon*, **reſolved, and a Prohibition granted, becauſe the Parſon ſued for the Tithe of this Necking; for it appears, that the ſhearing at this Time of the Year cannot be for the Benefit of the Wool.**

Cro. J. 575. pl. 3. Jowce v. Parker, S. C. but S. P. does not appear. — 3 Bulſt. 242 Foſſe v. Parker, S. C. but S. P. does not appear. —2 Brownl. 32. Arg. cites S. P. adjudged, Paſch. 36 Eliz. Jeſſop's Caſe.

6. **It is a good Modus, that, in Conſideration** the Parſon and his Predeceſſors Time out of Memory &c. have been ſeiſed in Fee of certain Meadow within the Vill of D. and taken the Profits thereof, in full ſatisfaction and diſcharge of all Tithes of Hay within the ſame Town, Time out of Memory **&c. for it ſhall be intended that this Meadow was given at the Beginning, in full ſatisfaction of all the Hay within the ſame Town. Mich. 16 Jac. B. R. between** *Moor and Bullock*, **adjudged upon a Prohibition, this Matter being moved in Arreſt of Judgment.**

Cro. J. 501. pl. 10. S. C. adjudg'd accordingly. — Libel &c. for the Tithe Wood in B. the Defendant ſuggeſted a Cuſtom in the Pariſh, *that all the Parſons of the ſaid Church, Time out of Mind haluerunt & paviſi fuerunt, ſuch Land Parcel of the Manor of F. in recompence of all Tithe of Wood in the ſaid Pariſh* &c. But *did not*

not aver that the Lands whereof the Tithes are demanded were Parcel of the Manor; but adjudged, that the Preſcription was good, for it might be, that at the Beginning all the Land within the Pariſh was Parcel of the Manor, and the Land of the Allotter, and that ſuch a Part was allotted to the Parſon in lieu of Tithe-Wood. Cro. E. 587. pl. 19. Mich. 39 & 40 Eliz. B. R. Somerton v. Cotton. —— S. C. cited Arg. Cro. E. 785.

In the principal Caſe of Moor v. Bulluck it was moved in arreſt of Judgment that the Surmiſe was not good; for he ſhewing that he was ſeiſed in Fee, that is as parcel of his Glebe, it cannot be in recompence of the Tithes; or ſhewn that he and his Predeceſſors time whereof &c. have had the Occupation of that Cloſe, and the Profits thereof in lieu of Tithes; and not to ſay that he was ſeiſed, which ſhall be intended as Parcel of the Glebe; Sed non allocatur, for it is a better Form to ſay that he was ſeiſed in Fee; for it is ſo antient that it cannot be ſhewed when, or by whom it was given; But having had it always in lieu of Tithes, it is good enough, and ſhall be intended to be given before Time whereof &c. in recompence of the Tithes. Cro. J. 501. pl. 10. Mich. 16 Jac. B. R. Moore v. Bullock.

The Suggeſtion for a Prohibition was, *That the Parſon had* 20 *Acres of Paſture, and a Cloſe of* 10 *Acres of Wood, in ſatisfaction of all the Tithes demanded*; The Witneſſes examined according to the Statute 2 Ed. 6. cap. 13. *proved that the Parſon had the* 20 *Acres of Paſture, but not the* 10 *of Wood*, and yet the Prohibition was granted, becauſe it appears that the Libel was unjuſt; for though the Pariſhioner had failed of his full Proof, yet there was enough to bar the Parſon of his Tithes in kind, and he need not ſhew how, or by what Title the Parſon had the Land; For *if it was not in Satisfaction of Tithes, the Parſon ought to ſhew that himſelf*. Mo. 911. pl. 1284. Hill. 42 Eliz. B. R. Auſtin v. Piggot. —— Cro. E. 736. pl. 4 S. C. the Subſtance is proved that he held Land in ſatisfaction. —— Cro. J. 501. in pl. 10. S. C. cited that the Preſcription was held good.

7. **It is a good Modus Decimandi,** that he hath paid the Tenth of the Wool of all Sheep that he had before Lady-day, and ſheered or ſold, or put in any other Pariſh, or hath paid the Value of the Tenth thereof, to be in full ſatisfaction as well of all the Wool of ſuch Sheep, as of all other Sheep brought within the Pariſh after Lady-day, **for it is not reaſonable that the Tithes he hath paid ſhould be a Diſcharge for all the other Pariſhioners; but this was intended to be a Diſcharge of all the Sheep of the Party himſelf brought within the Pariſh after Lady-day; but this was not ſo expreſſed, and this had been a good Cuſtom. Mich. 9 Car. B. R. between** *Market and Knight*, **adjudged upon Demurrer, and ſo ruled in another Caſe the ſame Term upon a Trial at Bar.**

In a Prohibition Plaintiff ſuggeſted that Time out of Mind the Owner of the Land had found

8. **It is not a good Modus** that he ought to be diſcharged of Tithes, in conſideration that he hath uſed Time out of Memory &c. to employ the whole Profits of the Land in the Reparation of the Body of the Church, and to find all Neceſſaries for the Church, **for this is not a Recompence to the Parſon. Paſch. 37 Eliz. B. between** *Longley and Meredine*, **adjudged.**

Straw for the Body of the Church, in diſcharge of all Tithes of Hay. Coke moved, that it is no Cauſe of Diſcharge, for the Parſon was not chargeable with it, nor had any Benefit by it, but if he had alleged that he gave the Straw to the Parſon, and he beſtowed it in the Body of the Church, or that the Parſon had a Seat in the Body of the Church it had been otherwiſe; and thereupon Conſultation was granted. Cro. E. 276. pl. 7. Paſch. 34 Eliz. B. R. Scory v. Barber.

Fol. 650.

9. But **it is a good Modus to be diſcharged,** becauſe he hath uſed &c. to employ the Profits for the Reparation of the Chancel; **for the Parſon hath a Benefit by this. Paſch. 37 Eliz. B. ſaid to be adjudged in B. R.**

* Noy. 15. Parry v. Chauncey. S. C.

‡ Cro. C. 393. pl 4. Meade v. Thurman. S. C the Court granted a Prohibition. —— Jo. 357. pl. 9. S. C. but that is of a Libel for green

10. **It is not a good Modus, that, in conſideration** that the Pariſhioner having arable Land hath ploughed it, and hath had Head-Lands, green Slips, or Doles, parcel or appurtenant to their Huſbandry-Houſes or Lands, that in conſideration the Pariſhioner would plough and ſow his Land with ſome Kind of Grain, and mow it, and make it up into Shocks, Pooks, and ſever it from the ninth Part, and prepare it for carriage for the Parſon, the Pariſhioner hath uſed to be diſcharged of the Payment of any Tithe ſowed, growing upon the Headlands &c. of ſuch arable Land, and then ſowed, applied, and converted for the Nutriment of his Cattle of Husbandry employed in the Tillage of the ſaid arable Land, **that is not a good Modus, becauſe of common Right the Pariſhioner ought to cut and prepare the Grain, and ſet out the Tithe. Mich. 3 Ja. B. R. between** * *Perry and Chauncey*, **adjudged upon Demurrer, and a Conſultation**

tion granted. But Hill. 10 Car. B. R. between ‡ *Mead and Thurland*, a Prohibition granted per Curiam, where the Suit was for Tithes of Hay, growing upon ſuch Head-lands, where by Cuſtom not uſed to be paid.

‡ Tares, cut for feeding labouring Horſes, and Prohibition was grounded not upon this general Suggeſtion, but upon the Cuſtom of the Pariſh, that no Tithe was paid in this Caſe ——— 2 Le. 27. pl. 30. Mich. 30 Eliz. B. R. Perry v. Somes. S. P. and held by the whole Court, that it was a good Preſcription as to the green Tares.

11. It is not a good Modus, that in conſideration that the Pariſhioner having Barley, the greateſt Part whereof he hath cut down and tied into Sheafs, and ſet in Cocks, of which the Parſon had the tenth Cock, that he hath uſed to leave a ſmall Parcel of the Barley to ſtand, to the Intent to cut it down after for Bands for the Rakings voluntarily ſcattered, and to be diſcharged of the Tithes of this ſmall Parcel of Barley when he cuts it. Hill. 8 Car. B. R. between *Saunders and Paramour*, per Curiam a Prohibition denied.

12. If a Pariſhioner preſcribes, that whereas the greateſt Part of the Land within the Pariſh, and within the Pariſhes next adjoining thereto, is arable Land, ſo that for want of Graſs they ought to provide other Suſtenance for their Plough-Cattle, and becauſe he hath uſed to cut and tie into Sheafs the Grain ſowed there, and to put them into Shocks, of which the Parſon had the tenth Shock, by which the Parſon hath the Benefit of the Labour of the Plough-Cattle, and in conſideration thereof the Pariſhioner hath Time out of Memory, &c. uſed to be diſcharged of the Tithes of green Tares before they come to Perfection, [and] in ſmall Parcels in the Time of Harveſt, or before, and given to his Plough-Cattle for their Subſiſtance; this is not a good Modus, becauſe if he cuts them down, he ſhall pay Tithes for them, as well as if they had come to their Perfection. Hill. 8 Car. B. R. between *Saunders and Paramour*, per Curiam, a Prohibition denied, ſcilicet, Hill. 10 Car. B. R. between *Mead and Thurland*, a Prohibition granted per Curiam in ſuch Caſe, this being alledged by way of Cuſtom.

See pl. 10. S. C. and the Notes there.

13. It is not a good Modus, that, in conſideration that he hath expended his Hay for his Husbandry-Cattle, to be diſcharged of Tithes of Hay. M. 3 Ja. B. R. and there cited. Sir * *Warner's* Caſe, adjudged.

* Cro. J. 47. pl. 17. Mich. 2 Jac. B. R. Webb v. Warner. S. C. adjudg'd.——Mo. 683. pl. 941. Paſch. 44 Eliz. B. R. Anon. S. P.——A Suggeſtion was of a Cuſtom, *that if any Pariſhioner fed his Sheep with his Graſs till June* or Auguſt, *that then he might mow the coarſe Graſs with which they fed the Sheep in the Winter*, whereby the Parſon had Uberiores Decimas of the Sheep &c. It was inſiſted that this was a plain non Decimando, and cited the principal Caſe here in Roll Abr. 650. pl. 13. and the Court held it a void Cuſtom, and ſo a Prohibition was denied. Ld. Raym. Rep. 677. Trin. 13 W. 3. Selby v. Clerk.

14. It is a good Modus for an Inn-keeper, that, in conſideration that he and all &c. have paid Tithe-Hay and Grain growing upon the Land belonging to the ſaid Inn, and have paid Tithe for all their own Cattle feeding upon the Land, that they have been Time &c. diſcharged of the Tithes of the Horſes of their Gueſts agiſted in the ſaid Land when they travel by the ſaid Inn; for ſome have ſaid, that this was but a perſonal Tithe, and others have ſaid, that no Tithes ſhould be paid for ſuch Agiſtment by the Common Law, without any Modus, between *Gabel and Richardſon* reſolved, and a Prohibition granted.

15. It is a good Modus to be diſcharged of the tenth Swarm of Bees for Tithe, in conſideration of the Payment of the Wax and Honey to maintain them in Winter, and find Caps for them, inaſmuch as they are Feræ Naturæ of themſelves, and require great Care and

Cro. C. 403. pl. 2. Anon. but ſeems to be S. C. adjudged.

and Labour to keep them when they ſwarm. Dubitatur, Hill. 10 Car. B. R. *Langford's* Caſe. Paſch. 11 Car. in this Caſe moved again, and then a Prohibition granted. But ſome of the Judges ſaid, the Modus was not good. ſcilicet, but only the Duty which the Law gave; But they held, That no Tithes were due of the tenth Swarm, becauſe they are Feræ Naturæ.

Preſcription that all the Occupiers

16. It is not a good Modus to preſcribe to pay one Tithe for another.

of L. have uſed to pay to the Parſon, Proprietor of the Tithes *all their Hay in Shocks* which hath been *in lieu of all Broom, and other Benefits of the Tenement* was held an unreaſonable Suggeſtion; For a Modus of one Kind will not ſerve for another. 2 Keb. 212. pl. 48. Paſch. 19 Car. 2. B. R. Brown v. Haywood.

Cro. E. 475. pl. 3. S. P. in S. C.—Mo. 909. pl. 1278. S. C. & S. P. —Gouldsb. 147. pl. 66.

17. As it is not a good Modus to preſcribe to pay for every Milch-Cow 2 d. and for every Calf 1 d. in ſatisfaction for all Tithes of all manner of Cattle, for this ſhall not diſcharge dry Cattle, for this is but one Tithe for another. Mich. 3 Jac. B. R. is cited by Coke to be ſo adjudged. between * *Sherrington and Fleetwood*, which Caſe was Trin. 38 Eliz. B. R.

S. C. & S. P.——S. C. cited 2 Bulſt. 238.——2 Salk. 657. pl. 3. Mich. 3 Ann. in the Exchequer in Caſe of the A. Bp. of York v. the Duke of Newcaſtle; the Court admitted the Payment of Tithe of one Species or payment of a Modus for one Species of Tithe could not be a Diſcharge as to another Species.——But if he had preſcribed that he had paid 1 d. for all Cows and Beaſts agiſted, that peradventure had been good; and ſays this Diverſity was ſo rul'd in Dr. Lewis's Caſe, and of that Opinion were all the Court here.——See Ld. Raym. Rep. 242. in Caſe of Norton v. Briggs.

Mo. 454. pl. 623. Monday v. Lovice. S. P. and ſeems to be S. C. and the Court held accordingly.

18. So if a Man preſcribes to pay one Heifer for all Tithes, this ſhall not diſcharge the Tithes of other Cattle, but he ſhall pay them in Kind. Trin. 38 Eliz. B. R. per Curiam.

Mo 909. pl. 1279 S. C. & S. P. accordingly, becauſe the Cheeſe is made by Labour and Charge.

19. It is a good Modus in conſideration of the Payment of the tenth Cheeſe made from the firſt of May, until the laſt of Auguſt, that he hath been diſcharged of the Tithe of Milk, for this is not a Tithe in kind of Parcel in diſcharge of the Whole, for no Tithe in kind is due of Cheeſe, but only of Milk, and ſo a good Conſideration. Paſch. 40 Eliz. between *Auſten and Lucas*, adjudged.

—— Cro. E. 609 pl. 15. S. C. held accordingly; but to pay the tenth Quart of Milk is not good; becauſe that is only for what is due. But Popham ſaid that to pay the 10th Quart of Milk at the Parſonage Houſe, or at any other Place is good enough.——S. C. & S. P. cited Marg. Raym. 278.—— S. C. cited, 2 Salk. 554. pl. 20. Trin. 4 Ann. B. R. in Caſe of Foy v. Lister, which was on a Modus ſuggeſted to pay *every 10th Day's Milk from April till November ſkimm'd and made into Cheeſe in lieu of all Tithes of Milk*, a Prohibition was granted to try the Modus and ſettle the Matter.—— 6 Mod. 261. Leiceſter v. Foy. S. C. The Court did not like the Modus as ſeeming very ſevere on the Vicar, but to ſettle the Point which they thought of great Conſequence, they granted a Prohibition, directing them to declare forthwith.

Savil. 100. S. C. by the Name of Savil v. Adams.——Mo. 278. pl. 433.

20. One can't make a Preſcription to pay *Parts of the Tithes in Kind for all Tithes of the ſame Nature*; as to pay an Apple for the Tithe of all his Apples, and ſo of the like, Per ſome of the Judges. And. 199. pl. 234. Trin. 31 Eliz. Adams's Caſe.

S. C. —— S. C. cited in the Caſe of Monday v. Lovice, Mo. 454.

21. A Cuſtom *to pay an Halfpenny for the Wool of Sheep ſold after ſhearing and before Michaelmas*, was adjudged a good Cuſtom. And Ovis, or Sheep, is nomen aquivocum, and extends to Weathers as well as to Ewes. Mo. 911. pl. 1203. Mich. 37 & 38 Eliz. B. R. Anon.

22. A

22. A Preſcription for a Modus Decimandi that *in Regard he paid for Milch Kine* 1 *d. he preſcrib'd to be diſcharged of the Tithe of Milch Kine and alſo of all the Dry Cattle*; but this was held to be contrary in itſelf; for a Modus of one Kind to be diſcharged of another Kind, and the Court held that good. 2 Bulſt. 231. Trin. 2 Jac. Arg. cites Mich. 37 Eliz. Lewis v. Gilbourn.

23. It is not a good Preſcription *to pay Tithe-Corn in Satisfaction of all Tithes of the Land.* Mo. 454. pl. 623. Trin. 38 Eliz. cites it as adjudg'd in C. B. in Ridiard's Caſe.

24. The *Lord of the Manor* of B. in the Pariſh of B. *preſcribed*, That he and his Anceſtors, and all thoſe whoſe Eſtate &c. had uſed from Time to Time whereof &c. *to pay the Parſon of D.* the now Plaintiff, *and his Predeceſſors* 6 *l. per Ann. for all Manner of Tithes growing within the ſaid Pariſh, and that by Reaſon thereof he and all whoſe Eſtates &c. Lords of the ſaid Manor had uſed Time whereof &c. to have Decimam garbam or Decimum cumulum Garbarum ſeu Granorum of all of his Tenants within the ſaid Manor.* Reſolved, That it was a good Preſcription, and that a Modus Decimandi by the Lord for himſelf and all the Tenants of his Manor, to bar the Parſon from demanding Tithes in Specie is good, for it might have a lawful Beginning, viz. That before it was a Manor all the Lands were in the Lord's Hands, and that was paid for the Tithe thereof; and then when he conveys Parcel thereof to others it ſhall be diſcharg'd as it was in the Lord's Hands. And as to the Decimam Garbam &c. he has it as a Profit Apprender as Parcel or Appurtenant to his Manor not as Tithes. Cro. E. 599. pl. 5. Hill. 40 Eliz. B. R. Pigott v. Hearn.

Mo. 483. pl. 685. S. C. & S P. agreed by all the Juſtices.— S. C cited Mo. 589.— S.C. cited 2 Rep. 45. a. in a Nota by the Reporter. — 2 Saund. 142. cites S. C.

25. It is a good Preſcription that he has uſed *to pay* 1 *d. called a Hearth-Penny, in Satisfaction of Tithes of all combuſtible Wood.* Mo. 910. pl. 1280. cites 41 & 42 Eliz. B. R. Green v. Hundle.

Cro. E. 702. pl. 21. Green v. Hun, S. C. adjudged to be a good Preſcription.

26. Surmiſe that he uſed *to pay the tenth Sheaf of Corn, the tenth Cock of Hay, the tenth Fleece of Wool, the ſeventh Calf &c.* and that it was *in Satisfaction of all Tithes of all dry Cattle, and for all other Tithes of Corn, Hay and Cattle.* The Court held this Surmiſe not ſufficient; for that which he uſed to pay is but Tithes in Kind, and therefore cannot be in Satisfaction for the Tithes of other Things than themſelves. Cro. E. 716. pl. 26. Mich. 42 & 43 Eliz. C. B. Ingoldsby v. Johnſon.

27. Pariſhoner ſuggeſted that he had all the *Tares* &c. that he ſowed and *cut green to give to his Horſes*, Tithe-free; and a Prohibition was granted, Niſi. Freem. Rep. 72. pl. 87. Hill. 1672. Stone v. Peacock.

28. Libel &c. *for Tithes of rough Hay growing on the Fenny Lands* of M. the Defendant *ſuggeſted that there were* 2200 *Acres of Fenny Land within the Pariſh, and* 600 *Acres of Meadow, and that the Pariſhoners paid Tithe of Hay and Corn growing upon the Meadow and Arable Lands, and ſo much for every Cow and Calf, and becauſe they had not ſufficient Graſs to keep their Cattle in Winter, they uſed to gather this Hay, called Fenny Fodder, for the Suſtenance of their Cattle for the better Increaſe of Husbandry, and for that Reaſon had been always freed from Tithes*; Adjudged that this Surmiſe is not ſufficient; For one may not preſcribe in Non Decimando, and they alleging that they beſtow'd it upon their Cattle is not any Cauſe of Diſcharge. Cro. J. 47. pl. 17. Mich. 2 Jac. B. R. Webb v. Warner.

Mo. 683. pl. 941. Paſch. 44 Eliz. B. R. Anon. S. P. adjudged accordingly, and ſeems to be S. C.

29. *Payment* of Tithes *to the Parſon is ſufficient Diſcharge againſt the Vicar*, becauſe of Common Right all Tithes belong to the Parſon and the Vicarage is deriv'd out of the Parſonage, ſo as no Tithes De Jure belonging to the Vicar but only upon Endowment or Preſcription, which

which ought to be ſhewn Ex Parte the Vicar and the Court cannot intend it; for the Vicarage is a Diminution and an Impairing to the Parſonage, whereof the Court will not take Notice without Monſtrance of the Parties; Reſolved. Yelv. 86. Paſch. 4 Jac. B. R. Grene v. Auſtin.

Cro. J. 116. pl. 4. S. C. but S. P. does not appear.

30. Where the Owner of the Land *pays Tithes of Hay* he is thereby *diſcharged of Common Right, as to Tithe of Agiſtment of the ſame Land in the ſame Year*; becauſe the ſame Land ſhall not anſwer the ſame Year but only one Tithe, and the Agiſtment is only Profit by the Mouth of the Beaſts of the ſame Land whereof the Parſon before had Tithes of Hay; Reſolved. Yelv. 86, 87. Paſch. 4 Jac B. R. Grene v. Auſten.

31. Whether a Modus Decimandi may *accrue after Endowment of a Vicarage?* The Reporter thinks it may. Godb. 180. pl. 254. Trin. 8 Jac. C. B. Anon.

Win 1. Paſch. 19 Jac. Reynolds v. Poole, S. C. adjornatur. Ibid. 44. Mich 20 Jac. C. B. Pope v. Reynolds S. C. a Prohibition was granted, and adjudged that the Prohibition ſtand.

32. If a Man preſcribes *to pay a Buck and a Doe yearly out of a Park in Diſcharge of all Tithes of the Park*, and the Park is diſparked the Modus is gone; Agreed per Cur. and that which is by Name of Park is for the Land, and is annexed to the Land by the Name of a Park. Hutt. 57, 58. Mich. 10 Jac. Pool v. Reynolds.

33. *But* if a Man preſcribes *to pay a Buck and a Doe out of the Park* it would alter the Caſe; but it is general and had been paid after the diſparking viz. the 10 Eliz. Hutt. 57, 58. Mich. 10 Jac. Pool v. Reynolds.

See 2 Bulſt. 239. 6 C. Arg.

34. A Libel was for Tithes *of Broom*, the Defendant preſcribed that for the rooting of the Broom and ſowing the Land the following Year with Corn, which is of greater Benefit to the Parſon, and alſo becauſe the Broom is of little Value and good to cover Houſes, they have uſed to be diſcharged of Tithes of Broom, which it was urged was in Effect Non Decimando and conſequently not good; but it was anſwered, that the rooting it is a great Charge to the Party and the ſowing the Land with Corn is more Benefit to the Parſon, and therefore the Preſcription not good; Coke Ch. J. ſaid he thought the *Land which has Broom* is not within the Statute of 7 E. 6. for it is not *barren Land*, and therefore if converted into arable is tithable; for the Statute ſpeaks of barren Heath or waſt Land. Roll Rep. 39. pl. 6. Trin. 12 Jac. B. R. in Caſe of Maſcall v. Price.

35. *Lord of a Manor preſcribed to have the Tithes within the Manor, for that he and all thoſe whoſe Eſtates he has, have uſed to maintain a Chaplain* in the Church of Dinn. Exception was taken becauſe he *did not allege* that the Church of Dinn was within the ſame Pariſh with the Manor and ſo no Conſideration, nor does he allege *the Maintainance of the Chaplain for ſo long Time as he claims the Tithes, viz. Time out of Mind*, nor did he prove *the Maintainance of the Chaplain within the laſt ſix Months* as he had ſuggeſted, but only the Reſidue, whereas this is the principal Matter which makes his Preſcription good; and upon this laſt Point a Conſultation was granted per Curiam; And Coke Ch. J. ſaid it ſhould be granted for all the other Exceptions alſo, but as to them the other Juſtices ſaid nothing. Roll Rep. 2. pl. 3. Paſch. 12 Jac. B. R. Boocher v. Rogers.

36. A Libel was for Tithe-Hay; The Defendant ſuggeſted a *Cuſtom to pay a Load of Hay for all Tithes of Hay growing and renewing on the Land where &c.* It was argued that this Preſcription was good and that it was not Tithes in Kind, becauſe it is *alleged that Defendant uſed to make the Graſs into Hay* by his Labour, and that it ſeems the Parſon de Jure ought to do this himſelf, for that the Tithes are to be ſet out for the Parſon

Parſon when it is cut and is only Graſs, and conſequently this is a good Modus Decimandi; But Curia e contra, and Prohibition was denied. Roll Rep. 172, 173. pl. 3. Paſch. 13 Jac. B. R. Cumberland's Caſe.

36. Libel &c. for Tithe-Wood &c. The Defendandant ſuggeſted for a Prohibition that the Libel was for Tithes of Beeches above 80 Years old, and that the Parſon had a *Conſideration for Tithe-Wood, viz. Certain Wood in the Lord's Wood, Time out of Mind, and never had any Tithe-Wood*; per Cur. This ſhall be intended a Compoſition for Tithe-Wood; and a Prohibition was granted. Roll Rep. 355. pl. 6. Paſch. 14 Jac. B. R. Lapthorn's Caſe.

37. Cuſtom to make the Tithe up *in Cocks*, upon Pariſhioners Refuſal the Parſon may ſue in Court Chriſtian for not making it into Cocks. Lat. 125. Paſch. 2 Car. Layton's Caſe. But not in that Caſe, for not ſetting out. Lat. 125. in S. C.

38. The Earl of Devonſhire had a *Manor in the Pariſh of C.* in Buckinghamſhire, *which extends to Latmos where there is a Chapel of Eaſe*, and the *Vicar of C. libels for Tithes* againſt one of the Tenants of the Manor; And Henden moved for a Prohibition, for the Earl *preſcribed that he* and all his Tenants ſhould *be acquitted of all the Tithes* of Land *within Latmos, paying* 10 *l. per Ann. to the Chaplain* of Latmos; and he ſaid that ſuch a Preſcription is good as it was adjudged in Bowles's Caſe; and a Prohibition was granted. Hetl. 52. Mich. 3 Car. C. B. The Vicar of Cheſham's Caſe. Litt. Rep. 61. S. C. in totidem Verbis.

39. A Libel was for *odd Sheaves*, to which it was ſuggeſted, That the Pariſhioners for the better dividing the Corn have *uſed to be at the Charge of making it up in Shocks*, and when made into Shocks *they ſet out a Stack for Tithes*; and becauſe they have been at this Pains they have been diſcharged for Tithes of odd Sheaves as will not make a Stack. This was held a good Cuſtom and a Prohibition granted, becauſe they do more than of common Right they ought to do. Lat. 226. Mich. 3 Car. Anon.

40. Conſideration of *making Hay* to be diſcharged of Payment for *Greenſlips, Headlands &c.* good, becauſe it is more than they are bound to do. Hetl. 147. Mich. 5 Car. C. B. Wood and Carverner v. Simmonds.

41. The Court refuſed to grant a Prohibition on Suggeſtion of a Modus *to pay* 4 *s. for every Day's Plowing of Wheat, and* 2 *s. for every Day's Plowing of Barley*, for the Uncertainty; *But* if the Modus had been *ſo much for every Day's Work with Averment that it is certainly known, and how much it contains, it might be.* But by Hyde, Wheat could ſcarcely be ſo much worth Time out of Mind. Keb. 612. pl. 86. Mich. 15 Car. 2. B. R. Took v. Ledgierd.

42. A Prohibition was granted to a Suit for Tithes *of Cows, Calves, Herbage and Paſture*, upon *Suggeſtion of a Cuſtom that every Pariſhioner* from Time whereof &c. *had uſed to pay* 1 *d. for every Cow having a Calf, and for every Cow not having a Calf* 1 *d. halfpenny as far as five Cows, for five Cows* 1 *s.* 3 *d. for ſix Cows* 2 *s.* 6 *d. and for ten Cows* 2 *s.* 8 *d. in plena Satisfactione omnium Decimarum Vaccarum et Vitulorum, et Herbagii, et Paſturæ.* The Plaintiff declared in Attachment upon this Prohibition, and upon Traverſe of the Cuſtom a Verdict was found for the Plaintiff in the Prohibition; Upon which Lutwych Serjeant mov'd in Arreſt of Judgment in Eaſter Term laſt paſt. 1. That this Cuſtom was void, for it is laid to be a Diſcharge of Tithe of all Cows which it is not; for nothing is laid for the Tithe of the ſeventh, eighth and ninth Cows, and Payment for the ſixth cannot be Payment for the ſeventh &c. 2. This cannot be a Diſcharge of the Tithes of Herbage and Agiſtment; for Tithes of one Thing cannot be a Diſcharge of Tithes of another, and 2 Lutw. 1043, 1052. Morton v. Briggs, S. C. accordingly, and a Conſultation was awarded.

Tithes are payable of both; then ſince the Cuſtom is laid intire it is void in the whole; and cites 3 Cro. 446. 475. and of this Opinion was the whole Court, and therefore Judgment was arreſted and a Conſultation granted, unleſs Cauſe ſhould be ſhewn this Trinity Term. Ld. Raym. Rep. 242. Trin. 9 W. 3, Norton v. Briggs

Carth 461. S.C. the Court was of Opinion, that the Cuſtom was void ——

43. Modus to pay a whole *Meal's Milk ſuch a Day, and every ninth and tenth Night and Morning after, till a young Lamb yean'd be heard to bleat*, in Lieu of Tithe of Milk is ill; for by this Modus the Parſon may have nothing; as ſuppoſe a Lamb be heard to bleat before the 9th of May. 2 Salk. 656. pl. 2. Mich. 10 W. 3. B. R. Hill v. Vaux.

12 Mod. 206. S. C but S. P. does not fully appear. —— Ld. Raym. Rep. 358. S. C. and per tot. Cur. the Cuſtom is ill, and it is a plain Non Decimando; For ſuppoſe a Lamb bleats at the End of December, or at the Beginning of January, the Parſon ſhall loſe his Tithes for four Months and more; and the Rule for Prohibition was diſcharged.

44. A Modus was laid to be *ten Fleeces of Wool and two Lambs for all Tythe*, the Court was divided whether good or not. 2 Salk. 656. Mich. 3 Ann. in Scacc. Arch-Bp. of York v. the Duke of Newcaſtle.

Cro. E. 446. Griſman v. Lewis.—— Lane 17. Skelton v. Airie. S. P.

45. Payment of Tithe of *one Species* or Payment of a *Modus for one Species of Tithe* cannot be a Diſcharge as to another Species. 2 Salk. 657. pl. 3. Mich. 3 Ann. in Scacc. Archbp. of York v. the Duke of Newcaſtle.

Per Holt Ch. J. a Modus muſt be of ſomething certain that may be demanded in the Spiritual Court, and here ſuppoſe the *Land be let out at a Fine and 5 s. Rent*, what becomes of the Modus or of the Parſon, and a Cuſtom cannot be laid *in a Rent which is alterable at Pleaſure* of Parties, and beſides, the Cuſtom would amount to a plain Non Decimando; See the great Caſe in Roll's Abridg 378. to pay 2 s for all Tithes Hob. 192. and he ſaid if the Caſe of Perkins and Perkins came in Queſtion again, he would deſire to hear it argued, for he was not ſatisfied with the Judgment of it. 12 Mod 563, 564. Mich. 13 W. 3. Vines v. Doderidge.

46. Modus to pay 2 s. *in the Pound of the improved Rent* is ill, for that is to riſe and fall as the Land is let and the Parſon cannot know it, and a Modus ſhould be as *certain* as the Duty that is deſtroy'd by it; Holt dubitante. 2 Salk. 657. pl. 4. Paſch. 4 Ann. B. R. Scarcup v. Doderidge.

47. Objection was to a *Modus* that it was too great and *too near the Value of Tithes in Kind*; Preſcriptions had their Beginning before R. 1. when it is probable that 12 d. or 8 d. might have been the Value of the Inheritance, therefore decreed in the Exchequer to be a Compoſition and not a Modus, but reverſed; for *Churches might have been endowed with more than the Value of the Tithes*. MS. Tab. March 5th, 1707. Pole v. Gardener.

49. Parſon leaſed his Tithes by Parol for a Year to A. B. and C. at 2 s. 6 d. per Acre, who *lett every Land-holder his Tithes at 3 s. per Acre*. The *Money* which the Leſſee receives of the Land-Owners ſhall be *accounted* a Modus. 8 Mod. 63. Mich. 8 Geo. The King v. Fairclough.

50. A Modus *that the Inhabitants of ſuch a Tenement with the Lands uſually enjoyed therewith had been accuſtomed to pay ſuch a Modus for Tithe-Corn*, was held by the Maſter of the Rolls to be quite *uncertain*, for the Houſe may fall, or be uninhabited, and then no Modus will be payable, and nothing can be more uncertain than Lands uſually enjoyed with the Tenement, ſince Lands lett with a Farm-houſe may probably be after ſhifted. 2 Wms's Rep. 462. Trin 1728. Charlton v. Brightwell.

51. Modus to be diſcharged *of Herbage-Tithes in Conſideration of making Graſs into Hay* and ſetting it up in Shocks for the Parſon is not good. Gibb. 52. Paſch. 2 Geo. 2. in Canc. Fox v. Ayde.

(E. a) To *what* Thing the *Modus* ſhall *extend.*

1. IF a Man preſcribes to pay to the Parſon a certain Thing as a Modus Decimandi for all the Demeſnes of his Manor of D. and after erects a Windmill upon part of the ſaid Demeſnes, he ſhall not pay any Tithes for this Mill, but the Modus Grain for the Demeſnes ſhall go in Diſcharge of this alſo which is built upon the Land diſcharged. Trin. 39 Eliz. B. R. between *Ruſſel and Moore*, per Curiam, and a Prohibition granted.

2. If a Man preſcribes in Modo Decimandi for Hay and Graſs in 40 Acres of Land, and the Tenant converts it into a Hop-Yard, or into Tillage, the Modus is gone, for when the Modus is ſpecial for Hay and Graſs only, by Converſion of this to other Uſes, the Modus is gone. H. 6 Ja. B. between *Sharp and Coult*, per Curiam. Nov 148. in Caſe of Sharp v. Sharp, cites Hill. 6 Jac. C. B. the Vicar of Clare's Caſe in Suffolk, who ſued for Tithe of Hops, and that there a Prohibition was granted, and ſeems to be S. C.

3. If a Man preſcribes to pay 6 s. 8 d. for all manner of Tithes of a Park, and after the Park is diſparked, and converted into Tillage and Paſture Land, the Modus is gone by the Alteration aforeſaid. *Spurdam's Caſe*, adjudged and cited by Coke Hill. 6 Jac. and there agreed per Curiam. If there was a Preſcription Time out of Mind for a Modus Decimandi for Land, when it was a Park, this Preſcription ſhall have Continuance clearly for the Payment of this Modus only, after that ſuch a Park be diſparked, and converted to another more profitable Uſe; Per Coke Ch. J. The whole Court agreed with him herein. 2 Bulſt. 240. Trin. 12 Jac. in Caſe of Price v. Maſcoll.

4. [But] if a Man preſcribes to pay 6 s. 8 d. for all manner of Tithes ariſing from ſo many Acres of Land which contain the Park, though the Park be diſparked, and the Land converted into Tillage &c. yet the Modus ſhall continue, becauſe the Preſcription is in the Soil, and not in the Park. *Spurdam's Caſe* adjudged; cited per Coke, Hill. 6 Ja. B. and there agreed per Curiam. Noy 148. in Caſe of Sharpe v. Sharpe, Coke Ch. J. cited one Shipden's Caſe, that a Modus Decimandi to pay a Buck and a Doe generally for the Park is not good if it be diſparked; but it ſhall be particularly for all Acres contained in the Park

5. If a Man preſcribes to pay yearly 2 s. for every Acre of 140 Acres, which were once a Park, and alſo the Shoulder of every third Deer that ſhould be killed within the Park, in Diſcharge and Satisfaction of all Tithes, and after the Park is diſparked, by which the Tithe (*) of the Deer is gone, which is part of the Conſideration, yet it ſeems the 2 s. for every Acre ſhall diſcharge the Land. Dubitatur. Hill. 12 Jac. B. between *Hooper and Andrews*, quod vide my Reports, 12 Jac. and Hobart's Reports 54. Et vid. Mich. 5 Jac. B. between *Shaw and Sharp*. Roll Rep. 120. pl. 4. S. C. the Court divided — * Fol. 652. Mo. 863. pl. 1186. Cooper v. Andrews, S. C. the S. C. with a long Argument by the Ch. J. — Win. 46 Arg. cites Mich. 10 Jac. Rot. 1223. S. P. that the firſt Opinion of the Court was, that the Defendant ought to plead in certain how that was diſparked; and 2dly,

Court divided. — Godb. 137. pl. 329. S. C. adjornatur. — Hob. 39. pl. 47.

2dly, it was doubted whether the Modus, as to the 2 s was gone, in regard that the Shoulder of the Deer is gone by the diſparking. — S. C. cited Hutt. 58. and ſays that it never was adjudged.

6. Inhabitants of A. a Hamlet within the Pariſh of B. had a *Chapel of Eaſe* within the ſaid Hamlet, becauſe the ſaid Hamlet was diſtant from the Church of the ſaid Pariſh, and preſcribe that *with part of their Tithes they have found a Clerk* to doDivine Service within the ſaid Chapel, *and alſo had paid a certain Sum of Money to the Parſon of B. and his Predeceſſors for all Manner of Tithes*, and held a good Preſcription. 4 Le. 25. pl. 77. Trin. 26 Eliz. B. R. Saer v. Bland.

Noy 148. Sharpe v. Sharpe, S. P. and the Suggeſtion allowed per Cur. and agreed firſt, that altho' they are Feræ Naturæ, yet they may be given for Tithes; So to pay Pheaſants &c.

7. R. was ſeiſed of Hadley *Park*, and of all the Tithes thereof, and *payed* for the Tithes but *one Buck in the Summer, and a Doe in the Winter for* 30 *Years paſt*. The Park was diſparked, and turned into arable Land. Carus and Catlin ſaid, that he need not pay other Tithes but a Buck and Doe, for although they be not titheable, yet may they be paid by Compoſition, and he may not take them, but they are to be delivered to him; and in like Manner Partridges and Pheaſants in a Garden are not tithable, yet may they be paid in Lieu of Tithes, and ſhall be brought dead to the Parſon, and altho' there be no Park yet may he give a Buck out of another Park, and perhaps it may be made a Park again. Ow. 34, 35. Trin. 31 Eliz. Ld. Rich's Caſe.

2dly, Although they are not tithable of themſelves, yet they may be given for a Modus Decimandi; As a great Tree may be given for Tithe of Trees tithable. 3dly, That that is a Diſcharge to the very Soil, and the Park is not but a Liberty, and the Owner may furniſh it with Game when he pleaſes. — The Court much doubted, whether one that had a Park, and uſed to pay one Shoulder of a Deer for all manner of Tithes, and the Park is diſparked, ſhould pay Tithes in kind or not. Brownl. 31. Paſch. 10 Jac. Anon.

8. In the Caſe of a *Park* in Norfolk the Parſon preſcribed Pro Modo Decimandi to be paid 3 s 4 d. for all Tithes ariſing out of the ſaid Park, and tho' the Park was afterwards converted into arable yet no other Tithes ſhall be paid; Per Coke Arg. But Popham ſaid, it had been adjudg'd otherwiſe in **Wroth's Caſe** in the Exchequer; but that the Law is clearly as has been ſaid, and that *the Difference is when the Preſcription is to pay ſo much for all Tithes, or when it is to pay a Shoulder of every Buck or Doe at Chriſtmas*; for there if the Park be diſparked, Tithes ſhall be paid; for Tithes are not due for Veniſon and therefore they are not Tithes in Specie. Ow. 74. Paſch. 38 Eliz. B. R. in the Dean and Chapter of Norwich's Caſe.

9. Where the Cuſtom is to pay a *Sum* for *all Grounds* of ſuch a Farm and *woody Ground is converted into Meadow*, the Cuſtom ſhall not extend to the Meadow; Per Montague Ch. J. 2 Roll Rep. 162. Paſch. 18 Jac. B. R. cites the Caſe of Coney v. Larke in C. B.

Hetl. 94. Paſch. 4 Car. C. B. per Hutton J. if a Man has an ancient Garden for which he paid a Penny, and that is inlarged, Tithes in Specie ought to be paid of that Inlargement.

10. Where the Cuſtom is for every Houſe to pay a *Garden-Penny* this will extend to Beans or Hops if they do not grow in Ground newly added to the Garden. Litt. Rep. 151. Trin. 4 Car. C. B. Alfrey v. Mills.

Per Cur. the Modus is not deſtroyed by the Addition of the new Pair of Stones. Carth. 215. S. C. —— 4 Mod. 45. Grimly v. Fawlkingham, S. C. and a Prohibition was granted.

11. Modus for a *Corn Mill*, two *new Mill-ſtones* are added; Per Holt Ch. J. it ſeems reaſonable the Parſon ſhould have the tenth Toll-Diſh; adjornatur. Show. 281. Mich. 3 W. & M. Gumley v. Falkingham.

12. A Modus was, that the *whole Crop of two Acres was given in Diſcharge of all Tithes of Hay* within the Pariſh; it was lately determined in the Exchequer that it was extended only to the old Meadow Ground; Arg. Gibb. 53. Paſch. 2 Geo. 2. B. R.

13. A Modus *paid to the Parſon may bar the Vicar of ſmall Tithes claimed by him*; for originally, and of common Right all the Tithes, as well ſmall as great, were the Parſon's, and the Modus, if good, muſt have been Time out of Mind, and have commenced when the Parſon was ſeiſed of all, and the after Endowment of a Vicarage ſhall not deprive the Pariſhioners of a Modus they were entitled to before. 2 Wms's Rep. 522. Paſch. 1729. by Ld. C. King. Fox v. Ayde.

(F. a) To what Thing it [the Modus] ſhall extend. *Mills.*

1. IF a Man be diſcharged of two ancient Griſt Water-Mill for one Modus, ſcilicet, for 6 s. 8 d. yearly paid to the Parſon, and after, by continuance of Time, by the Act of God, the Water-Courſe which uſed to run to the Mills is diverted, and runs in another Place a little Diſtance off from the ancient Mills, and thereupon the Owner of the Mills pulls down one of the ancient Mills, and rebuilds it upon the Stream in the new Courſe, he ſhall be diſcharged of Tithes of this new Mill for the ſaid 6 s. 8 d. for this is altered by the Act of God. Mich. 11 Car. B. R. between *Johnſon and Dandridge*, per Curiam reſolved, and a Prohibition granted accordingly. See (R) pl. 1. and the Notes there.

2. But in the ſaid Caſe, if the ancient Water-Courſe be changed by the Act of the Party himſelf who is the Owner of the Mill, he ſhall pay Tithes thereof as for a new Mill, and the ſaid ancient Modus ſhall not diſcharge it. Mich. 11 Car. B. R. in the ſaid Caſe of *Johnſon and Dandridge*, per Curiam reſolved.

3. If for two ancient Meſſuages, and two ancient Water-Grain-Mills, Time out of Memory &c. there hath uſed to be paid to the Parſon 20 s. per Annum in lieu of all Tithes iſſuing out of the ſaid Meſſuages and Mills, and after the Owner of the Meſſuages and Mills erects two new Grain-Mills within the ſaid Meſſuages, it ſeems the Modus will not diſcharge theſe new Mills from the Payment of Tithes, becauſe the Tithes of a Mill is not meerly prædial, but mix'd with the Perſonalty, and is more of the Perſonalty than of the Predialty. Mich. 13 Car. B. R. *Goodwin and Smith*, concerning *Torrington* Mills in the County of Devon, upon a Demurrer. Juſtice Berkly and Curia ſeemed to incline, that the Modus ſhould not extend to theſe new Mills; but they did not reſolve it, becauſe the Iſſue was taken upon the Modus as to the two Meſſuages and ancient Mills; and at the Niſi Prius the Plaintiff in the Prohibition was nonſuit, by which he was nonſuit as to the Demurrer alſo, and for this Cauſe a Conſultation was granted for the Whole.

4. If a Man be ſeiſed of eight Acres of Paſture, and of Meadow, for the Tithes of which there has been paid Time out of Memory &c. 5 s. 6 d. and after the Owner thereof erects thereupon a Corn-Mill, he ſhall pay no Tithe for the Corn-Mill, becauſe the Land was diſcharged per Modum Decimandi. Co. Magna Charta 49.

Show. 281. Gumley v. Falkingham, S. C. adjornatur —— Carth. 215. Gumble v. Falkingham, S C. and per Cur. the Modus is not deſtroy'd by the Addition of the new Pair of Stones —— Brownl. 32. Anon.

5. In a Prohibition to a Libel for Tithes of a *Corn-Mill*, the Plaintiff ſuggeſted a Modus &c. the *Defendant confeſſed the Modus, but alledged that a new Pair of Mill-ſtones were added to the old Mill, and ſo prayed that the Prohibition might go only to the Tithes of the ancient Mill*; But it was ſaid e contra, that the Modus extends as well to the new Mill-ſtones as to the old, for if theſe break, the Modus goes to the New, ſo that if they are laid down elſewhere under the ſame Roof the Preſcription will extend to all, becauſe the Mill is the Subſtance to which it chiefly relates; the Preſcription is to the Mill in general, and it is but accidental whether there are one or two Pair of Mill-Stones therein, 'tis ſtill but unum Molendinum, and muſt be ſo demanded in a Præcipe, and a Prohibition was granted. 4 Mod. 45. Trin. 3 W & M. in B. R. Grimley v. Falkingham.

is, that if you have but one Pair of Stones, and pay a Rate-Tithe for the Mills, and then you add another Pair of Stones, new Tithes ſhall be paid in Kind.

(G. a) [Modus.]

To what Thing it ſhall *extend for a collateral Reſpect. Fraud.*

1. IF a Man preſcribes to pay an Halfpenny for every Lamb which he ſhall ſell before the firſt Day of May without other Tithe of them, **and after by Fraud to deceive the Parſon, he** ſells the Lambs but a Day before May, **this is not a Diſcharge by the Cuſtom of Tithing. Mich. 17 Jac. B. per Curiam.**

Mo. 913. pl. 1290. S. C. a Prohibition was granted notwithſtanding the Covin, becauſe the Fraud is to be remedied in an Action on the Caſe at the Common Law.

2. Libel &c. for Tithes, the Defendant ſuggeſted a Cuſtom in the Pariſh of Letcombe, *that the Parſon ſhould have for his Tithes, the* 10*th Land ſowed with any Manner of Grain, to be reckoned at the firſt Land next the Church*, the Parſon replied, that the *Defendant by Fraud ſowed every* 10*th Land which belong'd to the Parſon as above very ill, and with ſmall Quantity of Corn, and did not Dung and Manure it as he did the other nine Parts*, by Means whereof the other nine each of them yielded eight Cocks, but the tenth yielded but three Cocks. Wray Ch. J. held, that this Cuſtom was againſt common Reaſon, and therefore void; but if it be a good Cuſtom, then the Parſon ſhall have an Action on the Caſe. Le. 99. pl. 127. Paſch. 30 Eliz. B. R. Stebbs v. Goodlack.

3. A Cuſtom was for the Vicar to have Tithes *for all Peas and Beans ſet, drilled, or ſowed in Rows in Gardens* or like Manner, afterwards a new *Improvement was found out to uſe a Plow inſtead of a Spade*, yet ſuch Peaſe and Beans ſhall pay Tithes. MS. Tab. January 23, 1717. Auſtin v. Nicholas.

(H. a) *Who* ſhall *preſcribe* in Non Decimando.

* Fol. 653.

1. A Layman cannot **preſcribe in Non Decimando** without ſpecial Matter, **though he be capable of a Diſcharge of Tithes in favour of the Church, becauſe it ſhall not loſe its Right without an actual Recompence. Co. 2. the Biſhop of Wincheſter 44. reſolved.**

Mo 425. pl. 593. Hill. 38 Eliz. B. R. Wright's Caſe, S. C. held, that temporal Perſons cannot preſcribe in Non Decimando, but in Modo Decimandi they may.

2. A Spiritual Perſon may **preſcribe** generally **in Non Decimando, becauſe he is more favour'd than a Layman, for this is always in a Spiritual Perſon, and ſo not taken from the Church, for ſuch Spiritual Perſon was capable of a Grant of Tithes at the Common Law in Pernancy. Co. 2. the Biſhop of Wincheſter 44. reſolved.**

Cro. E. 206. pl. 42 Mich. 32 & 33 Eliz. B. R. Naſh v. Molins, held that a ſpiritual Perſon may preſcribe in Non Decimando, and by the 31 H. 8. he ſhall hold it diſcharged as the Prior held it; and if he held it diſcharged Non refert by what Means. —— Le. 240. pl. 325. S. C. held accordingly.

A Spiritual Perſon may *preſcribe* in Non Decimando. Roll Rep. 264. pl 36. Mich 13 Jac. B. R. the Biſhop of Hereford's Caſe.

A *Dean and Chapter* may, though it was objected, that a Dean may be a Layman, as the Dean of Durham was by ſpecial Licence and Diſpenſation of the King; yet it was anſwered, that this is a rare and ſpecial Caſe, and therefore not to be brought for an Example. Win 65. Patch. 21 Jac. C. B. Briggs's Caſe.

3. As a Biſhop **may preſcribe in Non Decimando, as to be diſcharged of Tithes** for himſelf, his Farmers, and Tenants at will, for certain Land in the Pariſh of another. **Co. 2. the * Biſhop of Wincheſter 44. adjudged; And Mich. 15 Ja. B. R. ſame Caſe came in Queſtion, and adjudged, and a Prohibition granted accordingly. Mich. 42 43 Eliz. B. R. between** || *Crowther and Frier*, **adjudged; M. 13 Ja. B. R. in the Biſhop of Hereford's Caſe, reſolved, and a Prohibition granted accordingly.**

* Cro E. 475. pl. 1. and 511. pl. 36. Wright v. Wright, S. C. adjudged. —— Mo. 425. pl. 593 S. C. adjudged. —— S. C. cited Mo. 531. || Mo. 618. pl. 844. Crowcher v. Fryar, S C.

4. [And] **when certain Land is ſo diſcharged by Preſcription in Non Decimando in the Hands of a Spiritual Perſon,** if he leaſes it for Years to a Layman, he may now preſcribe **in Non Decimando alſo, becauſe the Land is diſcharged in Facto. Co. 2. the Biſhop of Wincheſter 45. adjudged; And Mich. 15 Ja. B. R. in the ſame Caſe it was adjudged alſo, and a Prohibition granted.**

Mo. 425 pl. 593. Hill. 38 Eliz. B. R. Wright's Caſe, S. P. adjudged, and ſeems to be S. C. —— Cro. E. 475. pl. 1. 511. pl. 36. S. C. adjudged. —— S. C. cited Mo. 531.

5. A Parſon **of a Pariſh** having Land in another Pariſh, parcel of his Glebe, may **preſcribe in Non Decimando** for him, his Farmers, and Tenants. **Mich. 13 Car. B. R. between** *Dr. Ward and Taylor*, **per Curiam.**

6. **The** Church-Wardens **of a Pariſh, admitting they may have Land by Preſcription,** yet cannot **preſcribe** generally **in Non Decimando,** for **this** Land which they have for the Reparation of the Church for the Pariſhioners, **for they are not Spiritual Perſons; P. 37 El. B. between** *Longeley and Meredine*, **adjudged.**

7. Copy-

Cro. E. 784 pl. 23 Crouch v. Fryer, S. C. adjudged, that the Preſcription is good —— Mo 618 pl. 844. S. C. adjudged accordingly by 3 Judges, Popham contra.

7. Copyholders of Inheritance that hold of a Biſhop as of his Manor, may preſcribe, That the Biſhop and his Predeceſſors ſeiſed of the ſaid Manor for themſelves, their Tenants for Life, Years, and Tenants by Copy of Court-Roll of the ſaid Manor Time out of Memory &c. have been diſcharged of the Payment of Tithes for their Lands parcel of the ſaid Manor; for this is a good Preſcription, and the Copyholders ſhall be diſcharged of Tithes thereby, for their Tenements are part of the Demeſnes of the Manor, and this might commence upon a real Compoſition for the whole Manor. Y. 42, 43 El. B. R. between *Crowcher and Frier*, adjudged.

—— Yelv. 2. S. C. adjudged by 3 Juſtices. And adds a Nota of the Reaſon; becauſe Preſcription in the Lord ought of Neceſſity in common Intendment to precede the Preſcription in the Eſtate of the Copyholder, and the Diſcharge of Tithes in the Lands, which in this Caſe may well be, (becauſe he is a Spiritual Perſon) ſhall trench ſo to the Benefit of the Tenant who is the Copyholder; for by this Means it is to be preſumed that the Lord has greater Fines and Rents; And adds another Nota, that Popham was againſt this Judgment becauſe the Plaintiff, who is a Copyholder, will have in Suo Genere an Eſtate of Inheritance diſtinct from the Eſtate of the Lord, who is the Biſhop. —— Noy 132. S. P. and cites S. C.

A *Copyholder* may preſcribe to be diſcharged of Tithes, by *pleading that he was always Tenant by Copy to a Spiritual Corporation.* Lane 17. Arg. cites it as ſo reſolved 40 Eliz.

Mar 26. pl. 59. Paſch. 15 Car. Anon. S. P.

8. A Pariſh cannot preſcribe in Non Decimando. Hill. 14 Ja. B. R. *Barham and Gooſe*, per Curiam.

2 Salk. 655. pl. 1. Hill. 8 W. 3.

9. A County may preſcribe in Non Decimando; Contra, P. 12 Ja. B. R. per Coke.

B. R. the S. P. as to a Thing that is in its Nature de Jure tithable; for as no ſingle Perſon, or his Eſtate, can, no more by the ſame Reaſon can the Hundred, [or County] which conſiſts but of many ſingle Perſon's Eſtates. In the Caſe of Hicks v. Woodiſon.

Though it be generally put in Dr. and Stud. 166. that a County may preſcribe to be diſcharged of any Tithe, yet I find no Inſtance of it in any other Caſe than Tithe Wood, (except one in Roll 654. which I am not ſatisfied with). Now Tithe-Wood does not ſeem to be due of common Right, becauſe it does not renovare Annuatim, but the Church had got Poſſeſſion of it, and the Statute de Silva Cædua, 45 E 3. cap. 3. is but an Affirmance of the Common Law, and where they have obtained it, it is to be paid as a Cuſtomary Tithe, and yet in the Caſe of Wood the Parſon need not lay a Cuſtom in his Libel; but if the Country be diſcharged by Cuſtom, it muſt come on the other Side. (Contra 13 Co. 13). The Caſe of Tithe Wood is ſomewhat like the Caſe of Tithe of Mills; The Church claimed Tithes for Mills, and by the Statute of Articuli Cleri, cap. 5. de molendino de novo erecto, a Prohibition lies not, but yet of an old Mill a Man may now preſcribe generally in Non Decimando. Per Holt Ch. J. Comb. 404. Hill. 9 W. 3. B. R. in Caſe of Hicks v. Woodiſon.

Libel for Tithes of Wood; the Defendant ſuggeſted for a Prohibition, a Preſcription to be diſcharged of the Tithes of Wood within the Wild of Kent. * Fol 654.

10. So a Wild may preſcribe in Non Decimando, As the Wild of Suſſex; Mich. 13 Ja. B. R. a Trial was at the Bar upon a Prohibition upon ſuch a Preſcription to be diſcharged of Tithes of Wood, between *Porter and Tike*, and the Preſcription found, and Judgment given accordingly. Hill. 14. (*) Ja. B. R. per Curiam, ſuch a Preſcription is good in *Barham and Gooſe's* Caſe. Mich. 17 Ja. B. in Dr. *Andrews and* , adjudged upon a Trial at Bar, by which the Preſcription is found.

The Plaintiff traverſed the Preſcription, and Iſſue found for the Plaintiff in the Prohibition and allowed, and the Plaintiff was diſcharged; And there is a Nota, that the Wild of Kent has twenty Pariſhes in it; And Henden Arg ſaid, that Tithe of Wood was not originally given to the Clergy before John Stratford, Arch-Biſhop of Canterbury, Anno 17 Ed. 3. made a Conſtitution, that Tithes of Silva Cædua ſhould be paid within his Province, and that in the next Parliament, 18 E 3. and ſo in every Parliament to the 16 R. 2. the Commons complained of this as a Grievance and Oppreſſion, and ſhewed two Parliament Rolls, where it was concluded, that Tithes in them ſhall be paid as the Uſage was before, and not otherwiſe; and that upon the ſame Iſſue the *Wild of Suſſex* was diſcharged the Year before in B. R. and ſo the *Wild of Surry* was in two Trials in C. B. and in B. R. Palm. 57, 58. Mich. 17 Jac B. R. Clanrickard (Earl of) v. Denton (Lady) —— 2 Roll Rep. 122. S. C.

There

There is not any Caſe of a *Cuſtom in Non Decimando* excepting for Wood in the Wilds of Kent and Suſſex, which is no Authority for allowing ſuch a Cuſtom as to any other thing which is tithable of common Right, for per Cur. *Wood* is not tithable of common Right being part of the Freehold, but it is tithable by Cuſtom only; Quod Nota. Carth. 392. Hill. 8 W. 3. B. R. Hicks v. Woodſon.

But Quære, for if Wood is tithable only by Cuſtom, then all the *Libels for Tithe Wood ought to be founded upon the Cuſtom* alleged; and if ſo, then *there could be no Suggeſtion of a Modus for Tithe-Wood*; for it would be abſurd to ſuggeſt *one Cuſtom againſt another* for one and the ſame Thing; for if the Duty ariſes by Cuſtom only, it cannot be diſcharged by another contrary Cuſtom, and yet many Modus's have been allowed againſt Libels for Tithe-Wood. Carth. 393. Hill. 8 W. 3. (ſeems to be a Note of the Reporter.)

11. So **the Wild of Kent may preſcribe in Non Decimando of Wood. Tr. 15 Ja. B. between** *Bell and Tarde*, **a Prohibition granted. Mich. 17 Ja. B. R. between** adjudged upon a Trial at Bar, in which the Preſcription was found. Mich. 21 Ja. B. R. between *Loan and Dixſon*, a Trial was at the Bar upon a Prohibition, in which the Iſſue was, Whether Hilden-Borough-Ward was within the Wild of Kent or not? admitting and agreeing that it was diſcharged of Tithes of Wood if it was within the Wild, and found by Verdict that it was within the Wild. Tr. 17 Ja. B. between *Fawkener and Andrews*, per Curiam.

12. A Man may preſcribe, that by the Cuſtom of the Country where he is ſued for the Tithes of Milk of Ewes, no Tithes Time out of Memory have been paid for Milk of Ewes. Mich. 14 Car. B. R. between *Sexel and Bichner*, per Curiam, a Prohibition granted upon ſuch a Surmiſe to the Conſiſtory of Winton.

13. A Man may preſcribe that there is a Cuſtom within the Hundred of Staiſton in the County of Middleſex, and in the County of Surrey, that if any common Baker of Bread inhabiting within any of thoſe Hundreds erects any Water-Mill, Wind-Mill, or Hand-Mill, within any of thoſe two Hundreds, to grind his Grain, to be employed in making of Bread for himſelf, in his Trade of a common Baker, for the making of Bread for the Maintainance of his Family, and to ſell to his Cuſtomers inhabiting there, or near the ſaid Hundreds, for their Suſtentation, by the Support of whom the Parſons within the ſaid Hundred have more ample Tithes, videlicet, of thoſe who have Lands or Tenements, and others, as of Handycraft Tradesmen, Offerings, and ſuch like, no Tithes hath uſed to be paid from the Time &c. from the grinding of this Grain ſo employed as is aforeſaid in his Trade; for two Hundreds may preſcribe in Non Decimando. P. 15 Car. B. R. between *Kidden and Edwards*, a Prohibition granted upon this Suggeſtion, where the Baker is inhabits in one of the ſaid Hundreds, and erected a Mill in the other Hundred.

The Caſe of Kidden v. Edwards. Roll 654. cannot be right, it is againſt the Statute of Articuli Cleri; Per Holt Ch. J. Comb. 404. Hill. 9 W. 3.

14. If an *Abbot or Prior* had been *ſeiſed of Lands diſcharged of Tithes*, he who is now Farmer of ſuch Lands ſhall be admitted to preſcribe in Non Decimando by the Statute 2 E. 6. which wills that none ſhall pay Tithes otherwiſe than they did for 40 Years before, but in no other Caſe ſhall a Man preſcribe in Non Decimando, but only in Modo Decimandi. Mo. 219. pl. 356. Mich. 27 & 28 Eliz. in Branche's Caſe.

15. A *whole Country* may preſcribe to be diſcharged from Payment of Tithes *but this* at the firſt *of Neceſſity ought to have a lawful Commencement by Way of Compoſition or &c.* Per Doderide J. cites Linwood and Dr. and Student, to which Coke Ch. J. agreed. 2 Bulſt. 285. Mich. 12 Jac.

A Country may preſcribe to be quit of Tithes of Wood, or any other Tithe, ſo that there is ſufficient Maintenance and Suſtentation for the Parſon beſides; but a Town cannot ſo preſcribe. 2 Inſt. 645. cites Dr. and Stud. 147. b. and Br. Diſmes, pl. 14. —— 12 Rep. 13. Mich. 6 Jac. Arg. cites Dr. and Stud. lib. 2. cap. 55. S. P. —— Roll Rep. 22. pl. 31. Paſch. 12 Jac.

Cro. E. 784 pl. 23 Crouch v. Fryer, S. C. adjudged, that the Preſcription is good —— Mo 618 pl. 844. S. C. adjudged accordingly by 3 Judges, Popham contra. —— Yelv. 2. S. C. adjudged by 3 Juſtices. And adds a Nota of the Reaſon; becauſe Preſcription in the Lord ought of Neceſſity in common Intendment to precede the Preſcription in the Eſtate of the Copyholder, and the Diſcharge of Tithes in the Lands, which in this Caſe may well be, (becauſe he is a Spiritual Perſon) ſhall trench ſo to the Benefit of the Tenant who is the Copyholder; for by this Means it is to be preſumed that the Lord has greater Fines and Rents; And adds another Nota, that Popham was againſt this Judgment becauſe the Plaintiff, who is a Copyholder, will have in Suo Genere an Eſtate of Inheritance diſtinct from the Eſtate of the Lord, who is the Biſhop. —— Noy 132. S. P. and cites S. C.

7. Copyholders of Inheritance **that** hold of a Biſhop as of his Manor, may **preſcribe,** That the Biſhop and his Predeceſſors ſeiſed of the ſaid Manor for themſelves, their Tenants for Life, Years, and Tenants by Copy of Court-Roll of the ſaid Manor Time out of Memory &c. have been diſcharged of the Payment of Tithes for their Lands parcel of the ſaid Manor; **for this is a good Preſcription, and the Copyholders ſhall be diſcharged of Tithes thereby, for their Tenements are part of the Demeſnes of the Manor, and this might commence upon a real Compoſition for the whole Manor. M. 42, 43 El. B. R. between** *Crowcher and Frier*, **adjudged.**

A *Copyholder* may preſcribe to be diſcharged of Tithes, by *pleading that he was always Tenant by Copy to a Spiritual Corporation.* Lane 17. Arg. cites it as ſo reſolved 40 Eliz.

Mar 26. pl. 59. Paſch. 15 Car. Anon. S. P.

8. A Pariſh cannot **preſcribe in Non Decimando. Hill. 14 Ja. B. R.** *Barham and Gooſe*, **per Curiam.**

2 Salk. 655. pl. 1. Hill. 8 W. 3.

9. A County may **preſcribe in Non Decimando; Contra, P. 12 Ja. B. R. per Coke.**

B. R. the S. P. as to a Thing that is in its Nature de Jure tithable; for as no ſingle Perſon, or his Eſtate, can, no more by the ſame Reaſon can the Hundred, [or County] which conſiſts but of many ſingle Perſon's Eſtates. In the Caſe of Hicks v. Woodiſon.

Though it be generally put in Dr. and Stud. 166. that a County may preſcribe to be diſcharged of any Tithe, yet I find no Inſtance of it in any other Caſe than Tithe Wood, (except one in Roll 654. which I am not ſatisfied with). Now Tithe-Wood does not ſeem to be due of common Right, becauſe it does not renovare Annuatim, but the Church had got Poſſeſſion of it, and the Statute de Silva Cædua, 45 E 3. cap. 3. is but an Affirmance of the Common Law, and where they have obtained it, it is to be paid as a Cuſtomary Tithe, and yet in the Caſe of Wood the Parſon need not lay a Cuſtom in his Libel; but if the Country be diſcharged by Cuſtom, it muſt come on the other Side. (Contra 13 Co. 13). The Caſe of Tithe Wood is ſomewhat like the Caſe of Tithe of Mills; The Church claimed Tithes for Mills, and by the Statute of Articuli Cleri, cap. 5. de molendino de novo erecto, a Prohibition lies not, but yet of an old Mill a Man may now preſcribe generally in Non Decimando. Per Holt Ch. J. Comb. 404. Hill. 9 W. 3. B. R. in Caſe of Hicks v. Woodiſon.

Libel for Tithes of Wood; the Defendant ſuggeſted for a Prohibition, a Preſcription to be diſcharged of the Tithes *of Wood within the Wild of Kent.* The Plaintiff traverſed the Preſcription, and Iſſue found for the Plaintiff in the Prohibition and allowed, and the Plaintiff was diſcharged; And there is a Nota, that the Wild of Kent has twenty Pariſhes in it; And Henden Arg. ſaid, that Tithe of Wood was not originally given to the Clergy before John Stratford, Arch-Biſhop of Canterbury, Anno 17 Ed. 3. made a Conſtitution, that Tithes of Silva Cædua ſhould be paid within his Province, and that in the next Parliament, 18 E 3. and ſo in every Parliament to the 16 R. 2. the Commons complained of this as a Grievance and Oppreſſion, and ſhewed two Parliament Rolls, where it was concluded, that Tithes in them ſhall be paid as the Uſage was before, and not otherwiſe; and that upon the ſame Iſſue the *Wild of Suſſex* was diſcharged the Year before in B. R. and ſo the *Wild of Surry* was in two Trials in C. B. and in B. R. Palm. 57, 58. Mich. 17 Jac. B. R. Clanrickard (Earl of) v. Denton (Lady.) —— 2 Roll Rep. 122. S. C.

* Fol 654.

10. So a Wild may **preſcribe in Non Decimando,** As the Wild of Suſſex; **Mich. 13 Ja. B. R. a Trial was at the Bar upon a Prohibition upon ſuch a Preſcription to be diſcharged of Tithes of Wood, between** *Porter and Tike*, **and the Preſcription found, and Judgment given accordingly. Hill. 14. (*) Ja. B. R. per Curiam, ſuch a Preſcription is good in** *Barham and Gooſe's* **Caſe. Mich. 17 Ja. B. in** Dr. *Andrews and* **, adjudged upon a Trial at Bar, by which the Preſcription is found.**

There is not any Caſe of a *Cuſtom in Non Decimando* excepting for Wood in the Wilds of Kent and Suſſex, which is no Authority for allowing ſuch a Cuſtom as to any other thing which is tithable of common Right, for per Cur. *Wood* is not tithable of common Right being part of the Freehold, but it is tithable by Cuſtom only; Quod Nota. Carth. 392. Hill. 8 W. 3. B. R. Hicks v. Woodſon.

But Quære, for if Wood is tithable only by Cuſtom, then all the *Libels for Tithe Wood ought to be founded upon the Cuſtom* alleged; and if ſo, then *there could be no Suggeſtion of a Modus for Tithe-Wood*; for it would be abſurd to ſuggeſt *one Cuſtom againſt another* for one and the ſame Thing; for if the Duty ariſes by Cuſtom only, it cannot be diſcharged by another contrary Cuſtom, and yet many Modus's have been allowed againſt Libels for Tithe-Wood. Carth. 393. Hill. 8 W. 3. (ſeems to be a Note of the Reporter.)

11. So **the Wild of Kent may preſcribe in Non Decimando of Wood. Tr. 15 Ja. B. between** *Bell and Tarde*, **a Prohibition granted. Mich. 17 Ja. B. R. between** adjudged upon a Trial at Bar, in which the Preſcription was found. **Mich. 21 Ja. B. R. between** *Loan and Dixſon*, **a Trial was at the Bar upon a Prohibition, in which the Iſſue was, Whether Hilden-Borough-Ward was within the Wild of Kent or not? admitting and agreeing that it was diſcharged of Tithes of Wood if it was within the Wild, and found by Verdict that it was within the Wild. Tr. 17 Ja. B. between** *Fawkener and Andrews*, **per Curiam.**

12. A Man may preſcribe, that by the Cuſtom of the Country **where he is ſued for the Tithes of Milk of Ewes,** no Tithes Time out of Memory have been paid for Milk of Ewes. **Mich. 14 Car. B. R. between** *Sexel and Bichner*, **per Curiam, a Prohibition granted upon ſuch a Surmiſe to the Conſiſtory of Winton.**

13. **A Man may preſcribe** that there is a Cuſtom within the Hundred of **Oſ'ſton in the County of Middleſex, and in the County of Surrey,** that if any common Baker of Bread inhabiting within any of thoſe Hundreds erects any Water-Mill, Wind-Mill, or Hand-Mill, within any of thoſe two Hundreds, to grind his Grain, to be employed in making of Bread for himſelf, in his Trade of a common Baker, for the making of Bread for the Maintainance of his Family, and to ſell to his Cuſtomers inhabiting there, or near the ſaid Hundreds, for their Suſtentation, by the Support of whom the Parſons within the ſaid Hundred have more ample Tithes, videlicet, of thoſe who have Lands or Tenements, and others, as of Handycraft Tradesmen, Offerings, and ſuch like, no Tithes hath uſed to be paid from the Time &c. from the grinding of this Grain ſo employed **as is aforeſaid in his Trade; for** two Hundreds may preſcribe in Non Decimando. **P. 15 Car. B. R. between** *Kidden and Edwards*, **a Prohibition granted upon this Suggeſtion, where the Baker is inhabits in one of the ſaid Hundreds, and erected a Mill in the other Hundred.**

The Caſe of Kidden v. Edwards. Roll 654. cannot be right, it is againſt the Statute of Articuli Cleri; Per Holt Ch. J. Comb. 404. Hill. 9 W. 3.

14. If an *Abbot or Prior* had been *ſeiſed of Lands diſcharged of Tithes*, he who is now Farmer of ſuch Lands ſhall be admitted to preſcribe in Non Decimando by the Statute 2 E. 6. which wills that none ſhall pay Tithes otherwiſe than they did for 40 Years before, but in no other Caſe ſhall a Man preſcribe in Non Decimando, but only in Modo Decimandi. Mo. 219. pl. 356. Mich. 27 & 28 Eliz. in Branche's Caſe.

15. A *whole Country* may preſcribe to be diſcharged from Payment of Tithes *but this* at the firſt *of Neceſſity ought to have a lawful Commencement by Way of Compoſition or &c.* Per Doderide J. cites Linwood and Dr. and Student, to which Coke Ch. J. agreed. 2 Bulſt. 285. Mich. 12 Jac.

A Country may preſcribe to be quit of Tithes of Wood, or any other but a Town

Tithe, ſo that there is ſufficient Maintenanee and Suſtentation for the Parſon beſides; cannot ſo preſcribe. 2 Inſt. 645. cites Dr. and Stud. 147. b. and Br. Diſmes, pl. 14. —— 13 Rep. 13. Mich. 6 Jac. Arg. cites Dr. and Stud. lib. 2. cap. 55. S. P. —— Roll Rep. 22. pl. 31. Paſch. 12 Jac.

Jac. B. R. in Caſe of Porter v. Tike, it was ſaid by Coke Ch. J. that Wray Ch. J. held, that a Country may preſcribe in Non Decimando, if the Incumbent has ſufficient for his Livelihood, but Coke ſaid that it ſeemed to him e contra.

S. C. cited Ld. Raym. Rep. 137.

16. A *Hundred* may preſcribe in Non Decimando and it is good; for it is the Cuſtom of the Country, which is the beſt Law that ever was; but a *particular Town* cannot preſcribe in Non Decimando; and thereupon a Prohibition was granted. Mar. 25, 26. pl. 59. Paſch. 15 Car. Anon.

4 Mod. 336. S. C. and the Cuſtom held not good, and Conſultation granted. —— Skin. 561. pl. 7 S. C. adjornatur —— Comb. 404. ſays a Conſultation was granted, and the Court directed that it ſhould be ſpecially entered, becauſe it appears that the Cuſtom is void and againſt Law. —— Carth. 392. S. C. the Cuſtom was held void, and a Conſultation granted. —— 2 Salk 655. pl 1. S. C. held accordingly, and a Conſultation granted. —— 12 Mod. 111. S. C. held accordingly and Conſultation granted; For no Country or Hundred can preſcribe in Non Decimando for any Thing that is tithable of common Right. —— Ld. Raym Rep. 137. S. C. ruled accordingly, and the Judgment was arreſted, and the Court directed the Entry to be made as is mentioned above out of Comb.

17. In Prohibition upon a Suggeſtion that the *Hundred* of Hunsbyton in the County of Somerſet is an ancient Hundred, that there has been a Cuſtom, Time out of Mind, *that the Inhabitants of that Hundred have been diſcharged of the Tithes of barren Cattle*, Iſſue was taken upon the Cuſtom, *and Verdict for the Plaintiff, but Judgment was ſtaid.* 1. Tithe is due for Agiſtment of barren Cattle of common Right, and at the common Law it is 2 s. per Pound, but the Cuſtom governs it as to the Sum. Comb. 403. Mich. 9 W. 3. B. R. Hicks v. Woodiſon.

18. Cuſtom to pay no Tithe of *Hay imployed in fothering* Cattle is ill, for *Hay is a predial Tithe*, and though you feed your Cattle with it, yet you ought to pay Tithe; Per Holt Ch. J. 12 Mod. 496. Paſch. 13 W. 3. Selby v. Bank.

19. B. moved for a Prohibition to the Spiritual Court, the Libel being for Tithe Hay and Lambs, Cuſtom to pay the 10th *Lamb yeaned* there, in Conſideration whereof to be *Tythe-free of Lambs* which were *not yeaned there* is ill; Per Holt Ch. J. of *common Right* Tithe Lamb is payable where they fall, but by *Canon Law* there is a Regard to be had to the Place where they were engendered and bred; And after Conſideration the Court declared at another Day that no Prohibition ſhould go in either Part, for as to the Lambs it is a *dangerous Cuſtom*, becauſe eaſily converted into Fraud by taking the Sheep away in yeaning Time. 12 Mod. 496, 497, 498. Paſch. 13 W. 3. Selby v. Bank.

20. Of *Wood ſpent in an ancient Meſſuage* for Husbandry one may preſcribe in Non Decimando, for that formerly Tithe was not paid for Wood; Per Holt Ch. J. 12 Mod. 497. Paſch. 13 W. 3. in Caſe of Selby v. Banks.

(H. a. 2) Modus Decimandi; What is; And Remedy for it; And Pleadings.

1. PRohibition for ſuing for Tithes of 15 Acres of Land, 10 Acres of Meadow and ſeven Acres of Paſture, and ſurmiſed, that he and all thoſe &c. Time out of Mind &c. *had uſed to pay 4 d. yearly in Satisfaction of all Tithes of Hay cut there*; The *Jury find* the Preſcription, but *that Part of the Land was never mowed*, but ſhew not certainly *what Part*; It was adjudged for the Plaintiff; for both Parties agreed that all the Land had been mowed, and the finding contrary is void; and

and the Verdict is certain enough. Cro. E. 333. pl. 13. Trin. 35 Eliz. B. R. Folcot v. Ridge.

2. Every Modus Decimandi is a Diſcharge of the natural Tithe, and ſo works by Way of Diſcharge. Hob. 118. pl. 148. Hill. 13 Jac. in Caſe of Shelton v. Montague cites D. Parſon of Pyekirk's Caſe.

Modus's are real Compoſitions run out into Preſcription;

Per King C. Gibb. 120. —— A Modus is nothing but *a real Compoſition* for, or in lieu of Tithes, *or an annual Profit certain and permanent*; Per Ward Ch. B. and Smith B. 1 Salk. 656. Mich. 3 Ann. in Scacc. in Caſe of the Arch-Bp. of York v. D. of Newcaſtle.

3. One Modus ſued for in the Spiritual Court, and *another Modus ſuggeſted* is no Cauſe of Prohibition unleſs for other Cauſe; Per Doderidge J. but per 2 Juſtices contra. 3 Bulſt. 241, 242. Mich. 14 Jac. Harding v. Goſling.

4. Bill in Chancery to maintain the Preſcription of a Modus Decimandi, to which the Defendant demurred, and ſays, It is proper for the common Law or Eccleſiaſtical Court; and the Court allowed the Demurrer and *diſmiſſed the Bill.* Ch. Rep. 27. 4 Car. 1. Brown v. Thetford.

5. In Actions for Tithes and a Prohibition brought upon this *Preſcription*, That Time out of Mind &c. the Sum of 2 *s.* 9 *d. had been paid for* 11 *Doles of Meadow* at 3 d. the Dole, and the Caſe was that this was a ſmall Piece of Meadow taken off and incloſed from a great Meadow of which it was Parcel, and the Witneſſes did prove that 3 d. the Dole had uſed to be paid for the whole Meadow, and that the 11 Doles in queſtion was Parcel of it, and the Judge did direct the Law to be againſt the Plaintiff, becauſe he had laid his Preſcription intire 2 *s.* 6 d. [2 *s* 9 d.] for the Whole, and not 3 d. the Dole, which does amount juſt to ſo much, and upon this Direction the Plaintiff was Nonſuit. Clayt. 56, 57. pl. 97. Aſſizes in Lent, by Vernon J. Ann. 1637. Seton's Caſe. And ſays, Vide if it is not all one in Mountjoy's Caſe. 5 Rep.

6. In a Prohibition and the *Preſcription* ſuggeſted was *to pay a Rato-Tithe of* 13 *s.* 4 *d. for all Land &c. and for Profits of a Mill*, and in Evidence the *Witneſſes proved ſeveral ſmall Sums paid, as* 5 *s.* 2 *s. &c. which in the Whole came to the juſt Sum laid in the Preſcription*, and it was holden no good Proof by the Owner of the Inheritance; otherwiſe it had been if theſe ſeveral Sums had been paid by the ſeveral Tenants of ſeveral Parcels of the Land in queſtion; and in this Caſe it was held if ſuch a *Preſcription* is *laid for an* 100 *Acres*, and the *Plaintiff fails in the Number*, it is doubtful whether it be not a Failure in Proof; The beſt Way is to lay it that it has been paid for ſuch Cloſes &c. by Name; and in this Caſe it was held clearly that no Proof being to extend this Sum paid for the Mill, the Plaintiff did fail in his Preſcription in all. Clayt. 81, 82. pl. 135. Aſſiſa 15 Car. before Henden Baron of the Exchequer. Sir Arthur Robinſon's Caſe.

7. There was a *Compoſition* between the Prebendary of A. and the Abbot and Convent of B. *that the Prebendary of A. and his Succeſſors*, for all Time to come, *ſhould have their Election yearly, either to receive Tithes in Kind of Corn or Grain ariſing within certain Lands of the Abbey, or elſe to receive five Marks*, to be paid by the ſaid Abbot and Convent *in Lieu thereof, ſo as ſuch Election was notified to the Abbot or any of the Monks*, or Porter of the Abbey &c. *The Lands came to the King by the* 31 *H.* 8. *and from him to the Defendant*, and the *Prebend came to the King by the* 1 *E.* 6, *of Chanteries &c. and from him to the Plaintiff.* Admitting the Compoſition good, it was adjudged that the Power of Election was gone, becauſe it cannot now be made according to the Compoſition; but in this Caſe it was ſaid by Hale Ch. B. that in one **Southwell's Caſe** in 44 Eliz. where an Abbot had a Quantity of Wood to be taken yearly

yearly in ſuch a Wood, or a Sum of Money at his Election, it was held the Election was transferred to the King by the Statute of Diſſolution of Monaſteries. Hardr. 381. Mich. 16 Car. 2. Sir William Ingolby v. Wivel & al.'

But an *uncertain Modus* is no Cauſe of Prohibition Hetl. 100.

8. If the Jury on an Iſſue joined in a Prohibition upon a Modus Decimandi find a *different Modus*, yet the Defendant ſhall not have a *Conſultation*; for it appears he ought not to ſue for Tithes in Specie there being a Modus found. Vent. 32. Paſch. 21 Car. 2. B. R. Anon.

Trin. 4 Car. S. P. argued, Goddard v. Tyler. —— Litt. Rep. 151. Toddard v. Tiler, S. C. —— 11 Mod. 60. Startup v Doderidge.

9. Chancery deny'd to *decree Rate Tithe*, though it might be after two Verdicts, and though it was urged that it was frequently done in the Exchequer. Ch. Caſes 187. Mich. 22 Car. 2. Buſh v. Richley.

10. There is *no Remedy* for a Modus Decimandi *but in the Spiritual Court*. 12 Mod. 416. Per Cur. Mich. 12 W. 3. in Caſe of Johnſon v. Ryſon.

Ibid. cites the Caſe of Reynolds v. Rogers, where the Plaintiff ſuggeſted a Modus, but did not lay it payable on any certain Day, neither did the Defendant in his Anſwer confeſs any Day of Payment; ſo that no certain Day of Payment appearing, either in the Bill or Anſwer, the Defendant, who was Plaintiff in a Croſs-Bill, having laid it to be payable on a certain Day, it was held good.

11. Where a Modus was ſet forth *payable on or about ſuch a Day*. this was not good; for the Day muſt be certain. 8 Mod. 375. Trin. 11 Geo. 1. Blackett v. Finny; and cites it as lately reſolved in the Caſe of Harriſon v. Clerke.

(H. a. 3) In what Caſes a Parol Agreement is good, or where there muſt be a Leaſe.

13. Eliz. See Cholmley v. Abby Grant in 6. Bro. Parl. Cas. it is to the force of agreem^t by parson since

IN Treſpaſs the Plaintiff counted that a Parſon Anno 18 H. 6. *Sold* to him all his Tithes of his Pariſh of A. payable which did or might ariſe in the ſaid Pariſh *during ſeven Years* next &c. and juſtified for Tithes Anno 18 and 19. Per Newton this cannot be good; for in Anno 18 the Tithes which came Anno 19 were not in Eſſe, and therefore it is not a good Contract of a *Thing not in Eſſe*; But per Paſton contra, and therefore the Plaintiff recovered notwithſtanding theſe Objections. Quod Nota pro Lege. Br. Contract, pl. 13. cites 21 H. 6. 43.

2. A Parſon may leaſe his Tithes for Years *without Deed*; Per Chocke J. Quod non Negatur. Quære Tamen. Br. Diſmes, pl. 8. cites 9 E. 4. 47.

Tithes will not paſs by Grant without Deed. Le. 23. pl. 29. Trin. 26 Eliz. B. R. Withy v. Saunders.

3. A *Parſon in Conſideration of* 12 *d. granted to one of his Pariſhioners that he ſhould hold his Lands diſcharged of Tithes*; It was holden by the whole Court that the ſame was no good Diſcharge, being without Deed as a Leaſe of his Tithes; But it was holden, if the Parſon afterwards ſues the Pariſhioner for Tithes againſt the ſame Grant and Promiſe, the Pariſhioner may have an Action upon the Caſe againſt the Parſon upon his Promiſe, although he cannot plead the Grant as a Leaſe. 2 Le. 73. pl. 98. Trin. 28 Eliz. B. R. Wellock's Caſe.

4. Conſideration to *pay to A. the Parſon* 10 *l. per Annum* during ſuch a Term *for his Tithes*, A. promiſed that the Plaintiff ſhould hold his Lands without Tithes and without any Suit for the ſame; Per Gawdy; It is a good Diſcharge for the Time, and a good Compoſition to have a Prohibition

Prohibition upon, and is not like unto a Covenant. Le. 151. pl. 208. Trin. 31 Eliz. B. R. Chapman v. Hurſt.

5. Libel for Tithes, the Defendant ſuggeſted for a Prohibition, that P. was ſeiſed of the Lands out of which the Tithes were iſſuing, and in *Conſideration of 5 l. paid by him to the Parſon, it was covenanted and agreed between them, That P. and his Aſſigns ſhould hold the ſaid Lands diſcharg'd of Tithes during the Parſon's Life*; A Prohibition was granted, but afterwards it was held that they may ſtill proceed in the Spiritual Court, becauſe here is no expreſs Grant of the Tithes, but only a Covenant or Agreement that P. ſhould be diſcharg'd of the Payment, for which he hath a proper Remedy by an Action for not performing the Agreement, and therefore no Prohibition ſhall go; for this Agreement cannot be without Deed, and the Aſſignee has no Colour to take Advantage thereof. Cro. E. 188. pl. 13. & 249. pl. 10. Mich. 33 & 34 Eliz. B. R. Nelſon and Bugg v. Woodward.

2 Le. 29. pl. 32. Woodward v. Bugg, S. C. and a Conſultation was granted. Wray ſaid, that if it had been for Years it had been good, but here it is not any Contract, but only a Diſcharge

for Life, which cannot be during his Life without Deed; and afterwards the Record was read, which was Concordatum agreatum fuit between the two Parties pro omnibus Decimis, during the Time that one ſhould be Parſon, and the other Occupier of the ſaid Lands, that in Conſideration of 5 l. the ſaid Prettiman and his Aſſigns ſhould hold the ſaid Lands diſcharged of Tithes, the ſame is not a Contract but a Promiſe, for he does not grant any Tithes &c. 3 Le. 257. pl 341. S. C. in totidem Verbis. —— Ow. 103. Woodward v. Nelſon S C ſays, that about this Time Wray Ch. J. died, and Popham ſucceeded, and was ſworn the ſame Day, and the Court held that the Agreement by Parol was not good, and a Conſultation was awarded; But ſays, that upon Search made no Judgment is entered upon the Roll.

6. If a Man *ſell* his Tithes for Years *by Word* it is good; but if the Parſon *agrees* that one ſhall have his Tithes for ſeven Years by Word it is not good, becauſe it amounts to a Leaſe; and Fleming Ch. J. held ſtrongly that Tithes *cannot be leaſed for Years without Deed*. Brownl. 98 Mich. 9 Jac. Anon.

Noy 28. S. P. —— Tithes may be granted for *one Year* without Deed, and

for no longer; Per Coke Ch. J. Roll Rep. 174 Sorrell v. Grove. —— Becauſe the Parſon for that Year had, as it were, an Intereſt; Per Fenner J. Ow. 103. in Caſe of Woodward v. Nelſon. —— By way of Agreement Tithes may paſs for Years without Deed, but *not by way of Leaſe* without a Deed; But a Leaſe for one Year may be of Tithes without Deed. Godb. 354. pl. 449. —— S. P. by Wray and Fenner. Cro. E. 249. pl. 10. in Caſe of Nelſon v. Woodward.

7. An *Agreement to be diſcharged from Tithes* may be *for a Year by Parol*, and ſhall *be good*; *but* to have ſuch an Agreement *during the Parſon's Life or for Years cannot be without Deed*; And although it were objected that this Agreement being in Way of Contract by Retainer is not any Leaſe of them, but only a Contract which may be for many Years by Way of Diſcharge to the Party himſelf who ought to pay them by retaining them without Payment, as well many Years as one Year; yet the Court held that it could not be, becauſe the Law will permit it for a Year; it being Quaſi by Way of Sale; but for many Years (which found in Nature of a Leaſe) it cannot be. And Tanfield ſaid, That ſuch a Surmiſe was in a Caſe betwixt **Nelſon and Prettiman** to be diſcharged for Years, and ruled to be void; a Multo Fortiori to be diſcharged during the Parſon's Life; and ſuch a Caſe was ruled betwixt **Rolls and Rolls**; Wherefore without further Argument it was adjudg'd for the Defendant, and Conſultation was awarded. Cro. J. 137. pl. 13. Mich. 4 Jac. B. R. Hawkes v. Brayfield.

8. If a Parſon contracts with me *by Word for keeping back my own Tithes* for three or four Years, this is a good Bargain by Way of Retainer, and if he ſue me in the Eccleſiaſtical Court, I ſhall have a Prohibition on this Compoſition; But if he grants to me the Tithes of another, though it be but *for an Year*, it is not good unleſs it be by Deed. 2 Brownl. 11. in a Note there. Mich. 8 Jac. B. R.

2 Brownl. 17. contra if it be for more than one Year and cites **Wellow's** Caſe, as ſo to be void; ſo of

adjudged; but the laſt Point of the Grant of the Tithes of another was agreed by all

of the Tithes of the Pariſh without Deed. Godb. 373. Bellamy v. Balthorp ——— But agreement for *his own Tithes for Life* is not good, and in the Caſe of Years it is the better Way to *plead it as an Agreement*, and not as a Leaſe. Noy. 121. Small's Caſe ——— Agreement to retain them *for Life of the Parſon* adjudged good. Lev. 24 Bernard v Evans.——Pleading it by way of *Demiſe* for a Year is void by Parol; But *diſcharge* of Tithes by Parol is good, or *Leaſe of the Rectory*, conſiſting of the Glebe and Tithes by Parol for Years is good. Lat. 176. Bellamy v. Balthorp.——Not good without Deed. 2 Le. 29. Woodward v. Buggs.——3 Le 257. S. C. ——— Per Hutton J. Het. 107. ——— Cro. J. 137. Hawks v. Brayfield. ——— Grant of Tithes *by Deed* for Life is not good if it be *to commence at a future Day, and to enure by way of Intereſt* and not by way of *Diſcharge*, and though it be to the Owner of the Land, yet to make it good there muſt be Words of Diſcharge in it Yelv. 131. Edmonds v. Booth ——— During the Life of the Parſon the Contract is on foot, but though the Contract was with the Pariſhioner, his Executors and Aſſignes, yet the *Aſſignee* cannot ſue the Parſon upon this Contract, but he may have a Prohibition to ſtay the Parſons Suit in the Spiritual Court for the Tithes in Kind, and may put the Parſon to his right Remedy, and that is to ſue here. This Agreement is no Leaſe, becauſe not by Deed, and the Pariſhioner being dead, the Parſon ſhall have his Remedy againſt the Executor, and not againſt the Executors, Leſſee at Will. Per Doderidge J. and a Prohibition was granted. Godb. 333. Snell v. Barret. S. C.

Cro. J. 137. pl. 13. Hawkes v. Brayfield, S. C. and a Conſultation awarded; For though ſuch Agreement may be good by Parol for a Year, yet it cannot be during the Parſon's Life, or for Years, without Deed, and cites S. P. ruled between Rolls and Rolls. ——— Yelv. 94. Hawkes v. Brothwith, S. C. takes a Diverſity where it is a Contract to have Tithes by way of Retainer without Deed, and where by way of Perception.

9. Libel &c. the Defendant ſuggeſted, That there was an *Agreement* between the Lord Chandos who was ſeiſed of the Manor of B. in the County of Wilts, and the Plaintiff who was Parſon of B. *that* the ſaid *Lord Chandos and his Tenants of the ſaid Manor, ſhould pay unto the ſaid Parſon ſo long as he ſhould continue Parſon there, ſo much Money in Satisfaction of all Tithes, and that in Conſideration thereof they ſhould hold the ſaid Manor diſcharged &c.* and upon Demurrer it was adjudg'd for this Defendant, and a Conſultation awarded. Hob. 176. pl. 199. Hill. 13 Jac. B. R. Hawles v. Bayfield.

10. A *Pariſhioner* covenants with the Parſon by Deed *to pay the Parſon annually* on Lammas-Day 11 s. and the *Parſon in Conſideration thereof* and *upon Receipt of the ſaid* 11 *s. covenants* by the ſame Deed *to diſcharge and acquit him of the Payment of the Tithes of B. Cloſe* as long as he ſhall be Parſon; The Pariſhioner being Tenant for Life made a Leaſe for a Year and after at Will to another; The Parſon ſued for Tithes in Kind in the Spiritual Court, about three Years afterwards a Prohibition was moved for but deny'd; One Reaſon was, That this was only a Covenant and no Leaſe. 1. Becauſe it *dependt on a Condition Precedent.* 2. Becauſe of the Words, (*upon Receipt of* 11 *s.*) and a Leaſe ought to have a certain Commencement and nor depend on a Condition; (cites Pl. C. 271.) 3. Becauſe the Words are not that he ſhall retain the Tithes, but that he will diſcharge and acquit him of the Payment of Tithes, which Words found only in Covenant. 2 Roll Rep. 121. Mich. 17 Jac. B. R. Alders v. Wray.

So of a Covenant. Poph. 140. Fulcher v. Griffin. —— So where the Parſon in Conſideration of 6 l. per Ann. covenanted and granted *by Deed to diſcharge the Pariſhoner of Tithes* on Condition to be void on Non-payment. The Parſon ſued in the Spiritual Court; But the Court would not grant a *Prohibition*, becauſe the Original, viz. the Tithes, belong to the Spiritual Juriſdiction; But it was ſaid he may have Covenant upon the Deed at Law. Godb. 272. Barnwell v. Pelſie.——2 Roll Rep. 42. S. C.

11. In Conſideration of Compoſition promiſed by the Pariſhioner for his Tithes; Parſon promiſes that *he will not ſue for Tithes*; after Parſon ſues; the Tithes do not paſs in Intereſt, for which the Pariſhioner was put to his Covenant being by Deed. Palm. 377. cites Alders v. Rayner. 16 Jac.

12. Tithes *cannot paſs without Deed.* Cro. J. 613. pl. 3. Paſch. 19 Jac. B. R. Swodling v. Piers.

13. The

13. The Parſon made a *Parol Agreement* with A. a Pariſhioner, *That in Conſideration of* 10 *s. to be paid to him every Year by A. his Executors or Aſſigns, he and they ſhould be quit of Payment of Tithes for ſuch Lands during the Life of the Parſon*; the 10 s. was conſtantly paid to the Parſon, which he accepted; afterwards A. the Pariſhoner made B. an Infant his Executor and died; the Mother of the Infant took out Adminiſtration Durante Minore Ætate, and made a Leaſe at Will of theſe Lands, and the Parſon libelled againſt the Leſſee for Tithes; Per Doderidge during the Life of the Parſon, the Contract is a Foot; but the Aſſignee cannot ſue the Parſon on this Contract, though he may have a Prohibition to ſtay the Suit in the Spiritual Court, and put the Parſon to ſue here; and a Prohibition was granted. Godb. 333 pl. 426. Trin. 21 Jac. B. R. Snell v. Bennet.

2 Roll Rep. 327. Bennet v. Snell, S.C. and by Doderidge the Parſon has no Remedy againſt the Leſſee for the Rent, but he muſt have it againſt A. or his Executors, but the Leſſee may have Action againſt the Parſon if he ſues him in the Spiritual Court; and a Prohibition was granted. — Palm. 377. S.C. and Prohibition was granted.

14. Where the Defendant in *Trover* juſtified by *Leaſe of the Tithes &c. by the Impropriator for a Year*; Per Cur. It is meerly void *without Deed*, otherwiſe if it be by Leaſe of the Tithes of a Year *by the Parſon himſelf*. Noy 89. Mich. 2 Car. B. R. Bellamy v. Balthrop.

Lat. 176. S. C. held accordingly as to the Impropriator; bat that the Parſon may diſcharge the Pariſhioner of Tithes by Parol, or leaſe the Rectory, conſiſting of Glebe and Tithes, by Parol for Years.

15. If A. *contracts with the Parſon for the Diſcharge of Tithes for Years* of his Lands, and demiſes his Lands to another, yet he ſhall not pay Tithes, but the Diſcharge runs with the Land; but if he takes a *Leaſe for his Tithes by Deed* and makes a Demiſe of his Land he has Tithes of the Leſſee; and the Direction was, That the Leſſee of the Farm ought to ſhew expreſly to the Eccleſiaſtical Court, that the Farmer (viz. A. the Leſſor of the Land) had not a Leaſe of Deed. Het. 31. Mich. 3 Car. C. B. Booth v. Franklin.

Hetl. 122. Mich. 4 Car. C. B Stone v. Walſingham, S. P.

16. There was an ancient Compoſition between the Prior and Convent of Bath and the Vicar of North-Stoke, *that the Vicar and his Succeſſors ſhould have five Marks yearly in Lieu of all Tithes of Sheep kept upon the Manor of North-Stoke, and that all the Tenants of the ſaid Manor ſhould be diſcharg'd accordingly, but ſuch Sheep were only to be Hog-Sheep and not exceeding* 500. The Manor came to the King by Diſſolulution, who gtanted it to Seymour. The Vicar notwithſtanding this Compoſition, and though only 500 Hog-Sheep were kept there, and though the five Marks were conſtantly paid, libelled for Tithes in Kind; but the Defendant had a Prohibition upon ſuggeſting this Matter, and upon hearing the Cauſe on an Engliſh Bill in the Exchequer the Compoſition was confirmed. Palm. 525. Paſch. 4 Car. in Scacc. Lon v. Seymour.

17. A Suggeſtion for a Prohibition was that the *Parſon made ſeveral Agreements with his Pariſhioner for the Payment of* 6 *s.* 8 *d. for his Tithes for four Years*, and thereupon a Prohibition was granted; And Harvey ſaid, That if an Agreement be proved for thoſe four Years it is ſufficient. Het. 128. Mich. 4 Car. C. B. Stone v. Walſingham.

18. The *Vicar and Pariſhioner Inter ſe convenerunt* to pay ſo much for Tithes, this was *confirmed by the Biſhop*; This is no real Compoſition but *only a perſonal Contract*, and ſhall not bind the Succeſſor; and a Prohibition was granted. Mar. 87. pl. 140. Paſch. 17 Car. Hitchcock v. Hitchcock.

19. Agreement made ten Years before at 2 s. in the Pound for every Pound Rent of Land within the Pariſh *as long as they ſhould live together and he continue Parſon*, Payment to be made May 1ſt and November 1ſt.

Per

Per Cur. This Agreement will not bind the Parſon being *by Parol*, but it will excuſe the Pariſhioners of the Penalties of 2 E. 6. and from Coſts till Notice given of his Diſſent, and *Notice* given after Payment due is *too late*, and ſo if given *after Lands are manured and ſowed*. Hardr. 203. Mich. 13 Car. 2. in Scacc. Breamer v. Thornton.

20. In Debt on 2 E. 6. cap. 13. on Nil Debet, it is good Evidence to excuſe the Defendant from the Penalties of the Statute to ſhew a *Parol Agreement*. Keb. 21. pl. 60. Paſch. 13 Car. 2. B. R. Barnard v. Ewen.

21. In a ſpecial Verdict in Trover for a Lamb and a Sheaf of Wheat, the Caſe was, That the *Abbey* of Fountaine being *of the Ciſtertian Order, and exempted from Payment of Tithes of thoſe Lands, Quas propriis manibus excolerent, was ſeiſed of the Grange of Hemmingford &c. within the Prebendary of Stodely &c.* and *between the Year* 1216 *and* 1261, *the Abbot and Convent and the Prebend made a Compoſition, confirmed by the Patron and Ordinary, that the ſaid Abbot and Convent ſhould be diſcharged of all Tithes of their Lands, Quas propriis manibus excolerent in Hemmingford*, but they ſhould pay Tithes there and elſewhere for their Lands out of Hemmingford; *and that they ſhould pay yearly to the ſaid Prebendary and his Succeſſors five Marks by equal Payments every* every half Year. That *Anno* 1359 *there was another Compoſition made between the then Abbot and Prebendary reciting the former Compoſition, but the Jury did not find that it was confirmed as the firſt was* by the Patron and Ordinary, *and by their later Compoſition the Prebendary and his Succeſſors were to have the Tithes of Corn and Grain, as well of Lands in the Hands of the Abbot and Convent as in the Hands of Tenants ariſing yearly in the ſaid Place, or elſe five Marks at the Election of the ſaid Prebendary &c. of which Notice was to be given to the Abbot &c.* or to the Porter of the Abbey, on St. Thomas's Day, *and that when no Election was made then the Prebendary &c. ſhould have the five Marks, ſaving the Right of Tithes of Lambs and Wool which was to be paid as formerly*; afterwards *the Poſſeſſions of this Abbey came to the Crown by the Statute of* 31 *H.* 8. *and* that at the Time of the Trover, *the Defendant was Proprietor of the Lands in Hemmingford, and that the Plaintiff was ſeiſed in Fee of the ſaid Prebend, and* that a *Lamb and Sheaf of Wheat were renovant on the ſaid Lands*; and the Queſtion was, Whether the Defendant ſhould pay Tithes or not? and this depended upon another Queſtion, viz. Whether the ſecond Compoſition was good? It was inſiſted for the Plaintiff that it was good, though not confirmed by the Patron and Ordinary becauſe it was for the Benefit of the Prebend and his Succeſſors, and an Enlargement of the firſt Compoſition; for by that he was tied up to the firſt five Marks, but by this he has his Choice either to take the five Marks or his Tithes in Kind; therefore it needs no Confirmation, for the Rule is that the Parſon without his Patron and Ordinary, Poteſt meliorare Statum Eccleſiæ ſuæ; it is true the Abbey is now diſſolved, and the Poſſeſſions given to the Crown by the Statute 31 H. 8. and ſo is the Prebendary by the Statute 1 E. 6. but yet the Tithes in Kind may be recover'd; *for the Diſſolution of the Abbey* will not hinder it, becauſe it *was by Surrender of the Abbot and Convent*; for the *Statute* 31 *H*, 8. *veſts nothing in the Crown but what the Abbots themſelves ſurrendered ſince* 27 *H.* 8. and it is a Rule in Law that Res inter alios acta alteri nocere non debet; it is likewiſe true that the *Prebendary can make no Election, becauſe his Poſſeſſions are given to the Crown*; but where no Election can be made, there the Party who was to have the Benefit of it ſhall have the Thing itſelf without any Election; but adjudged, That *the ſecond Compoſition was void, becauſe* it was *not confirmed by the Patron and Ordinary, and becauſe there could be no Election according to the Compoſition, for that the Prebend was diſſolved*; therefore

fore *the firſt Compoſition ſhall ſtand Quoad Terras in propriis manibus* as theſe Lands were; *and for the others, that Tithes in Kind may be taken*; ſo the Defendant had Judgment. 3 Nelſ. Abr. 298, 299. pl. 8. cites Hardres 381. [pl. 10. Mich. 16 Car. 2. in the Exchequer.] Ingoldsby v. Wivell.

22. A Suggeſtion for a Prohibition was of an *Agreement for a Year*, and though this Agreement *was pleaded in the Eccleſiaſtical Court by Way of Contract*, and not in Bar as an Agreement for Life or for ſeveral Years; yet the Court held it all one, and that both are triable in the Spiritual Court if the Suit be for Tithes in Kind; but otherwiſe *if it were for the Money then a Prohibition would lie*; and ſo Cro. J. 17. muſt be intended. 2 Keb. 6. pl. 14. Paſch. 18 Car. 2. B. R. Buckley v. Cheſter (Bp.)

23. In *Ejectment of* Tithes *upon Demiſe of J. S. not ſaying by Deed*, for which Cauſe after Error brought here on Judgment in C. B. after Verdict, Rotheron prayed for the Plaintiff in the firſt *Judgment* that it may be reverſed, which Twiſden doubted; but per Cur. *reverſed*. 2 Keb. 376. pl. 33. Trin. 20 Car. 2. B. R. Angell v. Rolfe.

24. *Indebitatus Aſſumpſit for Tithes ſold.* Baldwin moved in Arreſt of Judgment, that this ſounds in the Realty, and ſo an Action of the Caſe will not lie; But per Cur. it is well enough for this ſhall *not be intended a Leaſe* of Tithes, *but a Sale* of Tithes. Freem. Rep. 234. pl. 242. Mich. 1677. Anon.

25. A *Leaſe* of Tithes *cannot be for more than one Year without Deed*, and it is not good by Way of Leaſe for one Year, but ſo it enures by Way of Sale; Per North Ch. J. Freem. Rep. 234. pl. 242. Mich. 1677. Anon.

26. Caſe on a *Special Promiſe for Tithes for ſix Years*; on a Motion in Arreſt of Judgment it was *held good*, though ſuch Agreement be not a good Leaſe, nor does any Intereſt paſs by the ſame in the Tithes, yet it it is good to ground an Aſſumſit and the Action lies; Judgment for the Plaintiff. 2 Show. 307. pl. 314. Trin. 35 Car. 2. B. R. Eaton v. Sherwin.

Though no Intereſt paſſes by ſuch an Agreement, yet he having according to the Agreement ſuffered him to take the Tithes, an Action lies for the Money upon the other's Agreement. Skin. 113. pl. 4. S. C.

27. The Law for ſeveral Years paſt hath been clearly taken that no *Prohibition* will lie on any Compoſition whether *for Life or Years* for any Tithes, and therefore the *proper Remedy is to appeal to the Arches* if the Conſiſtory Court ſhould refuſe a Plea of Compoſition. Carth 70. Mich. 1 W. & M. in B. R. Bradſhaw v. Swanton.

28. Parol Agreement for the Tithes of *Lands to be incloſed was*, That the Proprietors would be at the Charge of encloſing, and that the Rector and his Succeſſors ſhould have *every tenth Acre* in Satisfaction of all Tithes, which ſhould be likewiſe inclos'd for him. This Agreement was made with the Predeceſſors of the preſent Rector; the preſent Rector traverſed the Agreement, and the Plaintiff took Iſſue on the Traverſe; the Jury found the Agreement, and gave a Verdict againſt the Rector, and after ſeveral Motions the Judgment was affirm'd. 2 Lutw. 1057. Hill. 13 W. 3. C. B. Machin v. Moulton.

29. Where an Agreement is made for Tithes they ſhall *paſs by Way of Bargain*; for otherwiſe they cannot paſs at all becauſe they lye in Grant, and therefore cannot otherwiſe paſs than by Deed; for a *verbal* Agreement for them is good only for a Year. 8 Mod. 62. Mich. 8 Geo. The King v. Fairclough. Hetl. 122. Mich. 4 Car. C. B. Stone v. Walſingham, S. P.

And ſhall pay the *Poor-Rate.* Ibid.

30. Parſon leaſes his Tithes for 2 s. 6 d. per Acre to A. B. and C. they let every Landholder his own Tithes at 3 s. per Acre; The Money which the *Leſſees* receive of the *Landholders* for thoſe Tithes ſhall be accounted a *Modus*, and wherever there is a Modus he that receives it ſhall be *taken to be Occupier* of the Tithes. 8 Mod. 63. Mich. 8 Geo. The King v. Fairclough.

(I. a) *Who* ſhall *have Advantage* of a Preſcription in Non Decimando.

* Cro. C. 422. pl. 14. S C. adjudg'd by 3 Juſtices for the Defendant, and that Conſultation be awarded. —— Jo. 388. pl 10. S. C. and held by 39. Contra Crook, that no Prohibition lies, and a Conſultation was awarded. —S. C cited per Cur. Jo. 387. pl. 3. Paſch. 12 Car. B R. —— 2 Keb. 29. pl. 59. Paſch. 18 Car. 2. B. R. the S. C. cited per Cur. and ſaid that it had been agreed for Law in all the Courts of Weſtminſter. —— Ibid. 175. pl. 61. cites S C. accordingly.

1. IF a Man preſcribes, that ſuch an Abbot and his Predeceſſors Time out of Memory &c. held certain Land diſcharged of Payment of Tithe, and that this came after by Diſſolution by the Statute of 27 H. 8. to the Crown, and ſo derives a Title to it from the Crown, the Patentee ſhall not have Advantage of this Preſcription by the Common Law, without the help of any Statute, becauſe it ſhall be intended that this Diſcharge was by reaſon of ſome Perſonal Privilege given the Abbot and his Predeceſſors, and ſo is gone by Diſſolution of the Body Politick, and not in reſpect of any real Compoſition. P. 7 Car. in Scaccario, between *Clarke and Ward*, adjudged in the Caſe of the Vicar of Daintre. Mich. 10 Car. B. R. between * *Tiddowne and Holms* per Curiam, upon Demurrer, and gave a peremptory Rule for Judgment accordingly, if Cauſe was not ſhewn the next Term to the contrary; But after Judgment was ſtay'd till M. 11 Car. at which Time it was ſolemnly argued by the Court, and then adjudged by Brampſton. Jones, and Barkely e contra, the Opinion of Croke, that the Preſcription in Non Decimando was gone by the Common Law. H. 11 Car. between *Cock and Thorpe*, and ſo adjudged upon a Demurrer without Argument e contra the Opinion of Croke. Intratur, P. 11 Car. Rot. 28.

Fol. 655. Jo. 387. pl. 3. S. C. and a Conſultation was granted.—— The King's Leſſee ſhall hold diſcharged, but his Feoffee ſhall not; Per Henden, Davenport and Atthow Serjeants. Hetl. 60. Mich. 3 Cur. C B. in Comins's Caſe.——

2. In a Prohibition, if the Plaintiff preſcribes, that King Edw. 6. was ſeiſed de nuper de-afforeſtata foreſta de Savernack in Comitatu Wilts of which 20 Acres of Wood, call'd Wickham-Huſſocks, within the Pariſh of Pewſey, a Tempore &c. was Parcel, and that King Edw. 6. and all his Progenitors and Predeceſſors, Kings of England, Foreſtam prædictam, cum pertinentiis, unde &c. habuerunt & gavili fuerunt exoneratam & acquietatam immunem & privilegiatam de & a Solutione omnium & ſingularum Decimarum quarumcumque Rectori Eccleſiæ parochialis de Pewſey prædict'; ſeu Firmario ſuo, pro Tempore exiſtenti ſolubilium infra Foreſtam prædictam, ſeu aliquam inde parcellam creſcentium, renovantium, provenientium, & contingentium, Rectori Eccleſiæ de Pewſey prædicta, ſeu ejus Firmario, pro Tempore exiſtenti ſolubilium and that King Edw. 6. by Deed enroll'd, convey'd the ſaid Foreſt to the Duke of Somerſet in Fee, and ſo it was convey'd from him by mean Conveyance to the Plaintiff, the new Earl of Hertford, in Fee, and that the Defendant being Parſon of the ſaid Pariſh, had ſued for Tithes of the ſaid 20 Acres of Wood, to which Defendant pleaded for a Conſultation, that the ſaid 20 Acres were not Parcel of the ſaid Foreſt, upon which an Iſſue being joined, a Verdict was given for the

the Plaintiff; And after it was moved in arreſt of Judgment, that this Preſcription in Non Decimando, which was laid in the King and his Progenitors Kings of England, was Perſonal, and did not extend to the Alienee of the King; and after ſeveral Arguments at the Bar, it was adjudged per totam Curiam, that the Plaintiff could not take Advantage of this Preſcription, without any Argument by them, and a Conſultation granted accordingly, for that the Ground of this Preſcription was either becauſe it was a Foreſt, and could not render Tithes ſo long as it was uſed with wild Cattle, ſcilicet, Deer, or becauſe the King was not within the Council of Lateran, which ordains the parochial Right, or becauſe the King is Perſona mixta, and ſo might preſcribe in Non Decimando as a Spiritual Perſon, in all which Caſes it could not extend to the Alienee of the King, the ſaid Foreſt being diſafforeſted; and ſo now it may render Tithe in Kind; and it ſhall not be intended that any real Compoſition or Conſideration was given for this Diſcharge without ſhewing thereof ſpecially, no more than in Caſe of a Spiritual Perſon or Abbot that makes ſuch Preſcription. P. 11 Car. B. R. between the Earl of *Hertford and Leech*, adjudged. Intratur, Hill. 8 Car. Rot. 565. Vide by Argument in this Caſe in my Book.

Cro. C. 94 pl 20. Morant v. Comming. S. C. it was doubted whether the Patentee may have ſuch Privilege, or that it be only a Privilege annex'd to the Crown during the time that the Land is in the Crown; but a Prohibition was granted De bene eſſe, unleſs Cauſe were ſhewn to the contrary ſuch a Day.——

Lands in a Foreſt not paying Tithes being in the Hands of the King, is but an Immunity for that Time only. Sty. 137. Mich. 24 Car. in Caſe of Baniſter v. Wright.

It was held upon Evidence by Hale Ch. B. and the whole Court, that the King is not by Virtue of his Prerogative diſcharged of Tithes for the antient Demeſnes of the Crown; but that he is capable of a Diſcharge De non Decimando by Preſcription, (becauſe he is Perſona mixta) as well as a Biſhop. See 2 Rep. Biſhop of Wincheſter's Caſe. But if the King alien any of the Lands that he is ſo diſcharged of Tithes for, his Patentee ſhall pay Tithes, and not only ſo, but the Preſcription is deſtroyed for ever, though the ſame Lands ſhould afterwards come into the King's Hands again, by Eſcheat or otherwiſe. Hardr. 315. pl. 7. Mich. 14 Car. 2. in Scacc. Compoſt v. .....

3. The *Abbot of A. was ſeiſed in Fee, and* that *he and his Predeceſſors Time out of Mind*, had *held the ſame diſcharged of Tithes, and he granted the Land to All Souls College in Oxford* &c. Keeling Ch. J. delivered the Opinion of the Court, in which they all clearly agreed, that this could not be intended of a Diſcharge by real Compoſition, not being pleaded or found ſo by the Jury, but a mere Preſcription, and Perſonal to the Abbot, and ran not with the Land. 1 Lev. 185. Trin. 18 Car. 2. Bolls v. Atkinſon.

Sid. 320. pl. 13. Bowles v. Atkins. S C. adjudged accordingly.

(K. a) *Who* ſhall *pay* Tithes.

1. IF a Parſon ſows his Glebe, and after leaſes over the Land, and after the Leſſee ſevers the Emblements, he ſhall pay Tithes for them to the Parſon. P. 40 El. B. R. in *Humfrey's* Caſe, per Fenner.

2 [So] If a Parſon ſows his Glebe, and after ſells over the Emblements, reſerving the Land, and the Vendee ſevers the Emblements, the Parſon ſhall have Tithes of them, notwithſtanding his own Grant. P. 40 El. B. R. *Humfrey's* Caſe. Dubitatur. P. 11 Ja. B. R. between * *Moyle and Ewer*, Curia, and affirmed in a Writ of Error.

* Cro. J. 362. pl. 23. S. C. adjudged. And the Court ſaid, that if any one will buy Corn

ſtanding of the Proprietor of a Rectory, if he has not ſpecial Words to diſcharge it he ought to pay Tithes, and the carrying it away without ſetting out the Tithes is an Offence within the Statute, and ſhall pay treble Damages.—— 2 Bulſt. 183. S. C. adjudged for the Plaintiff; States it that the Plaintiff

Plaintiff was poſſeſs'd of the Land ſown with Corn, (but had not then the Parſonage) but that before Severance he became Parſon.

Hob. 188. pl. 232. Trin. 15 Jac. Harris v. Cotton. S. P. of an Action brought by

3. If a Parſon ſows his Glebe, and dies before Severance, and after a Succeſſor is inducted, and after the Executor or his Vendee ſevers the Emblements, the Succeſſor ſhall have Tithes of them, for though the Executor repreſents the Perſon of the Teſtator, yet he cannot repreſent him as Parſon, inaſmuch as another is inducted. Contra P. 40 El. B. R. Humfrey's Caſe.

the Parſon appropriate; but the Court would give no Opinion, becauſe it hanged before them in Suit.——Brownl. 69. S. C & S. P. in an Action of Debt brought upon the Statute 2 E. 6. and the Court ſeem'd to incline that it would lie.

Fol. 656. S P and ſo if he reſigns before Severance; Per Coke Ch. J. 2 Bulſt. 184. Hill. 11 Jac.

4. If a Parſon ſows his Glebe, and after is depoſed before Severance, and another is inducted, it ſeems he ſhall have Tithes of his Predeceſſor. (Quære, * Whether there be not a Diverſity where he dies before the Annunciation, or where after?) H. 11 Ja. B. R. per Curiam.

* This ſeems to belong to the former Plea.

If a Parſon leaſes his Glebe for Years the Leſſee ſhall not pay Tithes; Per Brown and Weſton; Quod fuit conceſſum Mo. 47. pl. 140. Paſch. 5 Eliz.—Contra by Coke Ch. J. 2 Bulſt. 184. Hill. 11 Jac. ——If the Parſon of a Church which is not impropriate leaſes his Glebe the Leſſee ſhall pay Tithes; but otherwiſe if it had been an impropriate Church, becauſe of the Statute of 32 H. 8. of Diſſolutions; cited by Hutton Serjeant Noy. 132. as ruled in the Exchequer in Caſe of Brewer v. Veyſoy.——If the Parſon demiſes the Glebe, his Leſſee ſhall pay him Tithes. Per Eyre Ch. J. Gibb. 79. Trin. 2 & 3 Geo. 2. C. B.

5. If a *Parſon demiſes his Glebe to a Layman* there he ſhall pay Tithes; Contra of the Parſon himſelf who reſerves them in his proper Hands; And that Land before diſcharg'd of Tithes ſhall be yet diſcharg'd of Tithes, yet if *he who has purchaſed Manor and Rectory* which is *diſcharg'd of Tithes leaſes Part of his Demeſnes*, the Leſſor ſhall have Tithes thereof becauſe he has the Parſonage. Br. Diſmes, pl. 17. cites 32 H. 8.

Cro. E. 161. pl. 52. Parkins v. Hinde. S. C. and though the Rent was mentioned to be for all

6. A Parſon makes a *Leaſe for Years of parcel of his Glebe* Land *of the Value of* 13 *l. per Ann. rendering* 13 *s. Rent*; Adjudged that the Leſſee ſhall pay the Tenths to the Leſſor, notwithſtanding his own Leaſe, and the Reſervation of the Rent; But there *otherwiſe* it had been, *if it had been a Rack-Rent* to the value of the Land. Sed quære of that Diverſity. Noy. 35. Mich. 31 & 32 Eliz. Perkins v. Wilde.

Exactions and Demands, yet a Conſultation was granted by all the Juſtices, For Wray ſaid, that the Words here are no Diſcharge; For theſe Tithes ariſe, and accrue after, and are not Things iſſuing out of the Land, but collateral and due Jure Divino; and therefore cannot be diſcharged but by ſpecial Words; But if the Words had been as well for Tithes growing and ariſing upon the Land, as for other Demands, then peradventure it had been a good Diſcharge. But as the Caſe is, it cannot be intended by any Words, that he reſerved the Rent for Tithes, and ſo Gawdy J. did conceive, eſpecially as the Caſe here is, the Leaſe being of 24 Acres of Land, and only 13 s. 4d. reſerved. ——D. 43. Marg. pl. 2. cites S. C. that it was reſolv'd the Tithes ſhould not paſs by ſuch general Words.——S. C cited 11 Rep. 13. b. by the Reporter in a Nota as reſolv'd per tot. Cur. that the Tithes ſhall not paſs by ſuch general Words.

7. As long as the *Vicar occupies his Glebe Lands* in his own Hands, he *ſhall pay no Tithes*; *but* if he demiſes it to another, the *Leſſee ſhall pay* Tithes to the Parſon that is impropriate. Brownl. 69. 14 Jac. Harris v. Cotton.

8. If *Parſon* be *Tenant of the Land*, and at this Time Land is diſcharged of Tithe of Wood in his Hand, yet if he leaſes or ſells the Wood the *Leſſee or Vendee ſhall pay Tithes unleſs he ſells the Tithes alſo*; Per

Per Doderidge and Haughton. Palm 38. Mich. 17 Jac. B. R. in Caſe of the Earl of Clanrickard v. Denton.

9. If a *Layman Impropriator leaſes the Glebe* the Leſſee ſhall pay Tithes. And if he *purchaſe other Lands* in the Pariſh which are diſcharged of Tithes in his Hands, and he demiſes them the Leſſee ſhall pay him Tithes. Het. 31. Mich. 3 Car. C. B. Booth v. Franklin, ſaid that it was adjudged accordingly in the Caſe of Perkins v. Hinde.

10. Tithes were claimed by the Defendant as his *abſolute Inheritance under a Grant from the King*, and the ſame were decreed ſo. Fin. Rep. 309. Trin. 29 Car. 2. Roak and Collier v. Lee.

(K. a. 2) Payable to whom.

Executors or Succeſſors &c.

1. IN Treſpaſs it was admitted that where *Pariſhioners ſow* the Land *the 10th Day of May*, and after the *Parſon makes his Executors and dies*, and after *another Parſon is inſtituted* and inducted, and after the Pariſhioners cut the Corn and ſever the Tithes from the nine Parts, the Executors of the firſt Parſon ſhall have the Tithes, and not the new Parſon. Br. Diſmes, pl. 7. cites 21 H. 6. 30.

2. If a Man *keeps Sheep in one Pariſh until ſheering Time, and then ſells them into another Pariſh*; in this Caſe the Vendee ſhall pay the Tithe-Wool to the Pariſh where they were depaſtured in the greater Part of the Time of the growing of the Wool; Per Williams. Lane 16. Hill. 4 Jac. in the Exchequer. Anon.

(L. a) *By whom* they ſhall be *paid*.

1. IF a Man ſells to me Wood, and I burn it in my Houſe, the Vendor ſhall be charged for the Tithes, and not the Vendee, for no Tithes are due for Wood burnt in my Houſe; and this was reſolved, P. 14 Ja. B. between Parſon *Ellis of Devon and Drake*, and a Prohibition granted accordingly; although it was ſaid, by the Civil Law the Parſon hath Election to ſue either of them; But this croſſes the Common Law.

2. If A. agiſts the Cattle of a Stranger in his Land, the Parſon may ſue the Owner of the Land for the Tithes of the Paſture; for otherwiſe it would be very inconvenient for the Parſon to ſue every Owner of Cattle, and it would be very hard to know, and infinite. Mich. 7 Car. B. R. between *Facey and Lange*, per Curiam. Cro C. 237. pl. 20. S. C. but S. P. does not appear. —— J. 254 pl. 5. S. C. it ſeem'd to the Court in reaſon that a Suit was well brought againſt the Owner, but be that as it will it belongs to the Court Chriſtian to determine which of them ought to be ſued, and therefore for this Reaſon as to this Point a Conſultation was granted. —— S. C. cited Hardr. 35 pl. 2. by the Name of Fare v. Cauge, as held, that Tythes ſhall be paid for Agiſtment of Cattle by the Occupier of the Lands.

3. Where *Graſs is cut and made into Reeks or Cocks, and afterwards ſold*, the Parſon cannot ſue the Vendee for the Tithes thereof, but muſt ſue him who ſever'd it. 2 Roll Rep. 78. Hill. 16 Jac. B. R. Cannon's Caſe.

4. If a *Stranger takes Emblements before ſeverance from the Tythes* the Parſon *ſhall ſue* in the Spiritual Court for Tythes againſt *the Treſpaſſor*; and not againſt the Tertenant; Per Ley Ch. J. 2 Roll Rep. 440. Trin. 21 Jac. B. R. in Caſe of Gwyn v. Merryweather.

5. In a Bill in Equity for the Tithes *of a Nurſery* ſold; The Court was of Opinion, that if the *Owner ſells them and pulls them up himſelf*, he ſhall pay the Tithes; but if he ſell them particularly to another [after Severance] the Vendee ſhall pay the Tithes; As in Caſe of Tithes of Corn; if Corn be ſold ſtanding, the Vendee ſhall pay the Tithes; But if he ſell it after ſeverance the Vendor muſt. Hardr. 380, 381. pl. 9. Mich. 16 Car. 2. in Scacc. Grant v. Hedding and Ball

6. Upon hearing the Cauſe above divers Doubts and Queſtions were made; As 1ſt. Whether Tithes ſhould be paid if they *yielded no other Fruit?* 2dly, Whether Tithes ſhould be paid *for thoſe Trees that yield Fruit, which pay Tithes?* 3dly, If *ſome yield Fruit and others not*, Whether or no thoſe that yield Fruit, privilege and exempt the other which yield none, when they are all ſold together? 4thly, Whether Tithes ſhall be paid for them when *ſold and tranſplanted in another Pariſh?* Et adjornatur. But afterwards Tithes were decreed in all ſuch Caſes. Hardr. 380, 381. Mich. 16 Car. 2. in Scacc. Grant v. Hedding and Ball.

7. The Plaintiff being Rector of the Pariſh of Hemyoke in Devonſhire, brought a Bill for agiſtment Tithes againſt the Agiſter, the Caſe appear'd to be thus, *Defendant's Father lived in the Pariſh and rented a Farm there; Defendant lived with him, and he being a Butcher and renting a Farm in an adjacent Pariſh, frequently brought Cattle and put them in his Father's Ground for two or three Nights, and ſometimes kill'd ſome of them off, but generally ſent them to his own Farm.* The Queſtion was, Whether the Owner of the Land or the Owner of the Cattle ſhould pay agiſtment Tithes? Ch. Baron and other Barons agreed, that the Demand ought to have been againſt the Occupier of the Land for the agiſtment Tithe if any had been due, but they thought in this Caſe nothing appear'd due. And Baron Page ſaid, that as to what had been ſaid that the Demand might be either againſt Occupier or Agiſter, that could not be; for the ſame Duty could not ariſe in two different Perſons at the ſame Time. MS. Rep. in Scacc. Fiſher v. Lemen.

(M. a) Tithes Perſonal.

What ſhall be ſaid *Perſonal* Tithes.

1. A **Perſonal Tithe** is the tenth Part of the clear Gain quæ debentur ex opere Perſonali, **his Charges and** Expences, **according to his Eſtate, Condition, or Degree, to be firſt** deducted. **Co. Magna Charta** 621. 657. 649.

2. **Tithes of** Fiſh taken at Iſland, **or of** Herrings **or** Pilchards, **upon the Sea are Perſonal Tithes. Mich. 14 Ja. B. R.** * *Goſlin and Horden*, **per Doddridge. H. 14 Car. B. R. ſaid by Juſtice Jones, that in an Appeal out of Ireland to the Delegates here, in my Lord** *Deſmond's* **Caſe, it was agreed by all the Civilians, That Tithes Perſonal taken in the Sea out of any Pariſh are due deductis Expenſis, and not Tithes in Kind. Co. Magna Charta** 621.

* See (C) pl. 4. and 6. S. C. and the Notes there.

3. Tithes

3. **Tithes of Fulling-Mills and Paper-Mills are Perſonal Tithes. Co. Magna Charta 621.** Tithe of Mills are Perſonal Tithes, per Coke Ch. J. Roll Rep. 405. pl 15. Jake's Caſe. —— See (Q) pl. 19 and the Notes there.

4. **The Tithes of a Corn-Mill are not Perſonal, but predial or mix'd, and of this according to the Cuſtom of the Realm, the Miller ought to pay the tenth Toll-Diſh for Tithes. Contra. Co. Magna Charta 621.** Carth. 215. Hill. 3 W. & M. in B. R. Gumble v. Falkinham.

S. P. the Court doubted what Tithes ought to be paid out of a tithable Mill; Whether only Perſonal Tithes, viz. The 10th of the clear Gain, or elſe Predial Tithes, viz. The tenth of all the Income in General, and therefore a Prohibition was granted generally on Purpoſe that the Point might come before them upon a Declaration and Demurrer to it, ſo that the Matter might receive a ſolemn Determination by the Court. —— Show. 281. Gumley v. Falkenham. S. C. and by Holt Ch. J. The 10th Toll-Diſh is the Tithe; it is not the Owner of the Mill, nor the Owner of the Grain that has the Profit, but the Miller; and this is a Predial Tithe, becauſe payable Rectori Loci, viz. Where the Mill is, and not merely where the Parſon lives. It ſeems reaſonable, that the Parſon ſhould have the 10th Toll-Diſh. Adjornatur. —— 4 Mod. 45. Grimly v. Fawlkingham. S. C. but S. P. does not appear. —— —— The Defendant had libelled in the Spiritual Court for the Tithe of a Corn-Mill as Predial Tithe. The Plaintiff ſet forth in his Anſwer, that he conceived the Tithe of a Corn-Mill to be a Perſonal Tithe; and therefore prayed to be allowed all his neceſſary Charges in attending the Mill before the Tithe ſhall be paid. The Judge over-ruled this Plea, and decreed that the Plaintiff ſhould pay theſe Tithes without any ſuch Deduction. Upon which Mr. Denniſon moved for a Prohibition, and cited the Caſe of **Chamberlain v. Clifton**, determined in the Houſe of Lords the 20th of June 1706, wherein it was reſolved, That the Tithe of a Corn-Mill was Perſonal Tithe; accordingly a Rule was made to ſhew Cauſe. 2 Barnard. Rep. in B. R. 336. Mich. 7 Geo 2. Donalt v. Lowther.

5. Mr. Newte being Rector of the Portions of Pitt and Tidcomb, of the Rectory and Pariſh Church of Tiverton in Com' Devon, and an *Horſe-Mill for the grinding of Malt*, being erected within the ſaid Portions by the Corporation of the ſaid Borough, who in 1699 had leaſed the ſame to the Appellants for three Years at 30 l. per Annum. Newte preſerr'd his Bill in the Exchequer Mich. 3 Ann. and on 20th February 1705, the Cauſe was heard and debated, and the Court took Time to deliver their Opinions until the next Term after, and on 22d April 1706, the Court of Exchequer were unanimouſly of Opinion, That Tithes were due for this new erected Mill, and that ſuch Tithe was the tenth Toll-Diſh, and decreed the Appellants to account with the Reſpondent accordingly, viz. from the 8th of May 1699 to the 8th of May 1701, and alſo to pay Coſts; from which Decree the Defendants in the Exchequer appealed to the Houſe of Lords. 1. Becauſe the Tithe of an Horſe Malt-Mill was a perſonal Tithe, for there was no natural Increaſe from it, but only a Profit ariſing from the Invention of a Machine and the Labour of a Man and Horſe, and if it were perſonal the ſame could only be for the Tenth of the Neat Profit deducting all Charges. 2. If a perſonal Tithe was due for ſuch Mill it was only due where perſonal Tithes have been by Cuſtom paid for 40 Years before the Statute of E. 6. 3 The Appellants only took 2 d. per Buſhel for Grinding, and the Reſpondent did not prove any Cuſtom, nor the Value of the tenth Toll-Diſh, nor any other Toll to be taken by the Appellants. 4 That the tenth Toll-Diſh would be more ſometimes than the whole Proprietors Gains, conſidering the Expence of erecting and maintaining this Mill. 5. That the Corn will pay Tithe twice, for that moſt of the Corn that was ſo ground was grown within the ſame Pariſh, and ſo the Tenth paid to the Reſpondent in the Field; and it any was ground that grew elſewhere the ſame did in like Manner pay the Tenth to the Incumbent where it grew. 6. This Decree will introduce a new Sort of Tithe, and will affect a great many People in London where there are many ſuch Mills, and ſome Thouſands of them are in other Parts of the Kingdom, It was decreed in the Houſe of Peers, on Appeal from the Court of Exchequer, that the Tithes of a Mill *are Perſonal* Tithes, againſt ſeveral ſeeming Authorities or Doubts in the Books; and that in Conſequence of their being Perſonal Tithes, not the tenth Toll or tenth Diſh of the Corn ground belongs to the Perſon, but the *tenth Part of the clear Profits*, after the Charges of erecting the Mill, and the other Charges of Servants, Horſes, and other Ex-

fences deducted. Abr. Equ. Caſes 366. Newt v. Chamberlain. —— S. C. cited 2 Wms's Rep. 463. as determin'd in the Houſe of Lords upon an Appeal from a Decree of the Court of Exchequer, where the Bill was brought for the Tithes of a Malt-Mill in Tiverton in Devonſhire, and where the Lords determined, with the Aſſiſtance of 8 Judges, (whereof Holt Ch. J. was one) that Mills were tithable, but that the ſame was a Perſonal Tithe, and ſo ought to be paid out of the clear Gain after all manner of Charges and Expences deducted. And upon the Authority of this Caſe the Maſter of the Rolls decreed, Trin. 1728. in Caſe of Carleton v. Brightwell,

Kingdom, and if this Decree be affirmed they muſt all pay Tithes. On the Reſpondent's Part it was inſiſted, 1. That Tithes were due both by the Canon and Statute Law for new erected Mills; that Tithes were by the Canons due for all Mills, and by *Artic. Cler. cap. 5.* for new erected Mills, which expreſly *provides that no Prohibition ſhall lie in ſuch a Caſe.* 2. That there had been from Time to Time ſeveral Reſolutions and Decrees for Tithes of Mills. 3. That the reſt of the Mills within the Reſpondent's Portions had all along paid and did ſtill pay Tithe or a Compoſition for the ſame, and every Modus for a Mill proves Tithes to be due if they were not diſcharged by ſuch Modus. 4. That it was a predial Tithe and the tenth Toll-Diſh payable for the ſame, and ſo was both the Canon and Cuſtom and Uſage of this Kingdom. 5. That this was not a double Tithe for it was paid by different Perſons and for different Purpoſes, viz. In the firſt Caſe by the Owner of the Corn; and in the ſecond Caſe by the Owner of the Mill. This Cauſe was heard at the Bar of the Houſe of Lords Monday 20 January 1706-7, and upon ſome Debate in the Houſe the Conſideration of Tithes predial mixt or perſonal were due for ſuch a Mill, and if any due in what Manner payable was referred to the Judges, who after ſeveral Adjournments attended in the Houſe on the 17th Day of February following, and all the Judges of the King's-Bench and Common-Pleas (except Juſtice Powell) were of Opinion unanimouſly, That the Tithe due for a new erected Malt-Mill was a perſonal Tithe only, and Ch. J. Holt, and Ch. J. Trevor held, That there was no Tithe due at all for ſuch Mill, becauſe a perſonal Tithe was due only where it had been paid within 40 Years before, according to the Statute of 2 & 3 E. 6. cap. 13. S. 7. Upon which the Lords reverſed the Decree of the Exchequer, but ordered that Mr. Newte ſhould be paid the tenth Part of the Profits &c. deducting all Charges and Expences, as Reparations &c. and that the Appellants ſhould account with him in the Court of Exchequer for theſe Profits &c. Monday 17th Day of February 1706. It is ordered and adjudged by the Lords Spiritual and Temporal in Parliament aſſembled, that the Decree of the Court of Exchequer complained of in the Petition of Roger Chamberlain and Francis Plympton ſhall be and is hereby reverſed; and that the Plaintiff in the Court below John Newte (the now Reſpondent) do recover his Tithes of the ſaid Mill in the *Nature of a perſonal Tithe only; that is to ſay, The tenth Part of the clear Profits ariſing from Corn ground in the ſaid Mill, over and above all incident Charges*; and to that End an Account is to be taken of the Profits of the ſaid Mill, and Charges for the Time paſt within the Time of the Demand of the Plaintiff John Newte's Bill in the Exchequer and ſince, and the ſaid Tithes do ſo continue to be paid for the future. And it is hereby ordered that the ſaid Court of Exchequer do cauſe the ſaid Account to be taken, and what ſhould be found due thereon paid accordingly. MS. Rep. Mich. Vac. 5 Ann. Chamberlain & al' v. Newte.

the Mill in Queſtion there to pay Tithes, but that they ſhould be only paid as a Perſonal Tithe. 2 Wms's Rep. 463.

Tithe for *Malt-Mills* is only Perſonal, for it is not natural Increaſe, being only Profit ariſing from the Invention of a Machine, and the Labour of Man and Horſe, and Perſonal can only be for the Tithes of the neat Profit, deducting all Charges. MS. Tab. January 20. 1706. Chamberlayn v. Plympton.

(N a.) [Perſonal Tithes.]

In what Caſes they are due. Of what Things they ſhall be paid.

1. NO Perſonal Tithes ſhall be paid out of the clear Gains of the Party. Mich. 14 Ja. B. R. per Curiam.

2. As if the Owner of a Ship lends it to Mariners to go to Iſland for Fiſh, upon a certain Quantity of Fiſh to be paid to him upon their Return, no Tithes upon their Return ſhall be paid by the Mariners to the Parſon out of thoſe Fiſh which the Owner ſhall have for the Hire of his Ship, becauſe this is a Perſonal Tithe, and for that that it but of the clear Gain; and ſo in Devon upon the Hire of a Ship or Boat to take Pilchards or Herrings. Mich. 14 Ja. B. R. per Doderidge, in *Goſlin and Horden's Caſe.* Roll Rep. 419. pl. 5. S. C. but S. P. does not appear.

3. If a Man purchaſes an Houſe for 300 l. and ſells it again in a ſhort Time for 500 l. yet no Tithe ſhall be paid of the Gain (*) thereof, for this is againſt the Common Law. M. 11 Ja. B. R. between *Davies and Tolbin* reſolved, and a Prohibition granted. * Fol. 657.

5. 2 & 3 E. 6. *cap.* 13. *S.* 7. *Every Perſon exerciſing Merchandizes, bargaining and ſelling, Cloathing, Handicraft, or any other Art or Faculty, being ſuch Perſons and in ſuch Places as within theſe* 40 *Years have uſed to pay perſonal Tithes, or of Right ought to pay other than ſuch as the common Day-Labourers, ſhall yearly at or before Eaſter pay for his perſonal Tithes the tenth Part of his clear Gains, his Charges and Expences according to his Eſtate or Degree to be deducted.*

6. *S.* 8. *In all ſuch Places where Handicraftſmen have uſed to pay their Tithes within theſe* 40 *Years the ſame Cuſtom ſhall continue.*

7. 2 *E.* 6. *cap.* 13. *S.* 9. *If any Perſon refuſe to pay his perſonal Tithes it ſhall be lawful to the Ordinary of the Dioceſe where the Party is dwelling, to call the Party before him and examine him by all lawful Means, other than by the Parties own Oath, concerning the Payment of the ſaid perſonal Tithes.*

8. A Parſon libelled in the Spiritual Court *againſt an Innkeeper for Tithes of the Profits of his Kitchen, Stables and Wine-Cellar*, and alleg'd in his Libel that he made great Gain in ſelling his Beer which he bought for 500 l. and ſold it for 1000 l. that Negotiando & Trafficando he gain'd in the Sole 3000 l. and better; the Court granted a Prohibition. 2 Bulſt. 141. Mich. 11 Jac. Dolley v. Davis.

(O. a) Tithes *Extra-parochial.* *Who* may have them.

1. ANY Stranger may have a Portion of Tithes in the Pariſh of another Parſon. 14 H. 4. 17. 44 Aſſ. 25.

2. 3 E. 1. Rotulo Clauſorum Membrana 3. the Abbot de Burgo Petri had by the Charters of divers Kings Decimam Venationis capt' in Foreſtis Regis infra Comitatum Northt' 8 E. 1. Rot. Clauſarum, M. 2. accordingly in Foreſta Regis citra Trentham.

* Quære, if this be not miſprinted for N. S. and intended to ſignify New Sarum, which is but a ſmall Diſtance from Clarendon.

3. 13 E. 1. Rotulo Patentium, M. 6. the Dean and Chapter * M. S. had the Tithe in Foreſta de Claringdon ex conceſſione Regis.

* Br Scire Facias, pl. 154. cites 22 Aſſ. 75. —— Br. Diſmes, pl. 10. cites C. ——

4. The King ſhall have the Tithe in Places which are out of any Pariſh, as in Foreſts, and the like, and may grant them by his Letters Patents, and the Patentee ſhall have them. * 22 Aſſ. 75. D. Prorys, 4 Co. 2. the Biſhop of Wincheſter 44. for he is Perſona mixta.

Br. Patents, pl. 33 cites S. C. —— Br. Prerogative, pl. 47. cites S. C. —— Br. Prerogative pl. 143. cites S.C. —— Br. Juriſdiction, pl. 64. cites S. C.

2 Inſt. 647. ſame Record cited. —— See (P. a) pl. 2.

5. Libro Parliamentorum, Fol. 19. inter Placita in Parliamento de 18 E. 1. the Prior of Carliol and the Biſhop of Carliol's Caſe, it is there ſaid, that the Tithes of Land within a Foreſt, which is out of any Pariſh, belongs to the King, becauſe he is Foreſta prædict' Villas ædificare, Eccleſias conſtruere, Terras aſſertare, & Eccleſias illas, cum Decimis Terrarum illarum, pro voluntate ſua cuicunque voluerit conferre poteſt, eo quod Foreſta illa non eſt infra Limites alicujus Parochiæ.

6. There is a Fenn called *Wildmore in Com' Lincoln*, which is not known to be in any Pariſh within. Whereupon it was ordered in the Exchequer that in this Caſe the Tithes ſhall be *paid to the Parſon, Vicar, or Penſionary &c. where the Owner of the Cattle inhabits*; *But if the* Tithes have been *paid to the Parſon of any Pariſh Time out of Mind &c. though* it is *not known in what Pariſh the Moor* or Common *is, they ſhall be continued to be paid in the ſame Pariſh* where they have been uſed to be paid. But where no Uſe of Payment had been as before, nor the Pariſh certainly known, they ſhall be paid to the Parſon or Vicar where the Owner dwells by a Proviſo in the Statute 2 E. 6. cap. 13. Sav. 60, 61. pl. 136. 7 May, 26 Eliz. in Scacc. Wildmore Fenn's Caſe.

By the Civil Law the Biſhop of the Dioceſe ſhall have the Tithes of Lands not within any Pariſh there, but in England the King ſhall have them by the Cuſtom of the Realm; Arg. quod fuit conceſſum per Coke and Hobart, that the King ſhall have them. Roll Rep. 454. Hill. 14 Jac. in Cam. Scacc.

7. The *Canon Law* is, That the Biſhop is to have all Tithes growing on Lands not aſſigned to any Pariſh within his Dioceſe; yet this Canon being againſt the Law of the Land never had Allowance within this Realm, for in ſuch Part of the Foreſts as are out of any Pariſhes the King ſhall have them. 2 Inſt. 647.

8. If *Lands are diſafforeſted* and be within a Pariſh they ought to pay Tithes; for their not paying Tithes being in the Hands of the King is but an Immunity for that Time only. Sty. 137. Mich. 24 Car. Baniſter v. Wright.

9. The *Parſon of* the Rectory of *A. by Right of Preſcription hath Intereſt in and to the predial Tithes in the Pariſh of B. where there are divers barrsn Heaths and waſt Grounds converted into Tillage* which never before yielded any Profit to the Church; The Pariſh *Church of B. ſhall have theſe Tithes* becauſe they are *Decimæ Novalium*, viz. ariſing of ſuch Grounds as never were manured nor yielded any Profit at all to the Church before; becauſe by the Foundation of every Church the Tithes in general of that and every Pariſh are due to their own proper and peculiar Church. Now foraſmuch as the Church of A. &c. could never before be in the Poſſeſſion of the Tithes of theſe waſt Grounds, becauſe

becauſe they never were in Being, and becauſe the Law is Tantum Præſcriptum eſt quantum eſt Poſſeſſum & non plus; and alſo becauſe *Preſcription is not extended ad futura*, viz. it reaches not to Profits of tithable Grounds to come, it ſtandeth with great Equity that the Church of B. ſhould reap and receive theſe Tithes. The Tithing Table 7, 8. cites ſeveral Books of the Civil Law.

(P. a) [Tithes Extra-parochial.]

To whom they belong *de Jure*.

ſee 2. Inſt. 646. 647.

1. THE Tithes of ſuch Places as are out of any Pariſh belong de Jure to the King, as Foreſts, and ſuch like. 22 Aſſ. 75. per Thorpe.

Br. Scire Facias, pl. 154. cites S. C. —See (O. a) pl 4. and the Notes there.

2. 18 E. 1. Libro Parliamentorum 19. b. upon a Suit for Tithe between the Parſon and the Grantee of the King, &c. Willielmus, qui ſequitur pro Domino Rege, dicit, quod Decimæ prædictæ ad Dominum Regem pertinent, & ad nullum alium, quia dicit, quod prædictæ placeæ ſunt infra Bundas Foreſtæ ipſius Domini Regis de Inglewood, & quod ipſe Dominus Rex in Foreſta ſua prædicta, Villas ædificare, Eccleſias conſtruere, Terras aſſertare, & Eccleſias illas, cum Decimis Terrarum illarum, pro voluntate ſua cuicunque voluerit conferre poteſt, eo quod Foreſta illa non eſt infra Limites alicujus Parochiæ & petit quod Decimæ illæ Domino Regi remaneant, prout debent ratione prædicta &c.

See (O. a) pl. 5.

3. 2 E. 6. cap. 13. S. 3. *Every Perſon which ſhall have any Beaſts or Cattle titheable depaſturing on any waſt or common Ground, whereof the Pariſh is not certainly known, ſhall pay their Tithes for the Increaſe of the ſaid Cattle to the Parſon, Owner, or their Farmers, of the Pariſh or Place where the Owner of the ſaid Cattle inhabiteth.*

4. S. 4. *No Perſon ſhall be ſued or compelled to pay Tithes for any Lands which by the Laws of this Realm, or by any Privilege or Preſumption are not chargeable with ſuch Tithes, or that be diſcharg'd by any Compoſition Real.*

5. Libel by a Vicar for Tithes of young Cattle, and ſurmiſed, That the Defendant was ſeiſed of Lands in Middleſex, of which Pariſh he was Vicar, and that the Defendant had *Common in a great Waſte called Sedgmore Common* as belonging to the Lands in Middleſex, and put his Cattle into the ſaid Common; the Defendant ſuggeſted for a Prohibition that the Land where his Cattle went was not within the Pariſh in Middleſex, but no Prohibition was granted becauſe of the Clauſe in the Stat. 2 E. 6. cap. 13. that Tithes of the Cattle feeding in a Waſt or Common where the Pariſh is not certainly known, ſhall be paid to the Parſon of the Pariſh where the Owner of the Cattle lives. Mod. 216. pl. 3. Trin. 28 Car. 2. C. B. Anon.

6. Bill brought by the Rector of S. for Tithes *of Beaſts fed upon a Common*; Defendant by Anſwer inſiſts, That *the Common extends into ſeveral Pariſhes*, and that the Cuſtom was that every Farmer ſhould pay Tithes to the Rector where he lived, and that he lived in another Pariſh, and he paid the Tithes to that Rector; but there being Proof that *the Cattle was driven upon that Part of the Common that lies in S.* there was a Decree for the Rector of S. but reverſed becauſe the Cuſtom was good, there being no Incloſures. MS. Tab. Jan. 1710. Mickleburgh v. Criſp.

(Q. a) Payable. At what Place.

Tithe-Milk ſhall be delivered at the Parſonage-Houſe;

1. PReſcription to pay the *Tithe-Milk* at the *Parſonage Houſe* or at any other Place is good enough; Per Popham. Cro. E. 609. pl. 15. Paſch. 40 Eliz. B. R. in Caſe of Auſten v. Lucas.

Per Raymond B. becauſe where there is no Cuſtom the Common Law prevails; But Ld. Ch B. and the other two Barons agreed that it ſhould be delivered in the *Church-Porch*, becauſe the neighbouring Pariſhes did ſo; and ſo it was decreed. Raym. 278. Paſch. 31 Car. 2. in Scacc. Dod v. Ingleton. ——Freem. Rep. 329. pl. 409. S. C. ruled accordingly. — S. C. cited 12 Mod. 206. by Holt Ch. J. who ſaid that this was a meer equitable Decree guided by the Cuſtom of the neighbouring Pariſhes; and that a Pariſhioner is not obliged of common Right to deliver his Tithe-Milk either at the Vicarage-Houſe or Church-Porch, but only to ſet them out. — Ld. Raym Rep. 359 cites S. C. and Rokeby J. held according to Raym. but Holt Ch. J. contra, and cited 3 Cro. 609. Auſtin v Lucas, where Popham held, that a Preſcription to pay it at the Parſon's Houſe is a good Modus, and that the Reſolution in Raym. is an equitable one.

2. A Cuſtom was laid to pay *Tithe-Milk* of Cows to the Vicars &c. *at the Place where the Cows were milk'd.* It was argued that this Cuſtom was void for Uncertainty there being no Place certain mentioned, ſo that it is in the Power of the Owner upon the tithing Nighs and Mornings to milk them in ſeveral Places and there leave the Milk, which being to be paid on certain Evenings and Mornings, it would be impoſſible for the Vicar to have ſo many Servants to attend at every Milking Place to take the Milk, and ſo may be deprived of it; beſides in Law Tithe Milk in Kind ought to be carried by the Proprietor either to the Parſonage-Houſe or to the Church-Porch. The Court held the Cuſtom void. Carth. 461. Mich. 10 W. 3. B. R. Hill v. Vaux.

(R. a) Payable. At what Time.

1. THE Tithes *belong to the Parſon as ſoon as ſever'd* by the Pariſhioners; Per Manwood J. 3 Le. 24. pl. 50. Mich. 15 Eliz. C. B. in Caſe of Tottenham v. Bedingfield.

2. Tithes ought to be paid *as ſoon as the tenth Part can be well ſevered from the nine*, if there be no Cuſtom to the contrary; and ſo it is for Corn and Hay as ſoon as it is made into Shocks or Cocks. Freem. Rep. 335. pl. 416. Mich. 1698. in Scacc. Anon.

3. All Tithes ought to be paid *ſo ſoon as they may be fit for the Parſon to receive them*; ſo Calves at ſuch an Age, and other Things as the Matter will bear. Raym. 277. Paſch. 13 Car. 2. in Scacc. Dod v. Ingleton.

(S. a) Payable. In what Caſes, though there is no Product.

1. WHEN Tithes are payable *by Cuſtom* they ſhall be paid though the Lands are not rented or *lay freſh*. Hardr. 184. pl. 9. Paſch. 13 Car. 2. in Scacc. in Caſe of Holbeech v. Whadcock.

(T. a) Who capable.

1. *THE King* was capable of Tithes at common Law; for he *was Perſona mixta*; Reſolved. 2. Rep. 44. a. in the Biſhop of Wincheſter's Caſe. and cites 22 Aſſ. 75. Cro. E. 599. pl. 5. Hill. 40 Eliz. B. R. the S. P. agreed per Cur. and cites S. C.—Mo. 486. pl. 685. Mich. 39 & 40 Eliz. S. P. affirm'd

2. And *ſo was his Patentee* by the Prerogative of the King; Reſolved. 2 Rep. 44. a. cites S. C.

3. But the *King's Leſſee* ſhall pay Tithes, though the King never paid any; for the King is privileged by Reaſon of his Prerogative. Cro. E. 511. in Caſe of Wright v. Wright. Arg. cites it as adjudged, 31 Eliz. in the Exchequer.

in a Nota at the End of the Caſe. —— Jo 387. pl. 3. Paſch. 12 Car. S. P. in Caſe of the Earl of Hertford v. Leech; Reſolv'd, and that the Council of Lateran does not bind him unleſs where he voluntarily ſubmits to it, that this was a Perſonal Privilege which non egreditur Perſonam, and their Grantee ſhall not have Benefit of it.

4. 28 *H.* 8. *cap.* 11. *S.* 4. *If any Ordinary take the Fruits, Tithes, Profits, or Caſualties belonging to any Parſonage or other Spiritual Beneſice &c. during the Vacation of ſuch Beneſice &c. and the ſame upon reaſonable Requeſt, does nott reſtore to the next Incumbent, or interrupt the Incumbent to have the ſame; every Perſon ſo doing ſhall forfeit the treble Value of ſo much as he ſhall have received; the Moiety of which Forfeiture ſhall be to the King, and the other Moiety to the Incumbent, to be recovered in any of the King's Courts.*

5. In a Prohibition againſt a Parſon who ſued for Tithes, it was ſurmiſed, That the *Clerk of the Pariſh* and his Predeceſſors, Aſſiſtants to the Miniſter, have uſed to have 5 s. for the Tithe of the Place where &c. It was the Opinion of the Court that if this ſpecial Matter be ſhewed in the Surmiſe, it might perhaps be good by Reaſon of long Continuance; and that by this the Parſon is diſcharg'd from finding the Clerk; which perhaps he ſhall be charg'd with, and ſo is as a Payment of Tithes to the Parſon himſelf; but they held by common Intendment Tithes are not payable to a Pariſh Clerk, and he is no Party in whom a Preſcription can be alleged, becauſe he is dative and removeable; wherefore a Conſultation was awarded. Cro. E. 71. pl. 26. Mich. 29 & 30 Eliz. Savell v. Wood. Mo. 908. pl. 1274. S C held accordingly.

6. None *by the common Law* had Capacity to take Tithes but *only Spiritual Perſons, or Perſona mixta* and regularly no mere Layman was at common Law capable of them unleſs in ſpecial Caſes; for no Layman unleſs in ſpecial Caſes could at common Law ſue for them in Court Chriſtian, viz. for Subſtraction of them; Reſolved. 2 Rep. 44. a. Paſch. 30 Eliz. the Biſhop of Wincheſter's Caſe. Cro. E. 512. pl. 36. Wright v. Wright, S C & S. P. but that by way of Retainer he may well have them, and cites S E. 4. 14. Regiſter Fol. 38. and F. N. B. 41. (G) and that there it is held that an Aſſignee may hold diſcharged of Tithes.

For they are Spiritual, and of a diſtinct Nature, and ſo cannot belong to a Manor, and the Court held, that a Man cannot *preſcribe* for Tithes as Parcel of a Manor, but if he had preſcribed to have *Decimam partem Granorum* it had been good, but not to have *Portionem Decimarum*, and a Conſultation was granted. Cro. E. 293. pl. 7. Hill. 35 Eliz. B. R. Sherwood v. Winchcomb. — Same Caſes cited Saund. 142.

7. Tithes cannot be ſaid to be Parcel of or *appendant to a Manor*, and the *Difference* is *between a Tenth and Tithe*, the firſt is Temporal and the other Spiritual. Cro. E. 599. pl. 5. Hill. 40 Eliz. B. R. Pigot v. Hearn.

8. Pariſhioners preſcribed that there had been a *Curate* or an Incumbent *by Appointment of the Rector* who adminiſtered the Sacraments &c. and that the Cuſtom of the Pariſh Time out of Mind was, that the Curate ſhould have all Tithes renewing within that Pariſh except Decimas Granorum which were paid to the Parſon, and that every Pariſhioner who had ſo paid the Tenths to the Curate was diſcharged againſt the Parſon; but the Preſcription was held ill; for the Rector may remove the Curate at his Pleaſure. Noy. 15. Mich. 2 Jac. B. R. Bott v. Brabalon.

9. One who was accepted for a *Chaplain to a Chapel of Eaſe which was not Preſentative or Donative*, libelled for Tithes of the Inhabitants within the Precinct of the Chapel; and a Prohibition was granted. Litt. Rep. 72. Mich. 3 Car. C. B. Anon.

10. An *Incumbent preſented by Simony* cannot ſue for Tithes againſt his Pariſhioners. Mar. 84. pl. 109. Arg. cites Mich. 10 Jac. Stamford v. Dr Hutchinſon.

11. *Appropriator gave a Rectory by Will* to the Maintainance of a Miniſter there for ever, reſerving no Nomination of a Miniſter there, and *ſaying Nothing about a Nomination*. The Deviſe was void at common Law, being made to no certain Perſon. The Eſtate thereof came to J. S. who nominated A. to be Miniſter and ſerve the Cure; afterwards B. ſuppoſing a Lapſe to the Crown was preſented inſtituted and inducted as if the Church had been void. J. S. the Rector ſuppoſing that the Nomination of the Miniſter belong'd to him, nominated A. It was urged for B. that here is a pious Uſe wholly ſubject to this Court, and that coming in by the Ordinary, though he was *not Parſon or Vicar*, [but Curate only] *was allowed by the Biſhop* and decreed accordingly that he ſhould have the Tithes. 2 Ch. Caſes 31. Trin. 32 Car. 2. Perne v. Oldfield.

Skin. 51. S. C. adjornatur. — Ibid. 239. S. C. but S. P. does not appear. — 2 Show. 439. pl. 403. S. C. and Judgment in C. B. affirmed. — Pollexf. 523. S. C. argued by the Reporter.

12. The *Prior of N.* being *ſeiſed of the Manor of N. and of the Tithes* thereof, *ſimul & ſemel as of a Portion of Tithes*, 25 *H.* 1. *granted the Manor and Tithes to A. and his Heirs rendering Rent, and he enter'd and held it diſcharg'd* of Tithes, *and after granted two Hides* of Land, *Part of the Manor to S. with the Tithes thereof, and A. and his Heirs paid the Rent to the ſaid Prior till the Diſſolution, and after to the King and his Aſſigns*; It was adjudged, That the two Hides ſhould be diſcharged of Tithes, for the Prior might preſcribe for Tithes en Prender, and being well in him he might grant them to A. paying 5 s. Rent; and ſo a Judgment in C. B. affirm'd in B. R. 2 Mod. 320. Trin. 34 Car. 2. in B. R. James v. Trollop.

13. A Layman is not *capable* of Tithes *en Prender*, but a Layman is capable of paying and taking a *Modus* in Lieu of Tithes; Agreed by Council Arg. 2 Show. 440. Mich. 1 Jac. 2. in Caſe of James v. Trollop.

(U. a) Barren Lands. And what ſhall be ſaid ſuch.

1. 2 & 3 E. 6. cap. 13 S. 5. *ALL ſuch barren Heath or waſte Ground, other than ſuch as be diſcharged of Tithes by Act of Parliament, which before this Time have paid no Tithes by reaſon of Barrenneſs, and ſhall be improved and converted into arable Ground or Meadow, ſhall * after ſeven Years after ſuch Improvement pay Tithe-Corn and Hay growing upon the ſame.*

* Here are no expreſs Words of Diſcharge of the Tithes during the ſeven Years, but by reaſonable Conſtruction it impliedly amounts to a Diſcharge during the ſeven Years, and the ſeven Years are to be accounted next after the Improvement. 2 Inſt 656.

Only ſuch is intended barren Land, which before the ploughing produced no Profit to the Owner. Freem. Rep. 335. pl. 416. Mich. 1698. in Scacc. Anon.—— Bendl. 80. pl. 122. 2 Eliz. S. P. ſays, that it is ſo underſtood by the Opinion and Judgment of the Common Law.——S. C. cited D. 170. b. Marg. pl. 5.

Waſte Ground is underſtood ſuch Ground as no Man claims for his own, or no Man can tell to whom it certainly appertains, and lies unincloſed and unbounded with Hedge or Ditch; But Ground that lies incloſed, and hedged and ditched in ſo as the Land is known, is not waſte Ground. Bendl. 80. pl. 122. 2 Eliz. Anon.——S. C. cited D. 170. b. Marg pl. 5.

Heath Ground is intended ſuch Ground as is diſperſed and lies in Common. Bendl 80. pl. 122. 2 Eliz. Anon.——S. C. cited. D. 170. b. Marg. pl. 5.

2. S. 6. *If any ſuch Barren Waſte or Heath-Ground, hath before this Time been charged with Tithes, and that the ſame be hereafter improved and converted into arable Ground or Meadow; the Owners ſhall, during ſeven Years after the Improvement, pay ſuch Kind of Tithe as was paid for the ſame before the Improvement.*

3. A *Suit* was in the Eccleſiaſtical Court *for Tithes of Wheat and Rye on* 60 *Acres of Land*; The Defendant mov'd for a Prohibition, ſuggeſting that the Lands were barren Heath and waſte Grounds. It was *founded by Verdict that it was barren, but that of* 30 *Acres of it Tithe of Wool and Lambs had been paid.* And becauſe by another Proviſo in the Statute, viz. That ſuch Tithes as were paid before ſhould be paid within ſeven Years after the Improvement &c. and not any Tithes of another Nature, and becauſe the Libel was not for other Tithes than for Wheat and Rye, *the Party could not have a Conſultation, but* they told him that *he might commence a new Suit in the Eccleſiaſtical Court for Tithes of Wool and Lamb in the* 30 *Acres not improv'd.* D. 170. b. pl. 5. 171. a. pl. 6. Mich. 1 & 2 Eliz. Pells v. Sanderſon.

S. C. cited by Hobart Ch. J. Hob. 301. and ſays, that at firſt the whole Court thought a Conſultation ought to be awarded for the Tithe Corn; but that upon better Adviſement they reſolv'd the Contrary; For he had no Right to purſue his Suit for the Corn.

4. If Land be full of *Thorns and Buſhes* from Time whereof &c and it is grubbed up and made Meadow or arable Land, Tithes ſhall be preſently paid thereof, notwithſtanding the 2 & 3 E. 6. 13. For thoſe Lands were not *naturally Barren*, but became ſo by Negligence or ill Husbandry, and the Statute intends only barren Land made good by Induſtry. Cro. E. 475. pl. 3. Trin. 38 Eliz. B. R. in Caſe of Sherington v. Fleetwood.

2 Inſt. 656. S. C. & S. P. reſolved.——— Mo. 909. pl. 1278. S. C. reſolv'd.—— Gouldsb. 147. pl. 66. S. C. but S. P. does not appear.———Mo. 599. pl. 824. S. C. but S. P. does not appear.———S. C. cited by the Name of Farington's Caſe, by Coke Ch. J. Roll Rep. 354. in pl. 4. Patch. 14. Jac.——— 3 Bulſt. 165. S. C. cited by Coke Ch. J. as reſov'd.——— Bendl. 80. pl. 122. 2 Eliz. Anon. S. P.——— Freem. Rep. 335. pl. 416. Mich. 1698. in Scacc. Anon. S. P.

5. *Fenny*

If Land be *overflowed* with Water and afterwards gained by Induſtry, Tithes ſhall preſently be paid though the overflowing had been Time whereof &c. Cro. E. 475. pl. 3. Trin. 38 Eliz. B. R. in Caſe of Sherington v Fleetwood.

5. *Fenny Land drain'd* is not exempted by the Act. Mo. 430. pl. 603

6. Land which has *Broom* is not within the Statute of 2 E. 6. For it is not barren Land, and therefore if converted into Arable ſhall pay Tithe; Per Coke Ch. J. Roll Rep. 39. Trin. 12 Jac. B. R.

Roll Rep. 354. pl. 4 Buck v. Witt S. C. held accordingly, notwithſtanding it was inſiſted that the Party had been at great Coſts in making Mounds to keep out the Sea, and that the Statute was made for the Encouragement of Husbandry.

7. If a Man at a great Expence *gains Land from the Sea, which was Marſh and ſandy Land, and covered with ſalt Water, and* afterwards *converts it into arable* Land he ſhall pay Tithes preſently, becauſe this Land is not barren of its own Nature, but only by Accident, by Reaſon of the Sand and Salt-Water overflowing it; Agreed per Cur. clearly. 3 Bulſt. 156, Paſch. 14 Jac. Witt v. Buck.

Hetl. 147. S. C. & S. P.

8. If Sheep were kept on barren Land or if yielded any Profit which yielded Tithes, this *Tithe* ought to be paid within the ſeven Years; Per Richardſon Ch. J. Litt. Rep. 311. Mich. 5 Car. C. B. Flower v. Vaughan.

9. In Action on the Statute 2 *E.* 6. the Caſe was an Incloſure was Part of the Waſte and it was turned into a Paſture, and held that tho' it was of ſmall Value, viz. 2 s. per Ann. and never ſown or turned into Meadow yet it ſhall pay Tithes, and the very *Incloſure is an Improvement*, and it is no waſte Ground within the Statute to be freed from *Tithes* for a Time &c. Clayt. 127. pl. 226. March 1647. Anon.

10. Barren Lands to be exempted from Tithes within the Meaning of 2 E. 6. muſt be ſuch Land as is *Barren Suapte Natura*; And on Suggeſtion for a Prohibition to a Suit for Tithes of ſuch Lands it *muſt be alleged* to be Barren Suapte Natura; Per Powell J. 2 Ld. Raym. 991. Trin. 2 Ann. Anon.

If Land yields any Profit before, as Wood &c. it is not within the Statute; for it ought to be Suapte Natnra Sterilis. 6 Mod. 96. 2 Ann. B. R. Horner v. Bonner.

11. Prohibition for ſuing for Tithes *of barren Lands newly cultivated* was denied. 1ſt, Becauſe the *Plaintiff did not ſuggeſt that they were Suapte natura Steriles.* 2dly, Becauſe there *was no Affidavit that this was pleaded in the Spiritual Court.* 6 Mod. 86. Mich. 2 Ann. B. R. Anon.

(X. a) Diſcharge. By Common Law.

So if he make Feoffment his Feoffee ſhall pay. Savil. 3. pl. 8.

1. IF the Parſon of a Church not impropriate leaſes his *Glebe* the *Leſſee ſhall pay* Tithes; But otherwiſe if it had been an *impropriate Church*, becauſe of the Statute of 32 H. 8. of Diſſolutions. Noy. 132. cites D. 43. a.

Mich. 22 & 23 Eliz. Vicar of Sturton v. Grieſly. ——— D. 43. a. b. pl. 21. Mich. 30 H. 8. ſays the Juſtices and Serjeants were of different Opinions as to the Leaſe of Parcel of the Glebe, reſerving a Rent, and ſays ideo Quære.

The *Orders of the Ciſtertians Templars and Hoſpitallers,*

2. The Prior of St. John's of Jeruſalem had Privilege from Rome viz. *Ciſterians, Templars, Hoſpitallers,* that they ſhould *not pay Tithes of any Lands, Quæ propriis manibus* aut ſumptibus *excolunt, but their Tenors* and all other Occupiers *paid Tithes* according to the Statute 2 H. 4 cap.

4 cap. 4. *The Prior and Confreres made a Leaſe for Years before the Diſſolution, and the Leſſee paid Tithes to the Church of Rocheſter Proprietary, and the King after the Diſſolution granted the Reverſion* of the Manor *to B. and his Heirs, in tam amplo Modo as the Prior &c. had it.* The Term expired, the Patentee and his Heirs ſhall hold diſcharged ſi propriis manibus excolunt. But if he makes a Leaſe the Termor ſhall pay by the Statute 31 H. 8. cap. 13. Per Ld. Keeper, Catlyn, Saunders, Southcot and Dyer. Dy. 277. 8. pl. 60. Trin. 10 Eliz. Anon.

were diſcharged of Tithes *ſub Modo*, viz. *Quamdiu propriis manibus excolun-tur* &c 2 Rep. 44. b. at the Bottom cites D. 277.

10 Eliz.—This Privilege to theſe three Orders of Religion was *granted to them by the Council of Lateran*, Anno Domini 1215, and Anno 17. Johannis Regis, and was allowed by the general Conſent of the Realm; but *this Privilege extends only to the Lands which they had before that general Council.* 2 Inſt. 652.

3. *Lands in the Hands of an Abbot and of the Farmers of an Abbot were beyond Time of Memory &c. charged with Tithe only of Lambs and Wool*, and now the Parſon ſues to have Tithe of Hay and Grain; Prohibition lies by the Statute 31 H. 8. by the Word (diſcharged) in the Statute. D. 349. b. pl. 16. Paſch. 18 Eliz. Parſon of Peykirke's Caſe.

4. *Unity* of Poſſeſſion is no Cauſe of Diſchatge of the Diſcharge of Tithes, but is only a Suſpenſion during the Time of the Unity, but if *after Severance no Tithes are paid* for 20 or 30 Years they ſhall be charged with the Payment continually, and the Payment proves that the Unity was the only Cauſe of the Stay of Payment; but if after the Severance Tithes *have not been paid* it is a vehement *Preſumption of Diſcharge* by ſome Compoſition, or that the Abbey was of the Order of Ciſterians, or others who were diſcharged by the general Councel; Per Manwood, Ch. B. Savil. 62. pl. 134. Paſch. 28 Eliz. in Caſe of Whiſcard v. Futter.

5. Libel againſt the *Biſhop of L.* for Tithes out of the Manor of D. the Biſhop *ſuggeſted, That he and all his Predeceſſors were ſeiſed of the ſaid Manor, and ſo long as it was in their Poſſeſſions it had been diſcharged of Tithes*; and that in the Reign of E. 6. the *ſaid Manor was conveyed to the Duke of Somerſet in Fee; and afterwards re-granted to the Biſhop and his Succeſſors*; held the Preſcription good in a Spiritual Perſon but not of a common Perſon; and they were all clear that the *Preſcription is not gone by this Interruption*; for Tithes are not iſſuing out of the Lands, neither can a Unity of Poſſeſſion extinguiſh them, neither are they extinguiſhed by a Releaſe of all Right to the Land. Le 248. pl. 436. Mich. 33 Eliz. B. R. Lincoln (Biſhop) v. Cowper.

Cro. E. 216. pl 13 S. C. held accordingly. — Le. 300. pl. 411. Trin. 31. Eliz. B. R. Per Wray S. P. — Ow. 39. S. P Per Wray.

6. A *mere Layman* who was *not capable of Tithes in Pernancy*, yet *was capable of a Diſcharge* of Tithes *at common Law in his own Land*, as well as a Spiritual Perſon; Per Cur. cites 8 E 4. 14. a. b. and the Regiſter fol. 38. that this may be *by Grant* as by the Patron, Prrſon and Ordinary, *or by Compoſition*, as where a Pariſhioner gave Part of his Land to the Parſon for Diſcharge of Tithes of the Reſidue; *but not by Preſcription* to be diſcharged of Tithes; For it is commonly ſaid in the Law Books that he may preſcribe in Modo Decimandi, but not in Non Decimando. 2 Rep. 44. a. b. Paſch. 38 Eliz. The Biſhop of Wincheſter's Caſe.

7, In Caſe of a Prohibition it was reſolved, That *Unity of the Eſtate and not in Occupation of the Land and Rectory at the Day of Diſſolution of the Abbey*, was not a Diſcharge of Payment of Tithes by the Statute 32 H. 8. but if the Abbot held the Land at the Time of the Diſſolution in Fee, and the Rectory alſo, thoſe Lands were always diſcharged; but if the Lands were *in Leaſe for Years*, although but for a ſmall Term of Years, the Lands ſhould pay Tithes; and ſo it was ſaid it was adjudged in Knightley and Spencer's Caſe; and in Green and Buskin's Caſe. Mo. 528. pl. 799. Mich. 40 & 41 Eliz. B. R. Benton v. Trot.

8. As for the *Councel of Lateran* I never knew it pleaded in my Life; Some ſay that Tithes were payable of Right before; but how an Eccleſiaſtical

clcſiaſtical Conſtitution can inſtitute or create a temporal Right is ſomewhat ſtrange; beſides if this created the Parſon's Right it would deſtroy all the Preſcriptions and Modus's in the Nation; Per Holt a Counſel. Arg. 2 Show. 440. pl. 403. Mich. 1 Jac. 2. B. R. in Caſe of James v. Trollop.

9. There are *five Ways* or Means *whereby Abbey Lands are holden diſcharged of Tithes*, that is to ſay, *Compoſition, Bull, or Canon, Order, Preſcription of Diſcharge, and Unity of Poſſeſſion of Parſonage and Land Time out of Mind*, together with Payment of Tithe; of theſe Five, *the four firſt Diſcharges the Abbots themſelves had, or might have* them, but *the fifth was no Diſcharge in the Hands of the Abbeys, but it made a Diſcharge of Payment of Tithes to the King, and thoſe that claim under him by the favourable Conſtruction of that Clauſe of* 31 *H.* 8. for ſo much as that Clauſe extends to; which Opinion was long controverted, being confeſſed of all Hands, that it was no full and perfect Diſcharge in Law.

Now of the other *four, the firſt three*, that is, *Compoſition,, Bull or Canon, and Order were granted* and affixed *unto the Body of the Monaſtery*, and were granted unto them *as perſonal Privileges*, in reſpect of their Spiritual Abilities or Functions, and their Capacity of Tithes, and Diſcharge of Tithes for that Cauſe; and therefore theſe *had all vaniſhed and expired with the Diſſolution of the Body*, if they had *not* been *preſerved to the King and his Patentees by that Clauſe. But Diſcharge* of Tithes of the Lands of Monaſteries *by Preſcription is of another Nature*; for having been always (as Preſcription preſumes) in Spiritual Hands, *the Law judges that it was never charged with Tithe*; as *the Pleading is*, That the Lands were *Immunes a Solutione decimarum Negative, non Privative*, ſcilicet, *uncharged, not diſcharged*, as if they had been once chargeable; the Reaſon whereof was, That being Spiritual Perſons they were able to miniſter to themſelves Spiritual Rites, and therefore performing Officium they might retain Beneficium; and this Non-charge ſtanding upon Preſcription was inherent to the Land, not as a Thing given, but *as a Non ens*, Lands that never yielded Tithe, and Land of the little Monaſteries ſo free of Tithes, the King by the Statute 27 H. 8. and his Patentees were to hold free, not by Reaſon of any Privilege which did need to be preſerved by any Statute, but ever by the Grant of the Land by any Kind of Conveyance.

And therefore though I ſaid that *Diſcharge of Bull, or Compoſition*, was to die with the Corporation, yet *if it were once run out Time out of Mind, it was* then *to be pleaded* and uſed *as a Non-charge by Preſcription*, which was a Title of Diſcharge by the Temporal Law, and if it were impugned it were to be drawn by Prohibition to a Trial at the common Law, and this wirhout the Help of any Statute. And therefore in the Biſhop of **Wincheſter's Caſe** it was reſolved, That the Biſhop holding Lands of his Biſhoprick, diſcharged of Tithes by Preſcription, his Farmer being a Layman ſhall have a Prohibition for his Diſcharge; and ſo ſhall the Biſhop have himſelf though he be a Spiritual Perſon. And yet Biſhopricks, and their Lands, are in Point of Diſcharge of Diſcharge of Tithes at the common Law out of all Statutes; ſo then the Concluſion is, That of the five Ways of Diſcharge of Tithes, three, that is to ſay, *Order, Compoſition, Bull or Canon, are preſerved* and kept alive *by the Clauſe of Diſcharge in the Statute of* 31 *H.* 8. and a fourth which is *Unity, is created by that Branch*, and the fifth, which is *Preſcription, ſtands by the common Law, and has no Need nor Uſe of any Statute*; Per Hobart Ch. J. Hob. 309. Hill. 15 Jac. in Caſe of Wright v. Gerrard and Hilderſham.

10. There be *divers Diſcharges* of Tithes, 1ſt, *Real Compoſition*, which a Layman may have. 2dly, Diſcharge by Reaſon of *Order as Ciſterci*

ans

ans &c. 3dly, By Reaſon of *Papal Bulls.* 4thly, By *Preſcription*, which ought to be only by a Spiritual Corporation; And if the Statute 31 H. 8. had not been made, the perſonal Diſcharge, as by Bulls, or by Reaſon of Order, had been diſcharged alſo, for that the Perſons to whom they were annexed were diſſolved, therefore to prevent it the Statute was made, which ordains, That where any Monaſtery was diſcharged from the Payment of Tithes, in ſuch Caſe the King ſhall hold the Lands diſcharged, notwithſtanding the Corporation to which ſuch Privileges were annexed be diſſolved; And there is not any Clauſe to this Purpoſe in 27 H. 8. And this Statute of 31 H. 8. does not extend to Monaſteries diſſolved by the Statute of 27 H. 8. therefore this Reaſon of Unity of Poſſeſſion is not any Diſcharge in itſelf of the Tithes; and the Statute of 31 H. 8. does not extend to give a Diſcharge but to the Lands which come to the King of the 4th of February 27 H. 8. Cro. J. 608. pl. 3. Hill. 18 Jac. B. R. Gerrard v. Wright.

11. Pope Innocent the 3d. by his Bull diſcharged thoſe of the *Order of Premonſtratenſes* of the Payment of Tithes of ſuch Lands as were of their own Manurance or other Improvement. Note, *About the Year of our Lord* 1150 *moſt of all religious Orders were exempt* from Payment of Tithes out of their Poſſeſſions kept in their own Hands, *which Pope Adrian the 4th. about that Time reſtrained to Ciſterciences, Templarii, Hoſpitularii*, and that all other Orders ſhould pay Tithes &c. 2 Inſt. 652.

S. P. Per Sir John Davies Arg. Poph. 157.

S.P. Per Noy. Arg. 2 Roll Rep. 479. 80.

12. The *King is not* by Virtue of his Prerogative *diſcharged of Tithes for the ancient Demeſnes of the Crown*; Held upon Evidence by Hale Ch. B. and the whole Court. Hardr. 315. pl. 7. Mich. 14 Car. 2. in Scacc. Compoſt's Caſe.

13. *One Tithe in Specie cannot be a Diſcharge of another* Tithe in Kind; Per Holt Ch. J. 12 Mod. 498. Paſch. 13 W. 3. in Caſe of Selby v. Bank.

(Y. a) Diſcharged by Statutes.

1. 31 *H.* 8. *cap.* 13. *S.* 21. *ALL Perſons which ſhall have any Monaſteries &c. or any Manors, Meſſuages, Parſonages appropriate, Tithes, Penſions, Portions or other Hereditaments which belonged unto the Monaſteries &c. ſhall hold the ſame diſcharged of Tithes in as ample Manner as the Abbots &c. held the ſame at the Days of Diſſolution &c.*

2. An *Abbot had a Rectory impropriate, and alſo Land within the ſame Pariſh* &c. and *ſo paid no Tithes becauſe he could not pay them to himſelf, and for no other Cauſe was diſcharged*; and after the Diſſolution the Rectory is granted to one and the Land to another; It was holden by Egerton Solicitor upon the Statute 31 H. 8. that in ſuch Caſe the King nor his Patentees ſhould not be diſcharged of Tithes, for the Lands were not diſcharged in Right; But if the Lands in the Hands of the Abbot were diſcharged in Right, as by Compoſition or lawful Means, there the King and his Patentee ſhould be diſcharged from Payment of Tithes. 4 Le. 47. pl. 124. Mich. 30 Eliz. in the Exchequer. Prowes's Caſe.

3. And

3. And it was ſaid by Burleigh Ld. Treaſurer, That if the *Compoſition or Cuſtom was that the Abbot and his Succeſſors ſhould be diſcharged*, without extending to Farmers or Leſſees if the Abbot made a Leaſe, and the *Leſſee paid Tithes* as he ought, and after the Reverſion comes to the King the Leſſee ſhould pay Tithes during his Leaſe, but after the Leaſe determined the King and his Patentee ſhould not pay, but ſhould be diſcharged by the ſaid Statute. 4 Le. 47. pl. 124. Mich. 30 Eliz. Prowes's Caſe.

4. The like Matter was in Chancery Trin. 30 Eliz. The *Abbot of Tewkesbury having the Rectory impropriate of Tewkesbury* 11 *H.* 7. *purchaſed Lands within the ſaid Pariſh to him and his Succeſſors*; after the Diſſolution the King granted to G. the Rectory and to W. the Lands; and if W. ſhould pay Tithes was referred to Manwood and Periam, who gave their Reſolution, That Tithes were payable. 4 Le. 47. pl. 124. Mich. 30 Eliz. Prowes's Caſe.

Mo. 913. pl. 1291. Quarles v. Spurling, S. C. adjudged accordingly. —— Jo. 186. pl. 5. Trin. 4 Car. B. R. in Caſe of Whitton v. Weſton, S. C. cited by Winch and Warburton as adjudged, but the Reaſon was, becauſe it was not found by Verdict (the ſame being ſpecial) that the ſaid Lands came by the Diſſolution to the King, neither was any Mention made of the Statute of 32 H. 8. and then if it was not a Diſſolution, (as it was in the ſaid Caſe) the Fermor ſhall pay Tithes, and that after the Judgmnnt in Spurling's Caſe, and after the Caſe of Urry v. Bowyer, in which the Court was divided, it was made a Point in the Serjeant's Caſe, which proves that the Caſe never was adjudged; for it is not uſed to put any Caſe adjudged in the Serjeant's Caſes but a Point of Doubt which is in Controverſy.

5. In Debt upon 2 Ed. 6. cap. 13. for not ſetting forth of Tithes; the Caſe was, that the Lands were Parcel of the Poſſeſſions of the *Knights Templars* who *were diſſolved in E. II.'s Time, and their Poſſeſſions and their Lands annexed to the Priory of St. John of Jeruſalem, with all Privileges &c. They had a ſpecial Privilege to be diſcharged of Tithes* for all their Lands *quamdiu propriis manibus excoluntur*, and theſe Poſſeſſions were afterwards given by general Words, In tam amplis Modo & Forma &c. as the Abbot had them, to the King, by the Stat. 32 H. 8. cap. 24. and from the King theſe Lands came to S. the Defendant. Adjudged that the *Grantee ſhall not have the Privilege* to be diſcharged; for by the Common Law a Lay Perſon was not capable of ſuch a Privilege, *nor ſhould the King have Benefit of that Privilege until the Statute* 31 *H.* 8. *cap.* 13. that the King and his Patentees ſhall hold the Lands diſcharged of Tithes, in as ample Manner as Abbots &c. held the ſame at the Time of the Diſſolution; But *this Statute extends only to ſuch Poſſeſſions as came to the King by Surrender &c. and ſhould be veſted in him by that Act*, and not to ſuch as veſted in him by another Act of Parliament, and thoſe Lands were given to the King by a ſpecial Act of Parliament of 32 H. 8. which hath the ſame Words in the firſt Clauſe as 31 H. 8. hath, but hath not the ſecond, and therefore is no Cauſe of holding them diſcharged of Tithes. Cro. J. 58. pl. 3. Hill. 2 Jac. B. R. Cornwallis v. Spurling.

Debt on the Statute 2 E. 6. for Tithes. The Lands were Parcel of the Poſſeſſions of the Prior of St. John of Jeruſalem, and came to the Crown by the 32 H. 8. cap 24. and Parcel of St. John W. in the Pariſh of M. and H. and whether they were diſcharged from Payment of Tithes by 32 H. 8. cap. 24. was the Queſtion on a Trial at Bar, and a ſpecial Verdict found. Hale Ch. J. thought that they ſhould not pay Tithes by reaſon of the Word (Privileges) and in Whitty v. Weſton. Bridgm. 32. Lat. 99. Godb. 392. pl. 478. the Court was divided, but that Cro J. 57. Mo. 913. Cornwallis v. Spurling. In Debt on 2 E. 6. Judgment was, that the Lands are tithable, and ſo 2 Brownl. 8. 20. Urrey v. Bowen; Et adjornatur; but D. 277. pl. 60. is, that they are not tithable; and afterwards reſolved that the Lands are not tithable, and Judgment for the Defendant. Raym. 225 Mich. 25 Car. 2. B. R. Foſlet v. Franklin. —— 3 Keb. 217. pl. 23. the Court conceived that the Preſcription muſt be found for the King, his Farmers and Tenants, and that Nonpayment by the Under-tenants of the King's Fermor is ſufficient Evidence; So of Ceſtercians, it not appearing that they ever paid Tithes, and yet in Tenant's Hands.

Godb. 392. to 399. pl. 478. S. C. argued; and Jones and

6. Debt upon the Statute 2 Ed. 6. for not ſetting out Tithes brought by the Parſon of Merrow; The Defendant *pleaded, that the Prior of St. John of Jeruſalem in England was ſeiſed in Fee of the Lands &c. in the Right of his Hoſpital, and that he was of the Order of the Hoſpitallers*, and that he

he and his Predeceſſors ratione Ordinis ſui, had Time out of Mind been diſcharged of Payment of Tithes; then he pleads the Stat. 31 H. 8. for the Diſſolution of Monaſteries, and the Stat. 32 H. 8. for the Diſſolution of Hoſpitals, and that by theſe Diſſolutions the Lands were veſted in the King, and that he ratione Statutorum heid them diſcharged of Tithes, who granted them to the Anceſtor of the Defendant, under whom he claimed; and upon a general Demurrer the chief Queſtion was, Whether the Lands were diſcharged or not? And that depended upon the Expoſition of the Statutes 31 & 32 of H. 8. viz. whether the Clauſe of Diſcharge of Tithes in the Statute 31 H. 8. ſhall extend to theſe which were given to the King by the Statute 32 H. 8.? 2. When the Hoſpitallers were diſſolved by the Statute 32 H. 8. and all their Poſſeſſions, Hereditaments, and Privileges given to the King, his Heirs and Succeſſors, whether this extends to his Patentees or Aſſigns, for that they are not named in the Statute? Upon the firſt Point two Judges held, that theſe Lands were not diſcharged of Tithes by the Statute 31 H. 8. becauſe that Statute did not give any Lands or Monaſteries, but only ſettled them in the Crown, which then were, or hereafter ſhould be diſſolved, as it was held in the **Archbiſhop of Canterbury's Caſe**, and the Intent of that Act was to diſcharge thoſe Lands only, and not any which came to the King by virtue of any other Statute, and therefore this Clauſe of Diſcharge did not extend to thoſe Lands which came to the Crown by the Statute 27 H. 8. for diſſolving the leſſer Monaſteries, and ſo it was adjudged in **Wright and Gerrard's Caſe**, nor to the Chantry Lands, which came to the King by the Statute 1 Ed. 6. as it was adjudged in the ſaid Archbiſhop's Caſe; nor to the Lands which came to the Crown by the Statute 32 H. 8. as it was adjudged in **Quarles and Spurling's Caſe**; Now it is plain, that theſe Lands did not come to the Crown by the Statute 31 H. 8. becauſe they did not come by Diſſolution, Surrender, or renouncing, but by Act of Parliament; it is true there are other general Words in the Statute 31 H. 8. viz. or by any other Means, but theſe Words cannot be intended of an Act of Parliament, but by ſome other inferior Means. Two other Judges of a contrary Opinion, to whom one of the other having changed his former Opinion, agreed that theſe Lands came to the Crown by the Statute 31 H. 8. by Diſſolution, and by other Means, for the Word (Diſſolution) includes a Diſſolution by Act of Parliament, and theſe general Words, (by any other Means) include likewiſe an Act of Parliament, eſpecially in this Caſe, becauſe great part of the Hoſpitallers being beyond Sea, there was no other Means to convey their Lands to the Crown but by Act of Parliament, for thoſe who were beyond Sea could not be compelled to ſurrender; then as to the ſecond Payment, the Privileges of the Hoſpitallers being given to the King, his Heirs and Succeſſors, and the Privilege to be diſcharged of Tithes being given to them by an ancient Council, and explained by the Council of Lateran to extend only to thoſe Lands which they had at the Time that this Privilege was granted, was held by one Judge to be a Perſonal Privilege, and that the Hoſpitallers being diſſolved, this Privilege is gone, and could not be transferred to another; but 3 other Judges were of Opinion, that this Privilege was given to the King by Act of Parliament before the Hoſpitallers were diſſolved, and if ſo, it is not a Perſonal Privilege in the King, but a real Diſcharge of the Lands by virtue of an Act of Parliament, and ſhall go with the Lands in whoſe Hands ſoever they come, for the Privilege is to be diſcharged quamdiu propriis manibus excolunt, and when the King granted it over it ſhall be propriis manibus of the Patentee, and Judgment was given [by the Opinion of Hide Ch. J. Doderidge and Jones, contra

Doderidge held, that they of St. John's of Jeruſalem were Eccleſiaſtical Perſons, though they were divided from the Juriſdiction of the Biſhop, but the Caſe was adjourned to be further argued. — Lat. 89. S. C. argued; and Jones J. ſaid it was well evidenced to the Jury that they were Eccleſiaſtical, and the Judges are not to take Notice whether they are ſo. — Bridgm. 32 S. C. argued.

Whitlock, that theſe Lands were diſcharged of Tithes. 3 Nels. a. 302, 303. pl. 19. cites W. Jones 182. [to 192. Trin. 4 Car. B. R.] Whitton v. Weſton.

Jo. 2 pl. 3. Mich. 18 Jac. C. B. Wright v. Gerrard, S. C. and a Conſultation awarded — Hob. 306. pl. 388. S. C. and a Conſultation granted by the uniform Conſent of all the Judges. — Cro. J. 607. pl. 3. Gerrard v. Wright, S. C held accordingly by 3 Juſtices, but Warburton J. e contra, for he held that Appropriations were not given to the King by the Statute 27 H. 8. and therefore to ſupply the Defect the Statute 31 H. 8. was made, wherefore thoſe Appropriations being given by Statute 31 H. 8. the ſaid Diſcharge extends unto them. 2dly, The Intent of the Statute 31 H. 8. was to give equal Diſcharge to the one as well as to the other, as well to the Land given by the 27 H. 8. as to that given by 31 H. 8. and that upon this Reaſon is the Caſe of the Land of the Land of the Prior of St. John's of Jeruſalem in 10 Eliz. Dyer. But notwithſtanding a Conſultation was granted. —— S. C. cited and relied upon by Jones and Brampſton. Cro. C. 424, 425. Mich. 11 Eliz. B. R.

7. The Prior of Hatfield and his Predeceſſors, Time out of Mind, were ſeiſed of the Parſonage of Hatfield, and of a Farm in the Pariſh called D. Farm at the ſame Time. The Priory being under 200 l. per Ann. was given to the King by the Statute 27 H. 8. The King gives the Abby and Farm to the Abbeſs of B. The Abbeſs ſurrenders all to the King. The Queſtion was, whether the King and thoſe that claim under him ſhall hold this Farm diſcharged of Tithes by Force of the perpetual Unity. A Conſultation was granted. Reſolved by 3 Juſtices, (Warburton e contra) that the Impropriation was given to the King by the 27 H. 8. tho' no Impropriation is there named, but only Tenements, Churches, Tithes and Hereditaments. 2dly, If it was not granted and given to the King by the 27 H. 8. then it was given by 31 H. 8. For by the Diſſolution in 27 H. 8. the Body to which the Appropriation was made was diſſolved, and conſequently the Appropriation gone, as in 3 E. 3. in the Caſe of the Templars, and the Statute 31 H. 8. extends only to thoſe Appropriations which were not diſſolved till 4 February 27 H. 8. 3dly, It was agreed that the Statute 27 H. 8. does not of itſelf give any Diſcharge of Tithes. 4thly, That Unity of Poſſeſſion perpetual, and Time out of Mind, of the Lands, and of the Rectory, does not by itſelf make a good Diſcharge of Tithes without the Benefit of the ſaid Clauſe. 5thly, They reſolved, that the Clauſe of Diſcharge in 31 H. 8. does not extend to thoſe Monaſteries that were diſſolved, but only by way of Excluſion to thoſe which were diſſolved after 4 Feb. 27 H. 8. Jo. 187, 188. cites it as Wright's Caſe.

8. An *Abbot or Eccleſiaſtical Perſon* might preſcribe in Non Decimando, but when the Corporation was diſſolved, or when the Corporation granted the Land to a Layman, he ſhall not have Benefit of the Preſcription; becauſe *it was Perſonal to the Abbot*, reſolved. Jo. 373. pl. 10. Mich. 11 Car. B. R. Sydowne v. Holme.

9. And it was alſo reſolved per tot. Cur. that this *Privilege by Preſcription, and other Perſonal Privileges by Bull or Order*, that Abbeys under 200 l. a Year, and which were diſſolved by 4 Feb. 27 H. 8. cap. 28. *were not* preſerved and *given to the King or his Patentee* by the ſaid Statute. Ibid.

10. But 3dly it was reſolved, that Privileges by Preſcription, or by Order or Bull, *are preſerved by the Clauſe of* 31 *H.* 8. cap. [13.] and the King nor his Patentee ſhall not pay Tithes, *but it extends only to Monaſteries diſſolved after the* 4 *Feb.* 27 *H.* 8. and therefore the leſſer Abbies under 200 l. diſſolved by 4 Feb. 27 H. 8. are not included within the ſaid Clauſe of 31 H. 8. Ibid.

11. An *Abbot was Parſon imparſonee* of the Church where the Scite of the Monaſteries and Tithes were, and *the Abby was diſſolved.* The *King granted the Monaſtery to one, and the Parſonage and Rectory to another.* It was the Opinion of the Juſtices, that if the *Land of the Abbey was the Glebe of the Parſon before the Appropriation*, then this Land is diſcharged of Tithes by 31 H. 8. cap. 13. for it remains notwithſtanding

ſtanding the Appropriation, and the *Glebe cannot be gained by Preſcription*, and the Glebe was never chargeable to pay Tithes; But the *Demeſnes* of the Abbey *were of other Lands not Parcel of the Glebe*, and therefore ſhall be chargeable to pay Tithes if they were *not diſcharged* in the Hands of the Abbot, but *only by Unity of Poſſeſſion*; but *if in Right by a Compoſition*, then they ſhall be diſcharged afterwards, as they were in the Abbot's Hands. Mo. 46. pl. 140. Paſch. 5 Eliz. Anon.

12. Thoſe *Abbies that came to the Crown by* 27 *H.* 1. ought to pay Tithes, and tho' no Payment hath been at any time ſince the Diſſolution for the Lands of ſuch Abbies, that ſhall *not free them* when they come in queſtion, for they were ſpared in former Times becauſe the reaſon of the Law was not then known. Clayt. 41. pl. 70. 11 Car. before Vernon J. Anon.

13. A Prohibition was granted to ſtay a Suit for Tithes in the Eccleſiaſtical Court, upon a Suggeſtion that the Lands were *Part of the Poſſeſſions of the Priory of St. John's of Jeruſalem*, and ſo diſcharged by Statute 32 H. 8. [cap. 24.] And though there be Difference of Opinions in the Books, yet the later Judgments are that they are diſcharged. Freem. Rep. 299. pl. 357. Mich. 1680. Star v. Ellyot.

14. *Abbot ſeiſed in Right of his Abbey of a Rectory with all Tithes* &c. The Abbey is diſſolved, and the Crown grants the Tithes &c. The Parſon diſputes the Tithes with the Patentee, but Bill diſmiſſed. MS. Tab. March 21. 1715. Turner v. Wray.

(Z. a) Diſcharge by Unity of Poſſeſſion. Preſcription.

1. ONE *Man in a Vill cannot preſcribe to be quit of* Tithes, becauſe it is particular. *Contra* it *the whole Country* ſo preſcribe. Br. Diſmes, pl. 14. cites Doct. & Stud. lib. 2.

2. A *Compoſition* was *betwixt an Abbot and a Parſon, that in Recompence of the Tithes of all the Woods within the Manor whereof the Abbot was Owner, he ſhould have to him and his Succeſſors* 20 *Loads of Wood every Year, in* 20 *Acres of the Manor, to burn and ſpend in his Houſe; Afterwards the Parſonage was appropriate to the Abbey*, and after that the *Abbey was diſſolved*; and the King granted the Parſonage to one, and the 20 Acres to another. It was held, that by the Unity the Eſtovers were not extinct, for if they be Tithes they are not extinct by this Unity of Poſſeſſion, for that Tithes run with the Lands, and Tithes de jure Divino & Canonica Inſtitutione do appertain to the Parſon. Mo. 50. pl. 151. Paſch. 5 Eliz. Anon.

3. In Caſe of a Prohibition, it was reſolved, that an *Union of Copyhold Lands, and of the Parſonage in the Hands of the Parſon, as Parſon imparſonee*, was no Diſcharge of the Tithes of the Copyhold Lands. Mo. 219. pl. 356. Mich. 28 Eliz. in the Court of Wards. Branche's Caſe.

4. Prohibition, and *ſuggeſted that he and all his Predeceſſors &c. were ſeiſed of the Manor* of which Tithes were demanded, *diſcharged of Tithes, and that the Manor in Time of E.* 6. *was conveyed to the Duke of S. and* was *afterwards re-granted to the Biſhoprick again.* It was the Opinion of the Juſtices, that the Preſcription was not determined when it came to the Biſhop again, for Tithe is not a Thing iſſuing out of Land, and Unity of Poſſeſſion doth not extinct them, nor a Releaſe of all Right

Right to the Land. Cro. E. 216. pl. 13. Hill. 33 Eliz. B. R. Wickham v. Cooper.

S. C. cited Mo. 534. per Popham. —— 2 Rep. 46 a. Trin. 38 Eliz. B. R. the Arch-Biſhop of Canterbury's Caſe, S. P. and a Conſultation granted, and Ibid. 49. b. cites the principal Caſe by the Name of Green v. Buſſkin, and that a Conſultation was granted accordingly. —— S. C. cited Jo. 4. in pl. 3. —— Pollexf. 9. cites the Arch-Biſhop of Canterbury's Caſe, 2 Rep. 48. and ſays that it proves, that if the Farmers paid Tithes, then no Diſcharge by reaſon of Unity, and likewiſe expreſsly, that if the Lands were in Leaſe, and no Tithes paid by the Farmer, that then they are diſcharged by the Unity.

5. The *Statute* 31 *H.* 8. gave all Colleges diſſolved &c. to the Crown, with a Clauſe, that the King and his Grantees ſhould hold them diſcharged of Tithes, as the Abbots held the ſame at the Time of the Diſſolution. Afterwards, by the *Statute* 1 *Ed.* 6. all Colleges whatſoever were given to the Crown, but in this Statute there is no Clauſe of Diſcharge of Tithes. Upon a Libel for Tithes the Farmer of the Lands of Maidſtone College in Kent moved for a Prohibition upon the Statute 31 H. 8. The Court held clearly that the King had the Lands of the College by the Statute 1 Ed. 6. Another Queſtion was, whether theſe Lands which the King had by Virtue of the Statute of 1 Ed. 6. ſhall be diſcharged of Tithes by the Statute 31 H. 8. but as to this the Juſtices doubted; for though the Statute 1 Ed. 6. enacts, *that the King ſhall have the Lands in as ample Manner as the Colleges* &c. yet that Clauſe *extends only to the Eſtate in the Lands, and not to the Tithes.* Another Queſtion was, whether *the Unity of Poſſeſſion without Compoſition or Preſcription was a ſufficient Diſcharge of Tithes by the Statute* 31 *H.* 8.? And agreed by all that it was. Mo. 420. pl. 579. Mich. 37 & 38 Eliz. B. R. Green v. Boſekin.

Mo. 532. cites S. C. as reſolved accordingly.

6. In a Prohibition the Plaintiff *ſuggeſted that the Queen and all thoſe whoſe Eſtates ſhe had* &c. *uſed to pay the Rector of K. 2 s. 4 d. yearly, in Satisfaction for all Tithes of the Lands called Cowley in K.* in Wiltſhire; and Iſſue being taken upon this Preſcription, and upon Evidence at Bar it appeared that the *Queen had the Eſtate of the Abbot of K. who was Owner of the Lands, and alſo Rector in Fee in the Right of his Abbey*; on which *it was inſiſted*, that the Plaintiff had not proved his Preſcription, becauſe neither the Abbot could pay Tithes to himſelf, nor the Queen who had the Eſtate of the Abbot, but *that the Allegation ſhould have been, that when the Queen let the Lands, the Occupiers uſed to pay 2 s. 4 d. in Satisfaction* of Tithes. But Curia contra; for they were clear that the Unity of the Inheritance, both of the Lands and Rectory in the Abbot, is not a perpetual Diſcharge of the Tithes; and if ſo, then *the Retainer of them by the Abbot ſhall be taken to be a Payment to himſelf.* Mo. 527. pl. 697. Mich. 40 & 41 Eliz. B. R. Chambers v. Hanbury.

7. Unity of Inheritance of both is no Diſcharge perpetual of Tithes, nor of the recompence for them, and if ſo, then *Retainer* may be ſaid *Payment for a Man's ſelf.* Mo. 528. pl. 697. Mich. 40 & 41 Eliz. B. R. Chambers v. Hambury.

* Hob. 300. in Caſe of Slade v. Duke. Hobart Ch. J. obſerves that Ld. Coke in this Caſe of Priddle ſays that if the Abbey itſelf were founded ſince Memory, then he cannot pre-

8. Reſolv'd and adjudg'd that perpetual Unity Time out of Mind until the Diſſolution prima facie diſcharges the Land from Payment of Tithes. 1ſt. Becauſe the *Statute* 31 *H.* 8. *c.* 13. *does not ſay Diſcharge of Tithes, but of Payment of Tithes*; and divers other Reaſons, whereof the Principal was *for the infinite Impoſſibility*, and impoſſible Infiniteneſs *of ſuch Immunities and Diſcharges which ſuch religious Houſes had cannot be known*, and that *general Allegation of Unity at the Time of the Diſſolution* &c. *without Averment that it was Perpetual is not ſufficient.* And ſuch Unity *ought to have four Qualities*; 1ſt. It ought to be *Juſt and Rightful*, and not by Tort. 2dly, *Equal*, viz. a Fee in both. 3dly, It ought to be *perpetual* Time out of Mind. 4thly, It ought to be *free of Payment of any Tithes*; For if their Farmers at will, or for Years &c. paid any Tithes to them the Unity will not ſerve. And if the Appropriation

priation was made in Time of E. 4. H. 6. H. 4. R. 2. E. 3. &c. it is not ſufficient upon the Point of Unity; For it ought to be perpetual; But in ſuch Caſe he may *allege the ſaid Branch of* 31 *H.* 8. *of diſcharge of the Payment of Tithes, and that the Abbots &c. time out of Mind till the Diſſolution have held the Land diſcharged* of Tithes (as he well may preſcribe by the Common Law) and gives ſuch Evidence that he may approve it; and ſo if in Truth the Land be diſcharg'd he has ſufficient Remedy to relieve himſelf; * and ſays, ſee the Bp. of Wincheſter's Caſe. 2 Rep. 44. b. 45. a. But if the Abbey &c. was founded within Time of Memory, then he cannot preſcribe at all, and ſince the Appropriation was made 20 H. 8. it cannot be diſcharged. 11 Rep. 14. b. Mich. 10 Jac. C. B. Priddle v. Napper.

ſcribe at all in the general Diſcharge, and ſo leaves it as a Caſe deſperate where the Abbey was founded ſince Time of Memory, which yet he might eaſily have reliev'd if

he might plead a Diſcharge at the Time of the Diſſolution without ſhewing How, which is either a Retraction or an Explanation of his former Report of the Biſhop of Wincheſter's Caſe 2 Rep. 43 b.

9. An *Abbot* having a Privilege to be *diſcharged of Tithes* of Lands, *quamdiu propriis manibus excolunt*, in the Time of Ed. 4. *made a Gift in Tail*, and 31 *H.* 8. *the Abbey was diſſolv'd.* The Donee of the Iſſue Iſſue in Tail ſhall not be diſcharged of Tithes, becauſe the Statute 31 H. 8. diſchargeth none, but ſuch as were diſcharged at the Time of the Diſſolution, ſo that they muſt claim the Eſtate and Diſcharge under the Abbot ſince the Statute; But if the Land had returned to the Abbot or the King before or after the Statute, it had been otherwiſe. Hob. 244. pl. 320. Mich. 16 Jac. Farmer v. Shereman.

10. If *one has a Portion of Tithes out of a Rectory and afterwards he purchaſes the Rectory*; The Portion of Tithes *is not extinguiſh'd* but remains grantable; Agreed per Cur. and the Council of both Sides. And Haughton J. gave this Reaſon for it, viz. *becauſe the Portion of Tithes may be more ancient than the Rectory*; *and* that *the Rector in antient Times had no Title to the Tithes*; For *before the Council of Lateran* every one might pay his Tithes to what Parſon he would. 2 Roll Rep. 161. Paſch. 18 Jac. B. R. Sir Edward Coke's Caſe.

11. A perpetual *Unity of a Church appropriated and the Land* is not any Diſcharge of Tithes of itſelf; And the Statute 27 *H.* 8. *doth not give any Diſcharge but* gives *only the Poſſeſſions as they were in the Hands of the Abbots*, and that refers to the Poſſeſſions, and not to the Tithes out of them, which are collateral Things, and there is *no Clauſe of diſcharge of Tithes in the Statute of* 27 *H.* 8. *as there is in* the Statute of 31 *H.* 8. and the Statute of 31 *H.* 8. *does not extend to the Statute of* 27 *H.* 8. And therefore reſolved, that the Unity of Poſſeſſion of itſelf is not a Diſcharge of Tithes. Cro. J. 607. pl. 3. Hill. 18 Jac. C. B. the ſecond Reſolution in the Caſe of Gerrard v. Wright.

Hob. 306. pl. 388. S. C. & S. P. by Hobart Ch. J. — Jo. 3. Wright v. Gerrard. S. C. & S. P. reſolved. — S. C. cited Cro. C. 425. Mich. 11 C. B. in Caſe

of Sydown v. Holme, and agreed by all the four Juſtices to be good Law, that the Abbeys which came to the King by the Statute 27 H. 6. were not within the Privilege of 31 H. 8. nor to have Benefit of that Statute. ——— S. C. cited Jo. 373. in S. C. of Sydown v. Holme.

12. Unity of Poſſeſſion *of a Manor and Rectory* will not exempt the Demeſne Lands from the Payment of Tithes when they come to be ſever'd. Comyns's Rep. 498. pl. 213. Paſch. 8 Geo. in Scacc. Fox v. Bardwell.

(A. b) Diſcharge. By Order.

1. WHERE the *Ciſtercians* had a Privilege to be diſcharged of Tithes ariſing from their Lands, which propriis manibus excolebant, but their Farmers ſhould pay Tithes, and that Order is now diſſolved, by the Statute 31 H. 8. the King and his Tenants of thoſe Lands ſhall be diſcharged of ſuch Tithes as the Spiritual Perſons were. For *the King cannot excolere, and therefore his Farmers ſhall be diſcharged, and ſo long as the King has the Freehold his Farmers though Leſſees for Years or at Will ſhall have ſuch Privilege*; But if the King grants over the Reverſon then the Farmers ſhall pay Tithes. 2 Le. 71. pl. 95. 29 Eliz. in Scacc. The Counteſs of Lenox's Caſe.

2. Where a *Diſcharge* was *by reaſon of the Perſons* that were to pay Tithes as the *Ciſtercians* &c. there the Patentee ſhould pay Tithes; But if it was by reaſon of *Unity* it ſhall then be diſcharged by the Statute in the Hands of the Patentee, for that Privilege runs with the Poſſeſſion. Per Popham; and Judgment for the Plaintiff. Cro. E. 578. pl. 1. Mich. 39 & 40 Eliz. B. R. Blinco v. Barkſdale.

Where the *Preſcription* in an Abbot was *meerly Perſonal* it would not extend to the Alienee, but if it was *in reſpect of any real Compoſition* it is otherwiſe, but this real Compoſition ought to be ſhewn the ſame in the Caſe of the King and his Alienee. Lev. 185. Trin. 18 Car. 2. B. R. Bolls v. Atkinſon.——Sid. 320. pl. 13. Bowles v. Atkins. S. C.

3. So long as the Land is occupied by him that has the Fee Simple which did formerly belong to the *Order of Ciſtercians*, it ſhall *pay no Tithes*, but if he let it for Years or Life the *Tenant* ſhall pay Tithes. Brownl. 44 Trin. 15 Jac. Anon.

4. When Tumor Papalis was here in England all *Monks* were in reſpect of their Orders *diſcharged* of Tithes, who after increaſing to ſo great a Number and having here great Revenues, the Holy Church was thereby impoveriſhed, and Filia Devoravit Matrem; for Remedy whereof *Pope Paſchall II. ordained* that *Ciſtercians, Templars and Hoſpitallers* ſhould be only diſcharged, and that all other Orders ſhould pay their Tithes which alſo in reſpect of their great Revenues was found to be an Impoveriſhment to the Church, and therefore *Pope Adrian conſtituted* that the Land of Ciſtercians, Templars and Hoſpitallers ſhould be only diſcharged *Quæ Propriis Manibus excoluntur*. Per Montague Ch. J. Cro. J. 454. pl. 30. Mich. 15 Jac. B. R. in Caſe of Doubitoft v. Curteen.

Land may be ſaid to be manur'd Propriis Manibus by Servants if ſo be it was in Poſſeſſion and uſed as a Farm by the Prior &c. Clayt. 16. pl. 26 March 1633. before Vernon Judge of Aſſiſe, in Horn's Caſe.

5. If the *Impropriation* did *not come to the Crown till* 31 *H.* 8. yet it was an Abby under the Value mentioned in the 27 *H.* 8. and given to the Crown, the King ſhall be in now by the Statute of 27 *H.* 8. and ſhall not participate of the Privileges given by 31 *H.* 8. for diſcharge of Tithes. Clayt. 68. pl. 117. Aug. 1639. Sir Marmaduke Stricklands Caſe.

6. Where Land was *diſcharged* of Tithes *by reaſon of Order*, and there was a *Common* belonging thereto, Land *taken* of late Time *out of the Common*, and which was no Part of the Poſſeſſions of the Abbot is not diſcharged. See Clayt. 11. pl. 20. March. 8 Car. Bells Caſe.

7. The

7. The Land which the *Priors of St. John* of Jeruſalem held in their Hands in Fee *at the Council of Lateran*, are only capable of diſcharge of Tithes, and not what they purchaſed after, and where it was *in a Farmers hands*, though he purchaſed the Fee afterwards he ſhould not hold it diſcharged as a Lord Abbot. Clayt. 16. pl. 26. March 1633. before Judge of Aſſize. Horn's Caſe.

Land *eſcheated* afterwards ſhall not partake of the Privilege, but Lands *then in Leaſe* or *Copy* when the Leaſe endeth after the Counſel or Copyhold comes to the Lord, it ſhall be privileged as thoſe then in their Hands ſhould be. Clayt. 107. pl. 181. April. 8 Car. Whitfield Judge of Aſſiſe. Hodgſon's Caſe.

8. In Caſe of Tithes and Defence made by Priviledge of the *Ciſtercian Order*, viz. Dum *Propriis Manibus* excolunt &c. 1ſt. It muſt be for thoſe that are *Owners of the Inheritance* of ſuch Land. 2dly, A *Truſtee* of Land though another has the Eſtate in Law, *is ſuch* an Inheritor and *Owner* of Lands &c. 3dly, This extends to Meadow as well as Arable, and this Priviledge was for *great Tithes* as Corn or Hay &c. and did not *extend to ſmall Tithes*, and therefore Payment of ſmall Tithes is no Evidence to prove the greater Tithes to be due. Clayt. 53. pl. 92. Aug. 13 Car. before Barkley Judge of Aſſiſe. Anon.

9. In Prohibition the Priviledge of the *Ciſtercian Order* came in Queſtion; The Land was Parcel of the Abby of Rivaux, and no Tithes had been paid Time out of Mind &c. nor was any paid at the Diſſolution of the Abby, the Judge ſpared the giving in *Evidence* Dum Propriis Manibus Excolunt, and held it *ſufficient to ſhew the diſcharge of Paymant of Tithes Time out of Mind*, and though the Order is put in the Declaration which is ſufficient of itſelf, *yet he may take Advantage of the Statute of* 31 *H.* 8. which is the beſt Courſe. Clayt. 95. pl. 161. Aug. 23. 1641. before Whitfield J. Foſwick v. Bulmer.

10. Lands were *diſcharged of Tithes, the Abbot being of the Order of Ciſterians*, Dum propriis manibus excolebant; The Lands were *Parcel of the Demeſnes of a Manor but in Leaſe for Years at the Time of the Diſſolution*; Reſolved, that although the Farmer paid Tithes at the Time of the Diſſolution, yet Quoad the Abbot, the Inheritance was diſcharged of Tithes, and therefore that now the *King or his Patentee ſhould hold them diſcharged*. Cro. J. 559. pl. 6. Hill. 17 Jac. B. R. Porter v. Bathurſt.

2 Roll Rep. S. C. held accordingly. ——— Palm. 118. S. C. adjudged.

11. If Land was diſcharged *in the Hands of an Abbot* at the Time of the Time of the Diſſolution, be it which Way it will, and without ſhewing how by Union &c. and if he hath ſo continued to be diſcharged it ſhsll be diſcharged, and the 2 E. 6. gives no Remedy but in ſuch Courſe and Manner as then he might have had. Clayt. 67. pl. 117. Aug. 1639. Sir Marm. Strickland's Caſe.

12. The Caſe upon a feigned Iſſue out of Chancery was, Whether ſuch Lands were diſcharged of Tithes which formerly belonged to *Fountaine Abbey* in Yorkſhire, *which was of the Ciſtertian Order*; and it was held clearly that *the Council of Lateran which freed that Order from Payment of Tithes was a General one received in England*; And if theſe Lands were diſcharged of Tithes from the Time of that Council, that *no after Covenant or Contract made by the Abbot to pay Tithes could diſpenſe with this Privilege*, or make them liable to Tithes; for once diſcharged by this Council, and always diſcharged for *this Council is as forcible as an Act of Parliament, which concludes all Parties*; and the Court were alſo of Opinion, That if there were any ſuch Agreement for Payment of Tithes before the Council, yet this Council as a general Law, which includes all Mens Conſent, had diſſolved it, and the Lands were diſcharged. Hardr. 101. pl. 5. Paſch. 1657. in Scacc. Stavely v. Ullithorn.

13. Upon

Hardr. 190. pl. 17. Paſch. 13 Car. 2. in Scacc. S. C. Says an Iſſue was directed to try whether the Lands out of which they were demanded had belonged to any religious Order which claimed to be diſcharged, Quam diu propriis manibus &c. It was clearly held by the Court, That if ſuch Lands were in Leaſe at the Diſſolution &c. or an Eſtate for Life or in Tail were out upon them; yet he in Reverſion ſhould have the Benefit of ſuch Diſcharge after the Determination of thoſe Eſtates; becauſe *the Diſcharge was not interrupted, but only ſuſpended during the Time that they were in the Hands of particular Eſtates*.

13. Upon a Bill in Equity the Queſtion was, Whether *Lands* were diſcharged of Tithes ss having been *Part of the Poſſeſſions of an Abbey of the Ciſtertian Order*; The Court held that a Tenant for Life or Years is not within the Statute, but that a Tenant in Tail who hath an Eſtate of Inheritance is diſcharged, Quamdiu propriis manibus &c. Hard. 174. pl. 4. Mich. 12 Car. 2. in Scacc. Wilſon v. Redman.

So in the Caſe of *Commoning*. Ibid.

14. Upon a Bill in Equity for the *Tithes of Paſture Ground*, Parcel of the Poſſeſſionss of the Abbey of Fountaine, being of the Ciſtertian Order; it was held per Cur. that Tithes *for Agiſtment of Cattle were payable by the Owner of the Cattle*, becauſe they take the Profits snd Herbage of the Soil, and therefore it cannot be ſaid that the Profits are taken by the Owner of the Soil, or that the Ground is in propriis manibus. The Chief Baron ſaid, that the Owner of the Soil might pay them, but clearly the Agiſtor is compellable to pay them. Hardr. 184. pl. 10. Paſch. 13 Car. 2. in Scacc. Pory v. Wright.

(B. b. Diſcharge by Payment of other Tithe or Thing.

1. WHERE the *Pariſhioner does any Thing* which he *is not compellable by the Law to do, which comes to the Benefit of the Parſon*; there if he demand Tithes of the Thing in Lieu whereof this is done, Prohibition ſhall be granted; Per Barkley, who ſaid it was a Rule. Mar. 65. pl. 100. Mich. 15 Car. In Skinner's Caſe.

2. And there is another Rule; That *Cuſtom may make that thitheable which of itſelf is not titheable*. Mar. 65. in the S. C.

3. The Inhabitants of the Pariſh of H. in which there was a Chapel of Eaſe, ſuggeſted a Cuſtom, That thoſe who lived in ſuch a Precinct of the ſaid Pariſh *ought to find a Rope for the third Bell and to repair Part of the Mother-Church*. in Conſideration whereof they have been freed from Payment of Tithes to the Mother-Church. Whether this was a good Cuſtom, Quære, for it was adjourn'd. Mar. 91 in pl. 151. Hill. 16 Car. Anon.

(C. b) Diſcharge. Pleadings.

Cro. E. 206. pl. 42. S. C. and per Cur. A Spiritual Man may preſcribe in Non Decimando; and by the Sta-

1. LIBEL &c. for the Tithe of Wood; the Defendant ſuggeſted that the *Lands were Parcel of the Priory of Cree-Church, and that the Prior thereof and his Succeſſors Time out of Mind held the ſame diſcharged of Tithes*. Exception was taken becauſe it did not ſay any particular Diſcharge, as Compoſition, Unity of Poſſeſſion, or Privilege of Order, as Templars &c. Per Wray; though *the ſpecial Manner of Diſcharge is not ſet down*, yet it *ſhall be intended to be by lawful Means*,

Means, as Compoſition or otherwiſe? for the Statute is that the King ſhall hold diſcharged as the Abbot &c. and we ought to take it that it was a lawful Diſcharge of the Tithes at the Time of the Diſſolution. Le. 240. pl. 325. Mich. 32 & 33 Eliz. B. R. Naſh v. Mollins.

tute of 31 H. 8. he ſtall hold it diſcharged as the Prior hold it, and if he held it dſcharged, non refert by which Means; for it ſhall be intended lawful Means.

2. Prohibition, the Plaintiff *ſuggeſted that the Prior of B. was ſeiſed of the Rectory and of the Lands, out of which* the Tithes were demanded, *in Fee ſimul & ſemul, from Time whereof &c. and at the Time of the Diſſolution*, and for that Reaſon the Land is diſcharged &c. The *Defendant traverſed the Unity at the Time of the Diſſolution* &c. Fenner and Clench (cæteris abſentibus) held that the Traverſe was good; for though there had been an Unity of Poſſeſſion Time of Mind, yet if it was not at the Time of the Diſſolution Tithes ſhall be paid; but *if the Diſcharge had been pleaded generally by Preſcription, and not by Unity* &c. then *the Preſcription ought to have been anſwered and not the Unity.* Cro. E. 534. pl. 14 Mich 39 & 40 Eliz. B. R. Button v. Long.

3. In a Prohibition the Plaintiff *ſuggeſted, That the Abbot of Vale Royal was ſeiſed in Fee of the Parſonage of W. and of the Grange of D. out of which the Tithes were demanded by the now Parſon of W.* and by Reaſon thereof the ſaid Abbot and his Predeceſſors Time whereof &c. were ſeiſed of the Parſonage and Grange in their Demeſne as &c. in Right of the ſaid Abbey, & ratione inde ſhewed the Unity of Poſſeſſion and Diſcharge of Tithes upon the Statute 31 H. 8. The *Defendant pleaded that the Abbey was founded 5 E. 1. within Time of Memory, and confeſſed the Unity* of the Parſonage and Grange *after the Time of its Foundation.* The whole Court held the Plea in Bar good, and that he need not traverſe the Preſcription; For the *ſhewing the Abbey to be founded within Time of Memory is a ſufficient confeſſing and avoiding; But if the Defendant* againſt the Suggeſtion of the perpetual Unity, *would ſhew that the Demeſnes before the Statute, and in the Time of the Abbot, were in the Hands of the Farmers* &c. there *he ought to traverſe the Preſcription*; for though the Poſſeſſion was chargeable in other Hands, yet as to the Fee-Simple, which repoſed in the Abbot, it is a Diſcharge in Right. Yelv. 31. Hill 45 Eliz Gibſon v. Holcroft.

S. C. cited 2 Mod. 60.

4. *Libel for Tithes of two Acres*, Parcel of the Poſſeſſion of ſuch an Abbey, which came to the King by the Statute 27 H. 8. the Defendant *pleaded the Statute 31 H. 8. and averred that the Abbey from the Time of the Foundation to the Diſſolution had been diſcharged of Tithes of theſe two Acres*; and upon Demurrer to this Plea it was objected that it was ill, becauſe the *Diſcharge ſhould be pleaded only to the Time of the Diſſolution, by Reaſon of the Uncertainty of the Commencement* of the Diſcharge; Sed per tot Cur. a Conſultation was granted; But Doderidge ſaid, That *if he had alleged that the Abbey was founded before Time of Memory, and that the Foundation, till the Diſſolution, was diſcharged it had been good*, quod Coke conceſſit. Roll Rep. 54. pl. 27. Trin. 12 Jac. B. R. Prowſe v. Layfield.

5. S. ſues a Prohibition againſt D. alleging, *That an Abbot &c. was ſeiſed of that Land diſcharged of the Payment of Tithes at the Time of the Diſſolution*, and ſo conveyed it to the King, and from the King to him. The Defendant demurs and it was reſolved that the Abbot's holding of it diſcharged of Tithes &c. was not good *without ſhewing how*; for note the Statute 31 H. 8. cap. 3. is in as large and ample Manner as the Abbot held it &c. and the Statute pinches upon that; ergo he ought to take Notice by what Manner the Abbot was diſcharged; alſo ſuch a Claim of Diſcharge of Tithes is contrary to com-

Jo. 6. pl. 5 S. C. and Hobart, Hutton and Winch, held that he ought to ſhew how the Abbot was diſcharged at

the Time of the Diſſolation; For mon Right, and therefore ſhall be ſtrict. Noy. 97. Hill. 15 Jac. C. B. Slade v. Drake.

that Statute gives Diſcharge yet for pleading it as it was at common Law, the Party ought particularly to ſhew how; But Warbuton held e Contra, and Error was brought et pendet Quære de eeo. —— Hob. 295. pl. 378. S. C. adjudged for the Defendant and a Conſultation awarded t Warbuton diſſentiente.

6. *Libel for Tithes* the *Defendant ſuggeſted* for a Prohibition *that the Abbot of &c. and his Predeceſſors before and at the Time of the Diſſolution, hold the Lands diſcharged* of Tithes *by Reaſon of the Unity of Poſſeſſion*; it was inſiſted that this Suggeſtion need not to be proved within the Statute of 2 E. 6. For by that Statute the Suggeſtion ſhall not be proved, unleſs the Cauſe be determinable in the Spiritual Court for the not proving the Suggeſtion, and that this Caſe is not determinable there by the expreſs Words of the Statute; Sed per Cur. *Though preciſe Proof may not be made of the Diſcharge, yet the Defendant might ſwear that always ſince the Statute* 31 *H.* 8. *the Lands have been reputed to be diſcharged by Unity, or that he had heard it commonly reported to be ſo vel Similia.* And Doderide ſaid he had known divers Precedents of Proof made in this Court in ſuch Manner. 2 Roll Rep. 125. Mich. 17 Jac. B. R. Congley v. Hall.

7. 7. Upon a *Bill for Tithes* the *Defendant* by his Anſwer *ſet forth, That the Lands* of which the Tithes were claimed, *were Parcel of the Priory of . . . and that the Lands belonging to that Priory were diſcharged by Order; without ſaying any more* this was held ſufficient, Quod Nota; becauſe of the Uncertainty. Hardr. 322. pl. 5. Hill. 14 & 15 Car. 2. in Scacc. Page's Caſe.

8. Suggeſtion of a Diſcharge by the Ceſtertian Order in a Suit for Tithes *ought to aver poſitively that theſe Lands were in the Abbot's Hands at the Time of the Diſſolution, and now in the Patentee's own Hands,* otherwiſe no Prohibition will be granted; And it is not ſufficient to ſay that the Vills were, unleſs of which are Parcel. Keb. 830. pl. 9. Hill. 16 & 17 Car. 2. B. R. Barrington v. Boucher.

(D. b) Reviv'd.

1. A *Preſcription was laid in an Abbot and Convent to be diſcharged of Tithes*, and it appear'd that *the Body corporate was diſſolved, becauſe all the Monks were dead, and the Lands came to Laymen*, it was adjudged that they ſhall pay Tithes in Kind, becauſe the Preſcription continues no longer than the Lands remain'd in the Abbot's and Convent's Hands. Godb. 211. pl. 301. Mich. 11 Jac. C. B Windſor (Canons) v. Webb.

(E. b) Treſpaſs juſtifiable in order to ſetting them out and carrying them away. And Pleadings.

1. TRESPASS lies by Parſon againſt him who *carries away Tithes ſever'd* from the nine Parts; *contrary where he will not ſever* his Tithes, and carries them all away; there Suit lies in the Spiritual Court. Br. Treſpaſs, pl. 108. cites 38 E. 3. 5.

2. In

2. In Treſpaſs *of Corn* taken the *Defendant juſtified for Tithes as Servant of the Parſon* of M. ſo *he took the Tithes of his Maſter abque hoc, that he took the Corn of the Plaintiff* and others e contra. Br. Treſpaſs, pl. 49. cites 44 Ed. 3. 39.

3. Treſpaſs *de Clauſo Fracto on D. in the 6th Day of July* the *Defendant juſtified as for Tithes ſever'd from the nine Parts as Parſon the 10th Day of Auguſt, abſque hoc that he is guilty unleſs after the Tithes ſever'd and till they were carried away*, and it was held clearly that every Parſon may *enter to collect his Tithes, and to turn them till they are dry*, and of this the *reaſonable Time ſhall be tried*, and a good Plea, and *ſhall not be compell'd to ſay that he is not guilty before nor after*; For he is guilty every Year after the Tithes ſever'd, and the Plaintiff *reply'd, That the Day the Defendant juſtified, the Defendant was not Parſon, or that the Tithes this Day were ſever'd*; and ſo ſee that the Plaintiff was not compell'd to reply to the abſque hoc taken by the Defendant. Br. Traverſe per &c. pl. 242. cites 12 E. 4. 6.

Br. Replication pl. 61. cites S. C.— A Parſon ſhall have *reaſonable Time to take his Tithes* ſevered from the nine Parts, *and to turn them till they are dry, and that he* carries them away.

Br. Treſpaſs, pl. 325. cites 12 E. 4. 6.

In *Treſpaſs* where the *Defendant juſtifies as Parſon and collected the Tithes which were ſevered from the nine Parts*, it is a good *Iſſue* that *the Tithes were not ſevered from the nine Parts*. Br. Iſſues joines, pl. 69. cites 12 E. 4. 6.

4. Treſpaſs of *Graſs cut*, the Defendant *juſtified as Parſon of the Pariſh*, and took *as Tithes ſever'd* from the nine Parts, the Plaintiff ſaid, That De ſon tort demeſne without ſuch Cauſe. Per Brian this is no Plea, no more than *where the Defendant juſtifies as his Franktenement*, or by Leaſe, or for Years, ſuch Replication De ſon tort &c. is no Plea. Pigot ſaid, this is true *there*; For the *Defendant claim'd Intereſt in the Soil and the Occupation there*; contra here, by which he *reply'd* as above, *abſque hoc, that they were ſever'd from the nine Parts*. Br. De ſon tort &c. pl. 21. cites 16 E. 4. 4.

5. In *Treſpaſs in D.* the *Defendant juſtified as Parſon of D. for Tithes*, the *Plaintiff ſaid that they grew in another Place, and not in the Place in the Bar*, and no Replication unleſs they had ſaid *that the Place is out of the Pariſh of the Defendant*; For he may take his Tithes in any Place in this Pariſh, by which he ſaid that it was in another Pariſh, and not in the Pariſh of the Plaintiff. Br. Replication, pl. 54. cites 21 E. 4.

Br. Traverſe per &c. pl. 267. cites 21 E. 4. 65. that he ought to traverſe the Pariſh, and not the Place; For prima facie if they grow in the Pariſh the Parſon ſhall have them.

6. *Treſpaſs* for breaking his Cloſe and treading his Graſs &c. and taking and carrying away five Loads of his Hay; The Defendant as to all except breaking the Cloſe and ſpoiling the Graſs pleads Not Guilty, and as to the Reſt he *juſtified, for that he is ſeiſed of the Tithe-Hay ariſing in the ſaid Cloſe; and for that the Hay, (viz.) five Cart-Loads were cocked ſeparately for Tithes of the ſaid Hay, he entered* the Cloſe *and carried away the Hay, doing as little Damage as he could, Quæ ſunt eadem* &c. the Plaintiff *replied, That the Defendant took the Graſs which the Plaintiff had cut and made it into Hay upon the Land, and carried it away, and ſo five Cart-Loads of his Hay mentioned in the Declaration, he took and carried away, and traverſed that there were five Cart-Loads of Hay in the ſaid Cloſe ſeperated for Tithes*; the Defendant demurred ſpecially, for that the Plaintiff traverſed the Quantity of Hay ſeperated for Tithes which is not traverſable; and of that Opinion was all the Court, for the Defendant having pleaded Not Guilty as to all except the ſpoiling the Graſs, and juſtified this by entring and taking Tithes of Hay, it is good whether they were loaded in one or two or five Carts; and it was lawful for the Defendant to make the Hay on the Land after it was ſeparated, and Judgment was given for the Defendant by the whole Court. 3 Lev. 228. Trin. 1 Jac. 2. C. B. Paine v. Brigham.

2 Lutw. 1313, and 1316. S. C. Curia adviſare vult.

7. In

7. In Treſpaſs Defendants as Servants of the Parſon, juſtified their Entry into the Land *with their Horſes and Molliter chaſed the Cattle in the ſaid Cloſe to ſee what Tithes were due for the Cattle.* It was objected that this was not juſtifiable, becauſe there were other Means to come to the Knowledge thereof. But the Court delivered no Opinion as to that, Judgment being given on another Matter. Cro. J. 360. pl. 21. Mich. 12 Jac. B. R. Rolls v. Boulting and Roberts.

(F. b) Remedy for Recovery of Tithes. And in what Court.

1. OF Tithes there *is not any Form to demand at the Common Law.* But you will find in the Regiſter fol. 165. a Form of Writ of Covenant De decimis Garbarum ad Eccleſiam ipſius Prioris de N. qualitercunque ſpectant'. Thel. Dig. 68. Lib. 8. cap. 9. S. 1.

2. *In Aſſiſe a Plaint is made of the tenth Part of all manner of Corn growing in* 100 *Acres of Land, and of the tenth Part of all Manner of Hay in* 10 *Acres of Meadow cut after the Tithes of the Parſon aſſigned* &c. Thel. Dig. 68. Lib. 8. cap. 9. S. 2. cites Hill. 44 E. 3. 5. *But* ſays, that *now by the Statute of* 32 *H.* 8. *cap.* 7. *a Man ſhall have Præcipe quod redat, and all Manner of Writs real of all Profits called Eccleſiaſtical or Spiritual,* as Parſonages, Vicarages, Portions, Penſions, Diſmes &c. After the making of which Statute Theloall ſays, he has ſeen Writ of Covenant of ſuch Form to levy a Fine, Quod teneat Covent' &c. de Rectoria Eccleſiæ Parochialis de M. ac de omnibus decimis granorum, garbarum, & fœni eidem Rectoriæ ſpectant' &c. ſive cum omnibus decimis granorum garbar' & fœni eidem Rector' ſpectan' &c.

3. And in *Præcipe quod reddat omnes & omnimodas decimas majores mixtas et minutas infra Villam ſive Hamlet' de B. in Parochia de A. quoquomodo creſcen' contingen' ac annuatim renovan'* &c. Quære of theſe Forms and of others now uſed. See Præcipe quod reddat *quartam partem decimarum & oblationum Eccleſiæ Sancti* &c. Thel. Dig. 68. Lib. 8. cap. 9. S. 3. cites 16 E. 3. Quare Impedit 147. and ſays, See Fine levied of a Parſonage 2 H. 3. Grant 89.

Br. Aſſiſe, pl. 19. cites S. C.

4. *Aſſize* was maintain'd *of Tithes by Name of Profit Apprender,* notwithſtanding the Defendant demurr'd to the Juriſdiction. Br. Juriſdiction, pl. 7. cites 44 E. 3. 5.

5. If the *King grants Tithes which grow in great Foreſts,* as Englewood *by Letters Patents, and another takes them he ſhall have Scire Facias againſt them in Chancery, and ſhall be at Iſſue there, and then* it ſhall *be ſent into B. R. to try* as in other Caſes. *But* if the *Suit* be *againſt them who ought to render the Tithes and ſet them out* and ſever the nine Parts, *then lies the Suit in the Spiritual Court*; note the Difference. Br. Diſmes, pl. 10. cites 22 Aſſ. 75.

6. 32 *H.* 8. *cap.* 7. *S.* 2. *All Perſons of this Realm and other his Majeſties Dominions ſhall truly ſet out and pay all Tithes and Offerings, according to the Cuſtoms and Uſages of the Places where ſuch Tithes or Duties ſhall grow; and in Caſe any Perſons, of their ungodly and perverſe Will, with-hold any Tithes or Offerings, the Parſon, or Party Eccleſiaſtical or Lay, having Cauſe to demand the ſaid Tithes or Offerings, may convent the Perſons offending before the Ordinary, his Commiſſary or other competent Judge, according to the Eccleſiaſtical Laws. And the Ordinary &c. having the Parties, or their lawful Procurators before him, ſhall proceed to the Examination, Hearing and Determination, of ſuch Matter, ordinarily or ſummarily, according to the Courſe of the Eccleſiaſtical Laws.*

7. 32 *H.* 8. *cap.* 7. *S.* 3. *In Caſe any of the Parties appeal from the Sentence of the Ordinary &c. the Judge ſhall adjudge to the other Party reaſonable Coſts, and ſhall compel the Party appellant to pay the ſame by compulſory Proceſs and Cenſures of the Laws Eccleſiaſtical, taking Surety of the other Parties to reſtore the Coſts, if the principal Cauſe be adjudged againſt him; and ſo every Ordinary, or other Judge Eccleſiaſtical, ſhall adjudge Coſts to the other Party upon every Appeal in every Suit of Subſtraction or detention of Tithes, or in any other Suit concerning the Duty of ſuch Tithes or Offerings.*

8. *S.* 4. *If any Perſons, after Sentence definitive given againſt them, obſtinately and wilfully refuſe to pay their Tithes or Duties, or ſuch Sums of Money wherein they be condemned for the ſame, two Juſtices of Peace of the Shire, whereof one of the Quorum, ſhall have Authority, upon Information, Certificate or Complaint, made in Writing by the Eccleſiaſtical Judge that gave the Sentence, to cauſe the Party refuſing to be attached and committed to the next Gaol, till he ſhall have found Surety to the Uſe of the King to perform the Sentence.*

9. *S.* 7. *Where any Perſons which ſhall have any Eſtate of Inheritance, Freehold, Term, Right or Intereſt, in any Parſonage, Vicarage, Portion, Penſion, Tithes, Oblations, or other Eccleſiaſtical or Spiritual Profit, made Temporal, or admitted to be in Temporal Hands by the Laws of this Realm ſhall be diſſeiſed, or otherwiſe put from their lawful Inheritance or Intereſt by any Perſon claiming Title to the ſame, the Perſons ſo diſſeiſed or put from their Right, their Heirs, Wives, and ſuch other to whom ſuch Injury ſhall be done, ſhall have their Remedy in the King's Temporal Courts, or other Temporal Court, as the Caſe ſhall require, for the Recovery of ſuch Inheritance or Intereſt, by Writs of Præcipe quod reddat, Aſſiſe of Novel Diſſeiſin, Mortdanceſtor, Quod ei deforceat, Writs of Dower, or other Writs original, as the Caſe ſhall require; and Writs of Covenant, and other Writs for Fines, and other Aſſurances of any ſuch Parſonage, Vicarage, Portion, Penſion, or other Profit called Eccleſiaſtical or Spiritual, ſhall be granted in the Chancery, as hath been uſed for Lands.*

By this Act a Layman having Tithes or Offerings may either ſue for the Subſtraction,

or with-holding of the ſame in the Eccleſiaſtical Court, or at the Common Law, at his Election; and ſeeing that no ſpecial Writ is given by the Statute, the Party muſt have a general Writ of Aſſiſe de libero Tenemento, and make a ſpecial Plaint; But his Præcipe muſt be Quod reddat omnes & Omnimodas Decimas majores, minimas & minutas infra Dale quoquo modo creſcent' contingent' ac annuatim renovant' &c. according to his Caſe. But neirher Aſſiſe nor any Præcipe did lie of them, as of Tithes or any other Eccleſiaſtical Duty at the Common Law; for the Aſſiſe brought of any manner of Corn growing in an hundred Acres of Land after the Tithes of the Parſon taken was a Lay Profit Apprender, and no Eccleſiaſtical Duty. But Tithes, or other Eccleſiaſtical Duties that came to the Crown by the Statutes of 27 H. 8. 31 H. 8. 37 H. 8. and 1 E. 6. are by thoſe Statutes, and this of 32 H. 8. and of 1 & 2 P. & M. in the Hands of Laymen Temporal Inheritances, and ſhall be accounted Aſſets, and Husbands ſhall be Tenants by the Curteſy, and Wives endowed of them, and ſhall have other Incidents belonging to Temporal Inheritances, only that they have this Eccleſiaſtical Quality, that the Owner or Poſſeſſor thereof may ſue for the Subſtraction of the ſame in the Eccleſiaſtical Court. Co. Litt. 159. a.

No *Præcipe* lies for ſetting out Tithes at Common Law; and I doubt not, *by the Statute* 32 *H.* 8. *cap.* 7. tho' Sir Edw. Coke in his Litt. fol. 159. a ſeems to be of Opinion, that *a Man may at his Election have Remedy* for with-holding Tithe after that Statute *by Action or in the Eccleſiaſtical Court*, by that Statute doubtleſs he has *for the Title of Tithe*, as for Tithe of Land, or for the taking them away, but not, perhaps, for not ſetting them out; Per Vaughan Ch. J. Vaugh. 195. Hill. 18 & 19 Car. 2. C. B. in Caſe of Holden v. Smallbrooke.

10. *S.* 8. *Provided that this Act ſhall not give Remedy or Suit in the Courts Temporal, againſt any Perſon which ſhall refuſe to ſet out his Tithes, or detain his Tithes or Offerings.*

11. The *compelling the Appellant to pay Coſts, is to be underſtood when the Caſe appertains properly to the Spiritual Court*; but if the Suit did not originally or properly appertain to them, as in Caſe for *Tithes of Trees ſpent in Fuel*, a Prohibition ſhall be awarded, as well to the Coſts as the original Suit, notwithſtanding this Statute. Noy 137. Anon.

12. When *Tithes* were *ſet out*, they *are Lay-Chattles*; and *if a Stranger carries them away, Action lies not in the Spiritual Court but here*; otherwiſe where they are not ſevered from the 9th Part; Per Doderidge J. and Ley Ch. J. 2 Roll Rep. 440. Trin. 21 Jac. B. R. Gwyn v. Merryweather.

13. The Parſon exhibited *his Bill in the Exchequer for predial and other Tithes*, and *upon Proof of the Quantity and Value, had a Decree for the whole*; and the Clerks ſaid that this was the *conſtant Practice where* a Bill is exhibited for predial Tithes, and *the ſingle Value is only demanded*. Hardr. 4. pl. 4. Trin. 1655. in the Exchequer, Hardwick v. Newte.

14. 7 & 8 *W.* 3. *cap.* 6. *Impowers two* Juſtices of Peace *to determine Complaints for Nonpayment of* ſmall Tithes. *And the Money adjudged due ſhall be levied by Diſtreſs and Sale. But the Complaint muſt be made within two Years.* Appeal *may be to the Seſſions, and no* * Certiorari *ſhall be allowed unleſs the Title be in Queſtion.*

In Caſe of a Modus *the Juſtices are not to intermeddle.*

The Judgment ſhall be inrolled, and be a Bar to any other Proceſs. Party removing into a foreign County may be followed if adjudged againſt him. If the Complaint be vexatious, *Defendant ſhall have Coſts not exceeding* 10 *s. and any Perſon ſued for any thing done in purſuance of this Act, and the Plaintiff be nonſuit &c. ſhall have double* Coſts, *if no Suit be begun in the Exchequer or Eccleſiaſtical Court.*

*In the Conſtruction hereof it has been adjudged, that if the Party inſiſts on any Matter of Law before the Juſtice of Peace, which is any way doubtful, As on a Cuſtom in a Pariſh to be diſcharged of a certain kind of Tithe &c. the Order may be removed within the Intent of the Statute. 2 Hawk. Pl. C. 289. cap. 27. S. 38. cites Hill. 6 Geo. The King v. Furnace.

(G. b) Remedy for Recovery of Tithes. How; And in what Caſes. And Pleadings.

1. A Parſon ſues in the Spiritual Court for Tithes of Wheat and Rye growing on 60 Acres of Land. The *Defendant ſuggeſted for a Prohibition that the ſaid* 60 *Acres were barren*, and that by his Induſtry they became fruitful, and that 7 *Years are not expired* according to the Statute 2 E. 6. for Tithes of barren Lands. The *Jury found, that* 30 *Acres of the ſaid Lands were barren, but that* 30 *Acres of the ſaid Lands had yielded Tithes of Wool and Lambs* to the Parſon. The Parſon ſhall not have a Conſultation for them; for he has not ſued for them in the Spiritual Court; By the Judges of both Benches. Jenk. 218. pl. 65. cites D. 171. 2 Eliz.

*By the Opinion of all the Juſtices of both Benches, (except Whiddon) the Party who ſued in the Spiritual Court ſhall have Conſultation for the ſaid Reſidue, ad quod Saunders Ch. B. conceſſit. D. 171. a. pl. 6. Pells v. Saunderſon. —— S. C. cited Hob. 192. in pl. 242. that a Conſultation was denied, becauſe he ſhould not have ſued for Tithes in Kind, which if they ſhould grant, a Conſultation ſhould be allowed but for the ſmall Tithe only.

2. An Action of *Debt* was brought upon this Statute by G. *againſt two Tenants in Common*, and it appeared that *one of them ſet out his Tithe, and* that *the other afterwards took it and carried it away*; and adjudged that the Action lies only againſt him which carried it away. Hutt. 122. cites it as a Caſe ſhewn Mich. 8 Jac. Sir John Gerrard's Caſe.

4 Le. 7 pl. 30. 26 Eliz. B. R. Gerrard's Caſe, is of *Tithes ſevered and carried away by a Stranger*, and that the Pariſhioner may plead the ſame Matter in Bar in the Spiritual Court.

3. In

3. In Debt on the Statute 2 E. 6. for not ſetting out Tithes, the *Declaration recited the Statute as made Nov. 2. Anno 2 & 3 E. 6.* whereas it could not be in two Years of the ſaid King, and therefore after Verdict Judgment was arreſted. Mo. 302. pl. 452. Mich. 33 & 34 Eliz. in Scacc. Langley v. Haynes.

4. *Action* on this Statute *may be brought in any of the King's Courts*; Reſolved by all the Barons. Sav. 131. pl. 206. Paſch. 36 Eliz. in Scacc. Anon.

5. *Defendant pleaded Not Guilty*, and held well enough, the Action of Debt being founded on the Statute for a Wrong done, and *Debt lies* on it tho' a certain Penalty is not given thereby, but the treble Value, which is uncertain. Cro. E. 621. pl. 11. Mich. 40 & 41 Eliz. B. R. Johns v. Carne. Cro. E. 766. pl. 4. Trin. 42 Eliz. B. R. Wortley v. Herpingham, S. P. reſolved accordingly; for it is not for a Non-feaſance, but for a Male-feaſance wherein the Tort is ſuppoſed. ——— Mo. 302, pl. 452. Mich. 33 & 34 Eliz. in Scacc. Langley v. Hains, S. P. adjudged. ——— Brownl. 31. Paſch. 10 Jac. Anon S. P. ——— Ibid. 65. Trin. 8 Jac. Pain v. Nichols, S. P. — For Wool or Lambs no Action lies upon the Statute; for they are not predial Tithes, nor ſmall Tithes by the Statute of E. 6. Brownl. 70. Hill. 9 Jac. Mortimer v. Freeman. ——— Palm 222. Arg. cites it as reſolved 40 & 41 Eliz. Sharman v. Beadle, that Action of Debt lies upon this Statute for Tithe of Lambs; and thence infers that Lambs is not ſmall Tithe.

6. *Baron* poſſeſs'd of a *Leaſe for Years in Jure Ux'* may ſue alone and recover the treble Value, and need not mention the Quality of the Grain. Jenk. 279. pl. 2. cites the Caſe of Bedel v. Smith. Cro. E. 608. pl. 9. Paſch. 40 Eliz. Beadle v. Sharman. S. C held accordingly. ——— 2 Inſt. 650. cites S. C. & S. P. reſolv'd accordingly. ——— Husband and Wife *join'd* and held good. 13 Rep. 48. Bedel v. Sherman. ——— *But* where the Action is for *Tithes ſet out* they cannot join, though for Tithes not ſet out they may. Jo. 325. pl. 5. Mich. 9 Car. B. R. Anon.

Baron and Feme were Leſſees of a Parſonage &c. A Pariſhioner ſets forth the Tithes and preſently takes them away again. Reſolv'd that the Husband and Wife ought to have join'd in the Action; becauſe it is not for a Thing in Poſſeſſion; and if the Husband dies the Wife ſhall have the Damages, and not the Executor of the Husband. Noy 136. Hill. 7 Jac. B. R. Ford v. Pomeroy, ——— 2 Brownl. 9 S. C. Curia adviſare Vult; but ſeem'd of Opinion that the Wife ought to join; For the Statute ſays that the Proprietor ſhall have the Suit for the not ſetting forth &c. and the *Huſband in this Caſe is not intended Proprietor as the Statute intends, but the Wife.*

7. After Verdict on this Statute for the Plaintiff, it was *moved in arreſt* of Judgment *that the Suit for the treble Value ought not to be brought at the Common Law, but in the Spiritual Court* as it ought to be for the Tithes before they are ſet out; but reſolv'd that the Action was well brought, and Tanfield ſaid it was ruled in the Exchequer in Manwood's Time, that it lay well at the Common Law. Cro. E. 608. pl. 9. and 63. pl. 1. Trin. 40 Eliz. B. R. Beadle v. Sherman. Mo. 912. pl. 1288. S. C. ruled accordingly. —Jenk. 279. pl. 2. S. C. & S. P.— Mo. 912. pl. 1289. Hill. 34 Eliz. B. R. Wentworth v. Criſpe. S. P. adjudged.

8. Reſolv'd, that the Statute which gives treble Damages does not allow the Jury to give other Damages. No Coſts being given by the Statute, the Jury can aſſeſs no Coſts. Mo. 915. pl. 1294. Trin. 44 Eliz. B. R. Day v. Peckvell. Cro. J. 70. pl. 12. Dagg v. Penkevon. S. C. Paſch. 3 Jac. in Cam. Scacc. adjudg'd.

9. Debt upon the Statute of 2 E. 6. *by the Plaintiff (a Farmer)* for not ſetting forth of Tithes, *and demanded the treble Value*; The *Jury upon Non-debet* pleaded, *find for the Plaintiff.* It was *aſſign'd for Error that the Statute does not give the treble Value to the Farmers* of the Parſonage, ſed non allocatur. Cro. J. 70. pl. 12. Paſch. 3 Jac. in Cam. Scacc. Dagge and Kent v. Penkevon. Mo. 915. pl. 1294. Day v. Peckvell. S. C. reſolv'd accordingly that he ſhall have Action by the Equity of the Statute, becauſe he has Right to the Tithes though the Statute does not give Action to the Farmer.

10. Action

Jenk. 316. pl. 4. S. C. Mo. 915. pl. 1294. Day v. Peckvell S. C. reſolv'd accordingly. —Agreement with one Farmer ſhall bind his Companion; Reſolv'd. Mo. 915. pl. 1294. S. C.

10. Action was brought *by two [joint] Farmers who demanded the Forfeiture for carrying away the Corn without ſetting forth of the Tithes or agreeing with them for the Corn*, but *without ſaying* that he did not agree with them *nor either of them*, yet held good and Judgment for the Plaintiff, and affirm'd in the Exchequer Chamber; For if he agreed with one of them, he ought to ſhew it. Cro. J. 70. pl. 12. Paſch. 3 Jac. Dagg v. Penkevon.

11. If a *Pariſhioner ſets forth his Tithes and preſently takes them away again*; Debt lies for treble Damages upon ſuch a fraudulent ſetting forth, though the Statute ſpeaks nothing of the Fraud. Noy. 136. Hill. 7 Jac. B. R. Ford v. Pomeroy.

12. An Action of Debt brought upon the Statute of E. 6. for not ſetting forth of Tithes, and the *Plaintiff declared as well for the predial Tithes, for which he might well bring his Action, and for other Tithes, as of Lamb and Wool for which no Action would lie*, and upon Trial the *Jury found for all* as well for thoſe that would, as would not bear an Action; and after a Verdict this Exception was taken, and *Judgment arreſted*. Brownl. 65. Trin. 8 Jac. Pain v. Nichols.

13. Upon the Statute of 2 E. 6. cap. 13. In a Prohibition to ſtay Proceedings by a Parſon in a Suit in the Spiritual Court againſt one of his Pariſh, for hindring him in his Way in the Carriage of his Tithes, the Court all agreed that *if a Parſon has his uſual Way ſtopt ſo that he cannot come to take away his Tithes being ſet out for him, he may have his Remedy by Suit in the Spiritual Court; But if the Queſtion be whether the Parſon be of Right to have a Way one Way or another, this is triable by the Common Law*, and not in the Spiritual Court; but if he has a certain Way granted to him and ſet out by the Common Law, if he is at any Time diſturb'd and hinder'd by any of his Pariſhioners or by any other in the Uſe of this his Way, he may ſue in the Spiritual Court. Bulſt. 67. Mich. 8 Jac. Anon.

14. Debt on the Statute &c. after a Verdict for the Plaintiff, it was moved in arreſt of Judgment that the *Declaration* was ill, becauſe the Plaintiff *did not allege that he was Parſon*, for he ought to bring the Action according to the Name by which he claims the Tithes; for if a Man will bring an Action as Heir, Executor, or Sheriff, he muſt name himſelf ſo; but upon producing two Precedents to the contrary, it was adjudged per tot. Cur. for the Plaintiff. Brownl. 98. Mich. 9 Jac. Willot v. Spencer.

A Pariſhioner privately ſet forth his Tithes, and takes Witneſs of it, and immediately after he carries them away; *this is not a ſetting forth within the Statute.* For the Words are, Truly, Juſtly and without Fraud or Covin. Noy. 152. in Caſe of Rocheſter v. Porter cites 43 Eliz. B. R.

15. A Man poſſeſſed of Corn ſells it, and *before two Witneſſes ſets out his Tithes and afterwards privately takes away his Tithes*; and the Parſon ſues him upon the Statute of Treble Damages, for not ſetting forth of Tithes; and the Defendant proves by Witneſſes, that he ſet forth his Tithes; yet the Fraud is helped; for *the Words are without Fraud or Deceit*. Brownl. 34. Hele v. Frettenden.

S. C. cited by Coke Ch. J. 2 Bulſt. 184. Hill. 11 Jac. — 2 Inſt. 649. cites S. P. reſolv'd. Trin. 44 Eliz. B. R. in Caſe of Sprat v. Heale. —— Noy. 152. in Caſe of Rocheſter v. Porter, S. P.

16. So One *ſecretly ſells his Corn to one who was not known*, and *afterwards the Vendee commands the Vendor to cut the Corn, which he does, and takes away the whole Corn without ſetting forth his Tithes*; and the Queſtion was, Who ſhould be ſued for the Tithes? And the Court held *the firſt Vendor ſhould be ſued*, for it was fraudulent. Brownl. 34. Hele v. Frettenden.

P. and that the Parſon ſhalt not be compelled to ſue the Vendee, who it may be was not known to him, cites 44 Eliz. B. R. Baker's Caſe. ——— And it is not traverſable, if the Tithes were ſet forth according to 47 Eliz. reſolved in Trin. 7 Jac. B. R. Brickendine v. Denwood. Ibid.

17. In Debt upon the Statute of 2 E. 6. the Caſe was, *A. was poſſeſs'd of Tithes in Jure Uxoris as Executor of her former Husband, and granted ctum Jus, Titulum* & Intereſſe ſuum de et in Decimis prædictis; Reſolv'd unanimouſly that the Grant was good, and the Leaſe he had in the Tithes in Right of his Feme did thereby paſs; And Judgment for the Plaintiff. Cro. J. 318. pl. 1. Hill. 10 Jac. B. R. Arnold v. Bidgood.

18. Debt upon the Statute 2 E. 6. cap. 13. for not ſetting out Tithes; *the Words of the Statute are, Every of the King's Subjects*; and the *Plaintiff in reciting it, declared that Quilibet Subjectus Dicti Domini Regis*; adjudged this was a Miſrecital. 2 Bulſt. 119. Trin. 11 Jac. Tipping v. Swan. Brownl. 123. Kipping v. Swaine. S. C. & S. P. held accordingly, and that it was a

Fault incurable; For *the Statute refers Subditus to his politick Capacity, but* (*dicti*) *goes to his natural and ſole Capacity*, and by ſuch Conſtruction the Force of the Statute ſhall be determined by the King's Death; By three Juſtices but Houghton doubted and ſo it was adjourn'd. ——— Cro. J. 324 pl. 5. S. C. held accordingly & adjornatur.

19. If the Plaintiff declares in Debt for not ſetting forth Tithes, as of a *Leaſe made to him for* 20 *Years where it was but for* 10 *Years*. This is good, for it is not material in this Caſe how he doth declare, ſo as Tithe is to be paid to him out of the Land. Per Coke Ch. J. 2 Bulſt. 86. Tin. 11 Jac.

20. As to the Word *Proprietor* in the Statute, *if a Rectory be leaſed for Years* the *Leſſee may well ſay Poſſeſſionatus fuit, though he can take no Profits before Harveſt*, and the ſhewing the Leaſe, and pleading that by Force thereof he was poſſeſs'd and ſo continued, is clearly good; Per Doderidge, quod tota Curia conceſſit. 2 Bulſt. 67. Mich. 11 Jac. It was mov'd in arreſt of Judgment that the Declaration was that the Plaintiff was

Primo Die occupator ac poſtea eodem Die &c. ſo that it appears not that he was Proprietor, and therefore the Action does not lie; For he may be Occupator wrongfully and ſo not Proprietor; But it was anſwer'd that the Declaration is that tali Die Poſſeſſionatus fuit & ab eodem Die occupavit, and this ſhall be judged of a rightfull Eſtate, and it is ſaid that he is Rector Eccleſiæ and ſo ſhall be intended that he is Proprietor of the Tithes if the contrary be not ſhewn; and Judgment Niſi. Sty. 107. Trin. 24 Car. [Hobart v. Boraſton.]

21. A *Parſon may ſue for the double Value in the Spiritual Court* and no Prohibition will lie; For that is given by the expreſs Words of the Statute of 2 E. 6. and ſo it was adjudged in **Manwood's Caſe** in the Exchequer; Per Coke. Godb. 211. pl. 301. Mich. 11 Jac. C. B.

22. Plaintiff declared in Debt on the Statute that he was Proprietor for ſeven Years of the Rectory out of which the Tithes were iſſuing, and that *Defendant was Occupier of Lands there for ſix Months from March* 10, *and cut his Corn in Auguſt following, and carried it away* 10*th of September after*; Though by Plaintiff's own ſhewing Defendant's Intereſt in the Land was *determined before* he carried away the Tithes, yet he ſtill continuing Owner of the Corn the Action lies. Cro. J. 324. pl. 5. Mich. 12 Jac. B. R. Kipping v. Swain, als', Stone. Brownl. 123. S. C. & S. P. held accordingly. —— 2 Bulſt. 119. Tipping v. Swan, S. C. adjudged.

23. In Debt upon the Statute of E. 6. of Tithes Plaintiff *declares, That he was ſeiſed in Fee of a Portion of Tithes of Corn and Hay growing upon ſuch a Grange, whereof Defendant was Occupier, and alſo of* 40 *Acres ſown with Wheat, Rie and Barley, and reaped the Corn and carried it away without ſetting forth the Tithes*, which were worth 40 s. and the treble Damages 6 l. after Verdict it was moved that the Declaration was not good, becauſe he *intitles himſelf being a Lay Perſon to a Portion of Tithes, and does not ſhew how*; and it being a Profit in another's Soil he ought to make a good Title to himſelf; Sed non allocatur; For this

Action is grounded on a Tort for not ſetting out the Tithes, for which he demands the Penalty of the Statute, and the Seiſin in Fee is only a Conveyance, and for this Action he needs not make a Title, and therefore it is uſual to bring the Action as Firmarius or Proprietarius without ſhewing any particular Title and Judgment for the Plaintiff. Cro. J. 437. pl. 9. Mich. 15 Jac. B. R. Sanders v. Sandford.

24. And it was alſo objected not to be good, becauſe he did *not ſhew the Quantity of every Grain in Specie*, and ſo it is uncertain, and the Court knows not how to judge of it; Sed non allocatur; For he ſhews the Value of the Tithes which is the Wrong ſuppoſed for the carrying them away, which is ſufficient. Ibid. 438.

25. The *Abbot* of Eviſham *ſeiſed both of Rectory and Land time out of Mind* 26 H. 8. *demiſed the Land for ſix Years, and by the ſame Leaſe demiſed all Tithes with a Covenant that the Leſſee ſhould not ſet forth the Tithes* [*of*] *Corn and Hay* to the Leſſor [and his Succeſſors] *but that he ſhall pay Tithe of Wool and Lamb to the Leſſor, and ſmall Tithes to the Vicar.* It was adjudged that the Lands ſhall pay Tithes, 1ſt, Becauſe the Tithes were demiſed, and therefore the Lands were not diſcharged, but the Tithes were payable. 2dly, Becauſe there was a Covenant that the Leſſee ſhall not ſet forth his Tithes to the Leſſor which ſhews that they ſhould otherwiſe have been ſet forth. 3dly, Becauſe there is a Proviſion for Payment of Tithe Lamb, Wool &c. all which are ſtrong Evidences that the Lands were not diſcharged, as ſtrong as if there had been actual Payment, and the finding of all theſe do ſtrongly imply that if there had been nothing elſe but a Leaſing that that had not been ſufficient, but that it was neceſſary to find Payment, or that which amounted to Payment, diſcharges by Grants and Covenants expreſs. Pollext. 8. cites Car. 2. [Cro. J.] 453. [Mich. 15 Jac. B. R.] Dobitoft v. Courteen.

Brownl. 52. Bawkey v. Iſted. S. C. and tho' Exception was taken to the *Venire facias*, becauſe it was of Horſted-Parva, and not of the Pariſh of Horſted Parva, yet Judgment was given for the Plaintiff, becauſe both the Town and Pariſh were named in the Record, and the Venire facias may be either of the Town or Pariſh.

26. Debt upon the Statute 2 E. 6. for not ſetting out Tithes, the Defendant pleaded *nil debet*; and this was *adjudged a good Iſſue.* Hob. 218. pl. 285. Mich. 15 Jac. Bawtry v. Iſted.

2 Roll Rep. 54. S. C. adjudged accordingly.—S. P. held accordingly, Comb. 283. Trin. 6 W. & M. in B. R. Auſtin v. Burſcoe.

27. In Debt upon Statute 2 E. 6. of Tithes, the Plaintiff in his *Declaration demanded more than the treble Value did amount unto, and did not ſhew Satisfaction for the reſt*; But all the Court held it good enough, for there is a *Difference when an Action is grounded upon a Specialty or a Contract which is a ceatain Sum, or upon a Statute which gives a certain Sum for the Penalty*, for there he may not vary from the Specialty. *But when the Demand is of no Sum certain, but only ſo much as ſhall be given by a Jury*, although he varies from the firſt Valuation it is not material, for *he ſhall not recover according to his Demand in his Declaration, but according to the Verdict*; Judgment for the Plaintiff. Cro. J. 498. pl. 6. Trin. 16 Jac. B. R. Pemberton v. Shelton.

An *Information* was brought by *the Queen only* upon this Statute, and the treble Value was demanded, and adjudged that it lay not; for the Statute gives it to the Party grieved and not to the Queen; and afterwards it was brought by the Party grieved, and he had Judgment to recover. Cro. E. 608. in pl. 9. cites it as ruled in the Exchequer in the Time of Manwood, in the Caſe of Wood v. Halton. ——— Debt tam quam lies not on this Statute; For the Queen

28. In an Action brought upon this Statute of 2 E. 6. it was *laid to be Tam pro Domino Rege quam pro Seipſo*, and upon Exception taken thereto it was reſolved to be good; becauſe the King is to have a Fine. Hetl. 121. Mich. 4 Car. C. B. Luvered v. Owen.

Queen cannot have any Benefit thereof, nor is it given to her by the Statute but to the Party grieved only, and thereupon the Court commanded Judgment to be ſtayed. Cro. E. 621. pl. 11. Mich. 40 & 41 Eliz. B. R. Johns v. Carne ——— Mo. 911. pl. 1285. Anon. but ſeems to be S. C. held accordingly, and that Action of Debt non competit Reginæ but rather a Fine for the Contempt upon an Information or Indictment, the Statute being a Prohibition not to carry away the Tithes till the nine Parts are ſevered.

29. A *Leaſe* was made *to two, they enter and occupy and ſet not out their Tithes, Debt* was *brought againſt one* of them, it *lies not*; *But* here *it was found that one only occupied the Land, and therefore the Action well lies.* Hutt. 121, Mich. 8 Car. Cole v. Wilkes.

30. Debt upon the Statute for not ſetting forth Tithes; After Verdict it was moved that the *Declaration was* too general and uncertain, it being *for ſuch a Quantity of Grain, but did ſhew what Sort* of Grain; *and ſo it may be for Grain not titheable*, for the Word *Grain comprehends Rape-Seed, Cole-Seed* &c. there is a very good Authority that it comprehends *Muſtard-Seed*; but adjudged, That *the Declaration was good, for it was for Grain growing in ſuch a Field*; and the Word Grain *in common Underſtanding is taken for Corn.* Styles 103, 108. Trin. 24 Car. B. R. Southcott v. Southcott.

All. So. S. C reſolved accordingly. And it being further objected that the Plaintiff had intitled himſelf as Proprietarius Decimarum Garbarum, and demands for Tithe of Grain in general, whereas (Garbarum) is a Word of uncertain Signification, and divers Sorts of Grain are not wont to be bundled up as Rape-Seed, Muſtard-Seed, and Cummin-Seed, which uſed to be threſhed in the Field; But reſolved that Garba in its prime and proper Signification is intended of Corn; And ſo Roll ſaid it was reſolved in **Baxter's Caſe** upon Conſultation with the Civilians, where one upon a Grant of Decimas Garbarum would have had Tithe Hay, but they did agree that the Word in its Latitude did comprehend any Thing that uſed to be bundled as Wood &c. but the Ambiguity of the Word here is taken away by the Verdict, and is to be intended of Grain that is Garbable. 2dly, The Word Grain is certain enough; for that it is expreſs'd to be ſown upon a certain Number of Acres.———Grano ſeminat' was held good without mentioning the Quality of the Grain. 13 Rep. 39 Eliz. Bedel v. Sherman.

31. *In Debt* upon the Statute 2 E. 6. for Tithes, the *Plaintiff declared, That he was Rector of* M. A. *and by Reaſon thereof ought to have the Tithes of* 100 *Acres of Land in that Pariſh, and of* 80 *Acres of Land in the Pariſh of M. G. without ſhewing how he was entitled to the Tithes of the Lands out of his Pariſh*; The Court held this to be *well enough after a Verdict*; *beſides* that *a general Allegation* without ſhewing a Title *is well enough in this Action.* Another Exception was, That the Plaintiff did not allege that the Defendant was Subditus Domini Regis as the Statute requires; Sed non allocatur, becauſe it is alleged, that he was *Occupator Terræ*, which *implies that he was Subditus.* Hardr. 173. Mich. 12 Car. 2. in Scacc. Phillips v. Kettle.

32. A *Tenant in Common of Tithes brought Debt* and declared *for the 20th Part of the Tithes.* Exception was taken that the Tithe is but the 10th Part; But per Windham J. though it be improper to the Signification of the Word, yet one may declare for the 20th Part of the Tithes or the 15th Part of them; For *the calling them Tithes is only to ſhew and deſcribe the Nature of the Thing demanded.* Sid. 49. pl. 11. Mich. 13 Car. 2. B. R. Cole v. Banbury.

33. Debt for not ſetting out of Tithes lies for *Executor of Parſon*, but not againſt Executor of the Pariſhioner; Per Twiſden. Sid. 88. in pl. 5. Mich. 14 Car. 2. B. R. ſaid that ſo it was adjudged lately in C. B.

34. Where a Suit was in the Spiritual Court *for double Damages upon 2 E. 6. for not ſetting out of Tithes, pending which Suit Defendant dies*, and then they *ſue the Executors for double Damages*, it was inſiſted for a Prohibition, that this was a perſonal Offence and Tort of the Teſtator, for which by the common Law the Executors ſhall not anſwer; And of this Opinion were Windham and Keeling J. Sid. 181. pl. 20. Hill. 15 and 16 Car. 2. B. R. Weekes v. Truſſell.

35. Defendant

Vent. 126. S. C. by the Name of Pellow v. Kingsford.

35. Debt upon the Statute 2 E. 6. for Tithes, and declared, that he is Rector of the Churches of Dale and Sale, and the Defendant occupied 400 Acres of Land in D. and S. ſowed them, and *took away the Corn not tithed*; after Verdict for the Plaintiff it was moved in Arreſt of Judgment, that he *ſhould have ſhewn what Part of the Lands were in Dale, and what Part in Sale*, ſo that the Defendant might know how to anſwer particularly to each ſeverally, and perhaps he has good Title to one Church and not to the other; But per Hale Ch. J. and Cur. it is good, for the Action is in Nature of *Treſpaſs* founded on the Tort; and the Exception diſallowed, and Judgment given for the Plaintiff. 2 Lev. 1. Paſch. 23 Car. B. R. Fellows v. Kingſton.

Sid. 407. pl 19. Morton v. Hopkins, S. C. & S P. held accordingly that ſuch Action lies for Executors but not againſt Executors.

36. M. brought *Debt as Executor upon* 2 *E.* 6. *for not ſetting forth Tithe due to his Teſtator.* It was inſiſted that this Action though for a Forfeiture for a Tort done to the Teſtator was maintainable within the Equity of the Statute 4 E. 3. that gives the Executor Treſpaſs de Bonis aſportatis in Vita Teſtatoris; and the Court were clear of Opinion for the Plaintiff, and ſaid that it had been formerly reſolved ſo in the Exchequer Chamber. Vent. 30, 31. Paſch. 21 Car. 2. B. R. Juſtice Moreton's Caſe.

35. If the *Executor of a Parſon* brings a *Bill in Chancery* for Tithes, he, not being entitled to the treble Value by the Statute, need not *offer to accept the ſingle Value*, as the Parſon ſuing there ought to do if his Bill be for carrying away the Corn &c. without ſetting forth the Tithes according to the Statute. Vern. 60. pl. 57. Mich. 1682. Anon.

Cro. J. 68. pl. 6. S. C. adjudged accordingly, and held the Action well brought, in regard the Plaintiff had both Titles in him, and he is to have the intire Tithes. —— Noy 3. Champion v. Hill, S. C. reſolved accordingly; for it is Perſonal, and one intire Debt for one Wrong. —— Yelv. 63. S.C. held accordingly. —— Browni. 86. S. C. ſeems only a Tranſlation of Yelv.

36. In Debt upon the Statute 2 E. 6. for not ſetting forth of Tithes; Plaintiff *declared upon two Leaſes, one of the Parſon who had two Parts, and another of the Vicar who had the third Part.* The *Defendant pleaded Not Guilty, which was found againſt him.* It was moved in Arreſt of Judgment, that *Not Guilty* was no good Plea, but nil debet; but *adjudged well enough.* Then it was *moved that the Plaintiff ought to have brought ſeveral Actions*, his Title being by ſeveral Demiſes; *ſed non allocatur*; *for that the Suit was for the Tort as well as upon the Title*; ſo Judgment was for treble Damages. Mo. 914. pl. 1293. Hill. 2 Jac. B. R. Sir Richard Champernoon v. Hill.

Comb 283. Auſtin v. Burſcoe, S. C. and Judgment affirmed niſi.

37. In an Action of *Debt upon the Statute* 2 *E.* 6. *of Tithes*, wherein the *Plaintiff demanded the treble Value* &c. *Upon nil debet pleaded the Plaintiff had a Verdict* in C. B. and upon a Writ of Error brought in B. R. it was very much inſiſted on that the Declaration was ill, becauſe the *Plaintiffs had only alleged that the Defendant had carried away the Corn without ſetting out the Tithes, but did not aver that the Defendant had not made any Agreement with them for the Tithes*, for the Statute gives the Penalty where the Tithes are carried off without any Agreement made for ſo doing; therefore if the Defendant had agreed with the Plaintiffs for carrying off the Corn without ſetting out the Tithes, (as it does not appear but he might) then it had been no Forfeiture; And the Court was of that Opinion, viz. that the Declaration was ill for the Reaſon ſupra if it had been upon a Demurrer; but *this was helped by the Verdict*; *for if there had been any Agreement proved at the Trial, the Plaintiff could not have obtained a Verdict.* Carth. 304. Paſch. 6 W. & M. in B. R. Alſton & al' v. Buſcough.

38. Suit

38. Suit in the Spiritual Court for Tithes may be well brought *in Name of the Curate and Sequeſtrator.* 2 Lutw. 1066. Mich. 13 W. 3. Burton v. Cookerman.

(H. b) Count and Pleadings.

1. IT was awarded, that where *a Lay Man brings Treſpaſs*, and the *Defendant claims as Lord of the Parſonage for Tithes*, the Spiritual Court ſhall not have Juriſdiction, but ſhall anſwer in Banco. Br. Juriſdiction, pl. 10. cites 47 E. 3. 17.

2. The *Bounds of a Pariſh* were put in Iſſue *in Treſpaſs of Sheaves taken* where the Defendant claimed them as his Tithes as Parſon of D. Br. Iſſues Joines, pl. 48. cites 50 E. 3. 20.

3. If a Man *leaſes Tithes* for Years, rendring Rent, there in Debt he *ought to count that he was Parſon*, or otherwiſe *convey to himſelf the Tithes.* Br. Count, pl. 96. cites 10 H. 7. 21.

4. In a Suit for Tithes, *unleſs the Plaintiff demands the ſingle Value only*, the *Defendant ſhall not be compelled to anſwer ſo as to diſcover the Quantity and Nature of prædial Tithes*; Arg. Hardr. 137. Hill. 1658. in Scacc. ſays, that it had been often reſolved in this Court, and that ſo it was adjudged here 1 Jac. in Caſe of Fenner v. Robinſon.

5. In *Ejectment* of *Tithes*, he muſt ſhew that it was by Deed, becauſe that it cannot paſs without Deed. Cro. J. 613. pl. 3. Paſch. 19 Jac. B. R. Swadling v. Piers.

But in *Debt on 2 & 3 Ed. 6. cap.* 13. the Statute gives the Action to the Proprietor, and when he names himſelf *Proprietor* he need not ſhew any other Title. Roll Rep. 13. pl. 16. Paſch. 12 Jac. B. R. Babington v. Mathews. —— 2 Bulſt. 228. S. C. adjudged, and Man Secondary informed the Court, that to ſay generally Poſſeſſor, Occupator, Firmarius or Proprietarius is good and ſufficient Pleading upon this Statute, which gives the Action to the Proprietor, and that ſo it had been ſeveral Times adjudged.

(I. b) Suits in the Eccleſiaſtical Court allowed or not. In what Caſes.

1. 9 E. 2. *cap.* 1. FOR *Tithes, Oblations, Obventions or Mortuaries, when they are propounded under thoſe Names the King's Prohibition ſhall not hold Place, albeit for the long with-holding of them they come to a pecuniary Eſtimation, but if an Eccleſiaſtical Perſon lodge his Tithes in his Barn, and then ſell them for Money, if that Money be demanded before a Spiritual Judge, for this a Prohibition lieth; for by the Sale they are Temporal.*

2. 9 E. 2. *cap.* 2. *If Debate ariſe upon the Right of Tithes, (having his Original from the Right of the Patronage) and the Quantity of the ſame Tithes do amount to a fourth Part of the Goods of the Church, for this a Prohibition lieth; but if a Prelate injoin corporal Penance, and the Party afterwards commutes for Money, that Money is recoverable in the Court Chriſtian, and in that Caſe a Prohibition lieth not.*

3. 9 *Ed.* 2. *cap.* 5. *No Prohibition ſhall be granted where Tithes are demanded of a* New Mill.

4. Where a Man *will not tithe his Corn*, Suit lies in the Spiritual Court; But where he *ſevers the Tithes* from the 9 Parts, *and a Man carries it away*, Treſpaſs lies at the Common Law. Br. Diſmes, pl. 6. cites 38 E. 3. 6.

5. *Treſpaſs by a Lay Man againſt W. N. Clerk, of Corn taken*, the *Defendant ſaid that he is Parſon there*, and the Place is within his Pariſh, *and the Corn were Tithes ſevered from the 9 Parts*; Judgment if the Court will take Conuſance; et non allocatur; for a *Lay Man by Intendment cannot have Tithes*; By which he ſaid, that Debate was in the Spiritual Court between him and the Prior of D. who claimed Tithes there, and the ſaid W. N. ſaid, that the Prior himſelf was ſeiſed of the Land, and infeoffed another, ſo that in his own Land he could not have Tithes, by which Judgment was given for W. N. and after the Plaintiff claiming by the Prior got Poſſeſſion, and the Defendant took them as his Tithes; Judgment if the Court will take Conuſance; and no Plea, but the Defendant was compelled to anſwer over, becauſe the Plaintiff was a Lay Man. Br. Juriſdiction, pl. 6. cites 42 E. 3. 12.

6. *Aſſiſe of Novel Diſſeiſin* was maintained of Tithes as of Lay Profit Apprender, and was brought *by a Prior*, and therefore the Defendant demanded Judgment if the Court would take Conuſance, and yet the Aſſiſe was awarded to inquire of the Truth; And there Ludlow ſaid, that *in ancient Time every Man might grant his Tithes to what Church he would* quod verum eſt, *and of ſuch ſuch Tithes the Juriſdiction belongs to the Spiritual Court notwithſtanding the Grant.* Br. Diſmes, pl. 1. cites 44 E. 3. 5.

7. *But* where a Man *Grants the tenth Part over and above the Tithes which he ought to pay to the Church*, there of this the Lay Court ſhall have Juriſdiction. Br. Diſmes, pl. 1. cites 44 E. 3. 5.

8. 45 *E.* 3. *cap.* 3. *A Prohibition (and an Attachment thereupon) ſhall be granted, where a Suit is commenced in the Spiritual Court for the Tithes of Underwood above twenty Years Growth in the Name of Silva Cædua.*

9. 27 *H.* 8. 20. *Perſons* ſubſtracting *Tithes ſhall be convened before the Ordinary, and bound over by two Juſtices to obey the Sentence.*

10. A Man ſhall have Prohibition *upon a Surmiſe*, and ſo it was agreed 31 H. 8. that if a Man be *ſued* in the Spiritual Court *for Tithes of ſeaſonable Wood*, the Party grieved may make *Suggeſtion* in Chancery or in B. R. *that he is ſued in the Spiritual Court for Tithes of great Trees which is paſt the Age of 20 Years, by Name of Silva Cædua which is ſeaſonable Wood* uſed to be cut *where in Fact it is great Trees*, and pray a Prohibition, and ſhall have it. Br. Prohibition, pl. 17. cites F. N. B. 43. and H. 31. H. 8.

11. 2 & 3 *E.* 6. *cap.* 13. *S.* 13. *Perſon ſued in the Spiritual Court, and not obeying the Sentence ſhall be* excommunicated *and the Writ of Excommunicato capiendo ſhall iſſue.*

12. *Where it appears by Libel that the Eccleſiaſtical Court ought to hold Plea*, there *Prohibition* of the King *does not lie. Contra where it appears that they ought not to hold Plea.* Br. Diſmes, pl. 14. cites Doct. & Stud. lib. 2.

13. Where this is *no Parſonage* Houſe or *Barn*, and a *Diſpute* is *about a Way by which the Tithes ſhould be carried*, the Way to *plead* is, that J. S. is ſeis'd in Fee of the Rectory of D. and that time out of Mind he and thoſe &c. have uſed for them and theirs formerly to have a Way to carry their Tithes from ſuch a Place over the Land where &c. unto ſuch a Highway, and name the Way which is the next to the Place where the Treſpaſs was done. 2 Le. 10. pl. 13. Mich. 19 & 20 Eliz. B. R. Anon.

Le. 128. pl. 175. S. C. cited accordingly.

14. Spiritual Court cannot try an *Agreement between the Parſon and Pariſhioners* for Tithes. Arg. Cro. E. 136. Trin. 31 Eliz. in Caſe of Gomerſal v. Biſhop, ſays it was ſo ruled in the Caſe of Pendleton v. Hunt.

15. The

15. The Spritual Court will not allow of any Plea for a *Modus Decimandi*. Per Coke Arg. Cro. E. 511. pl. 35. Mich. 38 & 39 Eliz. B. R. in Caſe of Wright v. Wright.

Mo. 907. pl. 1268. Paſch. 36 Eliz. B. R. Fryer v. Beſtney. S. P.

16. It was ſurmiſed for a Prohibition that the Parſon or Proprietor of the Rectory and his Predeceſſors had 20 Acres of Paſture, and 20 Acres of Wood in ſatisfaction of Tithes. If the Witneſſes *prove the 20 Acres of Paſture, but do not prove the 20 Acres of Wood* it is Proof ſufficient. For the Subſtance is proved that he held Land in ſatisfaction. Cro. E. 736. pl. 4. Hill. 42 Eliz. B. R. Auſten v. Pigot.

Mo 911. pl. 1284. S. C. accordingly, and no Conſultation granted.

17. On a Prohibition *Plaintiff ſurmiſed a Cuſtom time out of Mind to pay 3 s. 4 d. for all great Tithes except Corn growing on 70 Acres of Land, and made Proof by two Witneſſes according the Statute, but they teſtified* that *the Cuſtom* was *to pay* 4 s. yet a Prohibition was awarded; For though he had fail'd in Proof of the Preſcription, yet *ſo much is prov'd that the Spiritual Court had no Cauſe to proceed for Tithes in Specie.* D. 171. a. Marg. pl. 6. cites Mich. 42 & 43 Eliz Rot. 227. B. R. Webb v. Beal.

Ibid. ſays that Doderige ſaid that Mich. 34 & 35 Eliz. Bird v. Collingworth a Conſultation was awarded in ſuch Caſe,

but Popham anſwered that the Opinion of the Juſtices of C. B. now is e contra; For *when a Modus Decimandi is ſurmiſed to be in one Manner and it is proved to be in another* Manner, *we ought not to award a Conſultation* to give them Authority to ſue for Tithes in Kind, *but only to ſue for Tithes in ſuch Kind as is proved.*

18. *Libel for Tithes of Cows and Calves* &c. the *Defendant ſuggeſted a Modus to pay a Half-penny for the Tithes of every Calf, and* 1 *d. for a Cow, and that upon a certain Day they uſed to bring thoſe Tithes to the Church, and there pay them to the Vicar, who libelled now to compell them to bring the Tithes to his Houſe*; It was held by Winch (he only being in Court) that ſince they agree in the Modus, and differ only in the Place of Payment, that is not matter of Subſtance, and therefore no Prohibition will lie. Win. 33. Trin. 20 Jac. C. B. Anon.

19. Where the *Right of Tithes comes in Queſtion* a Prohibition ſhall not be granted; Per Ley Ch. J. and Doderidge J. 2 Roll Rep. 440. Trin. 21 Jac. B. R. in Caſe of Gwynn v. Merryweather.

20. It belongs to the Spiritual Court to determine *who ſhall pay Tithes for Agiſtments*, whether the Owner of the Land or the Proprietor of the Cattle. Jo. 254. pl. 5. Hill. 7 Car. B. R. Facy v. Longe.

21. A *Conſultation was pray'd upon a Suit for Tithes of two Mills* in Newcaſtle, *ſuggeſting that they were ancient*, and per Curiam *this, nor no other Suggeſtion, but only of a Modus, need not be proved within ſix Months* by the Statute 2 E. 6. cap. 13. and Twiſden ſaid he knew it thus ruled heretofore in this Court, and this is on a Diſcharge at Common Law, and on reading the Statute, though the Words were general, yet the Court would not grant Conſultation for this Cauſe, but ordered that if the Plaintiff did not declare on his Suggeſtion, the Defendant appearing thereto, a Conſultatien ſhould go by the firſt Day of the next Term. 2 Keb. 134. pl. 100. Mich. 18 Car. 2. B. R. Eaton v. Naylor.

22. Upon the Suggeſtion of a Modus the Court uſes to grant a Prohibition without *Notice given to the other Party.* Freem. Rep. 78. pl. 95. Trin. 1673. Anon.

23. A Prohibition was prayed to ſtay a Suit for *Tithes of Wood.* The *Plaintiff ſuggeſted he had a Houſe in the Pariſh, and that the Wood was cut for Fuel burnt in his Houſe.* But the Court ſaid, that this would not ſerve, unleſs it were *expreſſed, that the Houſe was for Maintenance of Husbandry, by reaſon of which the Parſon had Ubertores Decimas.* Vent. 75. Paſch. 22 Car. 2. B. R. Tilden v. Walter.

Sid. 447. pl. S. S. C. held accordingly. —— Mod. 150. pl. 105. S. C. but S P. does not appear.

— 2 Keb 628. pl. 31. Tilders v. Walker, S. C. & S. P. per Curiam.

24. The

See Tit. Prohibition (F) pl 17. 20. (M) pl. 9. (Q) pl. 14, 15. (U) pl 1. and the Notes at the ſeveral Places.

24. The Eccleſiaſtical Court cannot *try a Modus* tho' the original Suit be for a Modus, becauſe the Preſcription differs; but if the Queſtion be *Payment or Non-payment*, then they may proceed; Per Holt Ch. J. Cumb. 427. Trin. 9 W. 3. B. R. Godfrey v. Mathews.

25. One may libel in the Spiritual Coutt for *Tithe of Rakings of Corn* if it *never was gathered into Sheaves*; but otherwiſe after Corn has been gathered into Sheaves, and there was *no Fraud* in the gathering, and Prohibition would lie; Per Holt. 12 Mod. 235, 236. Mich. 10 W. 3. Anon.

The Juriſdiction ariſing to the Spiritual Court by Matter diſcloſed in the Libel cannot be taken from them, but by other Matter diſcloſed in the Plea, and therefore in the principal Caſe, which was a Libel for Tithe of Silva Cedua, *the Suggeſtion that they were Timber Trees, and of 20 Years Growth, ought to have been ſet forth in the Plea*; and a Prohibition was denied. Barnard. Rep. in B. R. 71. Trin. 2 Geo. 2. Bouton v. Hurſler.

26. The *Spiritual Court has general Juriſdiction of Tithes, and if any ſpecial Matter deprives them of their Juriſdiction, it muſt be pleaded there*; *As* in Caſe of a Suit there *for Tithes of Faggots cut from the Stumps of Timber Trees above the Growth of 20 Years*; if this had been pleaded there, and Iſſue joined upon it, and on the Trial it had been found not to be Sylva Cædua it had been well; But *if they had refuſed to admit the Plea a Prohibition ſhould be granted.* 2 Ld. Raym. Rep. 835. Mich. 1 Ann. Dike v. Brown.

(K. b) Where the Parſon ſhall have them; And where the Vicar.

Before this Council there were no Pariſhes, nor Pariſh Prieſts that could claim Tithes, but a Man might give them to what Spiritual Perſon he would, but to the Church he muſt give them; But ſince Pariſhes were erected they are due to the Parſon (except in Spiritual regular Caſes) or Vicar of the Pariſh; Per Hobart Ch. J. Hob. 296 in Caſe of Slade v. Drake.

1. BEFORE the *Council of Lateran* Men might have given their Tithes where they pleaſed, and by this Council they ſhall give it only to the Curate of the Pariſh where they grow or come. Br. Diſmes, pl. 21. cites 10 H. 7. 18.

2. *Libel &c. by the Parſon for Tithes in Specie in the Pariſh of N.* The *Defendant for a Prohibition ſuggeſted, that he was an Inhabitant in the Pariſh of S. and that time out of Mind every Inhabitant there had paid Tithes for their Lands which they had in the Pariſh of N. to the Vicar of S. and that the Vicar of S. had paid to the Parſon of N. 2d. for every Acre.* The Court held that a Prohibition lay, and it is as if he had preſcribed to pay 2d. for every Acre. Cro. E. 136. pl. 4. Trin. 31 Eliz. Coteford v. Peaſe.

3. If a *Vicar is endowed of Tithe-Hay*, and *the Land is ſown with Corn*, the Parſon ſhall have Tithe in Kind, and when the ſame is in Hay, the Vicar ſhall have the Tithe-Hay. Godb. 194. pl. 278. Trin. 10 Jac. C. B. Brown's Caſe.

4. A Modus pleaded *to pay ſo much to the Parſon in diſcharge of Tithes claimed by the Vicar* was diſallowed; and per tot. Cur. a Conſultation was granted. 3 Bulſt. 220, 221. Mich. 14 Jac. Wintel v. Child.

5. *Alteragium* will paſs Tithe-Wool &c. to the Vicar; certified by the Doctors Win. 70. Hill. 21 Jac. C. B. in Caſe of Bret v. Ward.

6. *Payment*

6. *Payment is Evidence of Endowment* of a Vicarage, and no Man can prove other Endowment; Per Cur. 2 Keb. 729. pl. 13. Hill. 22 & 23 Car. 2. B. R. Brigham v. Robſon,

7. A *Modus to the Rector* is a *good Diſcharge againſt the Vicar*; Per Cur. Mod. 216. in pl. 3. Trin. 28 Car. 2. C. B. Anon.

8. A *Suit* was in the Spiritual Court *by the Vicar againſt the Leſſee of the Impropriator of a Rectory for the ſmall Tithes* of the Pariſh, *and the Hay-Tithe of the Glebe, which the Vicar claims by Preſcription and Endowment.* Eyre Ch. J. held it to be good; becauſe the Glebe may be charged by an expreſs and particular Charge. Gibb. 79. Trin. 2 & 3 Geo. 2. C. B. in Caſe of Barton v. Hollis.

(L. b) What Words will paſs or extinguiſh Tithes.

1. RELEASE *of all Right of Land* is no Extinguiſhment of Tithes. Le. 248. pl. 336. Mich. 33 Eliz. B. R. Lincoln Biſhop v. Cowper. Cro. E. 216. pl. 13 S. C. & S. P. —— Le. 300. pl. 411. Trin. 31 Eliz. B. R. Stile v. Miller, S. P. —— Ow. 39, 40 Stile v. Miles, S. C. & S. P. per Wray.

2. If the *King makes a Grant of Tithes, all Sorts of Tithes paſs thereby.* Hardr. 305. Arg. cites it as held clearly Paſch. 12 Car. 2. C. B. in Caſe of **Elſington v. Barker,** and ſays the Doubt in that Caſe was occaſioned by a *Videlicet in the Grant*, viz. of ſuch and ſuch Things; and the Queſtion was, Whether Tithes of other Things, which were not named, would paſs? But if the Viz. had been out of the Caſe there would have been no Scruple, but that all Sorts of Tithes had paſſed.

(M. b) Equity.

1. LORD Chancellor declares that Matters for *Tithes* are *determinable in this Court.* Toth. 282. cites Moone v. Bond, 3 Eliz. li. A. to. 621.

2. A *Demurrer* becauſe the Matter concerneth Tithes *over-ruled* and ordered. Toth. 283. cites Windham v. Noris. 17 Eliz. li. a. fol. 282.

3. Cuſtom proved of 16 Pence an Acre for Tithe of Wood, and no Wood in Kind, yet the Court would not decree a Cuſtom. Toth. 111, 112. cites 38 Eliz. Wingfield v. Bedford.

4. A Bill for the Manner and Cuſtom of Tithing diſmiſſed. Toth. 113. cites 10 Jac. Knivet v. Freeman.

5. Point of Tithes *determinable in this Court, and Parcel or not Parcel.* Toth. 283. cites Decanus & Capit' Eccleſiæ Chriſti in Oxon v. Grant, June 11 Jac.

6. Bill *to eſtabliſh certain Cuſtoms of Tithing* within a particular Pariſh which never had been tried. The Bill diſmiſſed as not proper for Equity. N. Ch. R. 10. 5 Car 1. Gawle v. Lake.

7. Tithes *in Kind decreed*, notwithſtanding a Decree in Lord Bacon's Time. Toth. 131. cites 12 Car. Farmer v. Troſt.

8. A Decree for *Tithe Conies* and *Wood.* Toth. 132. cites 13 Car. Shires v. Burgaine.

9. In an *Information* in the Exchequer Chamber *by Engliſh Bill for ſmall Tithes appertaining to the Rectory of S. in D. The Defendant in his Anſwer did not admit the Plaintiff's Title, but alleged an Extinguiſhment of the Tithes by Unity of Poſſeſſion.* And the *Plaintiff made no Proof of the Value of the Tithes, nor what Cattle had been depaſtured in the Place where* &c. and for that Cauſe *the Court* upon hearing of the Cauſe *refuſed to direct a Trial at Law, becauſe no particular Damnification appeared to them* whereon to ground a Decree for the Plaintiff if the Verdict ſhould paſs for him; and hereupon the Bill was diſmiſſed. Hardr. 4. pl. 3. Trin. 1655. The Att. Gen. v. Straite.

10. Upon a *Bill* in Equity *for Tithes of Corn and Grain* and a *Demurrer* to it *becauſe the ſingle Value was not barely demanded, but it was a Bill of Diſcovery only to enable the Plaintiff to recover the treble Value*; Sed non allocatur; for that Tithes were ſuable for in this Court before the Statute; Quod Nota & Quære, becauſe it is contrary to the common Practice and Uſage to have ſuch a Bill without alleging that the Plaintiff is contented to receive the ſingle Value only. Hardr. 190. pl. 18. Paſch. 13 Car. 2. in Scacc. Driver v. Man.

Hardr. 150. Mich. 1658. in the Exchequer, Button v. Honey. S, P. and the Exception was over-ruled becauſe the Defendant by his Anſwer admitted him to be Vicar, and that the Tithes in queſtion were his Due, but inſiſted only upon Payment and Satisfaction. But there is a Note added, that it has been often ruled contrary, it being the Ground and Foundation of the Plaintiff's Title.

11. In a *Bill for Tithes* due to the Complainant *as Vicar and Incumbent of* ——— in Eſſex; the *Complainant did not ſhew how he was intitled* to them, viz. By Preſcription, Endowment or otherwiſe. And the *Court held it to be good notwithſtanding*, as well as in an Action at Law for Tithes upon the Statute of 2 E. 6. where the Plaintiff is not obliged to ſet forth his Title. But the Reporter adds quod Nota for it is againſt ſeveral Precedents in this Court, which he ſays he has known of Demurrers for thst Cauſe held to be good. Hardr. 321, 322. pl. 4. Hill. 14 & 15 Car. 2. Stone v. Ludlow & al'.

12. Chancery will *not decree* a *Rate Tithe*, though it was inſiſted that it was frequent to do ſo in the Exchequer. Chancery Caſes 187. Mich. 22 Car. 2. Buſh v. Riſhley.

13. A Bill was exhibited for Tithes, and *the Juriſdiction of the Court demurred to*; *but the Demurrer over-ruled*, and the Defendant ordered to anſwer. And it was ſaid by Finch Lord Keeper, that the Court of Exchequer did not hold Plea by Engliſh Bill until the Statute of 33 H. 8. cap. 39. Freem. Rep. 303. pl. 371. Trin. 1674. in Chancery. Anon.

Ld. Chancellor declared that this Court had Cognizance of Tithes as well as the Exchequer, and that the Plaintiff had Electionem Fori. 2 Freem. Rep. 27. pl. 29. Anon. ſeems to be S. C.

14. Sir John Churchill as Amicus Curiæ ſaid that a Suit for Tithes, eſpecially *ſmall Tithes*, was not proper in Chancery, and had not been uſed; yet Finch C. pronounced a Decree for them, the Bill for Refuſal to anſwer being taken pro Confeſſo. 2 Chan. Caſes 237. Mich. 29 Car. 2. Anon.

S. P. as to the eſtabliſhing the Modus and Demurrer allowed. Chan. Rep. 27. 4 Car. 1. Browne v. Thetford. ——— Such Bills have been ſeveral Times allowed; agreed by Connſel and Court; But the Bill being likewiſe to compel the Parſon to give Receipts on Payment of the Modus, it was diſmiſſed at the Rolls. Mich. 1738. Wood v. Farington. ——— It was formerly doubted whether a Bill in Equity would lie to eſtabliſh a Modus or cuſtomary Manner of paying Tithes, eſpecially if the Cuſtom had not been found good at Law; and ſometimes on a Demurrer to ſuch Bills they have been diſmiſſed; but the conſtant Practice now is to retain ſuch Bill's. and

15. Bills to eſtabliſh a *Modus Decimandi* have been ſeveral Times diſmiſſed, but where it is only to preſerve Teſtimony North K. thought it reaſonble that the Defendant ſhould anſwer, and over-ruled the Demurrer. Vern. 185. pl. 184. Trin. 1683. Somerſet v. Fotherby.

and to decree on the Pleadings, or to direct a particular Point to be tried at Law, concerning the Reality of ſuch a Cuſtom or the Legality of it. Equ. abr. 367. (B) in the Note in Marg. againſt pl. 1.

16. Bill to be relieved for *Tithe Oar*; The Court directed a Trial if any and what Cuſtom within the Townſhip. 2 Vern. 46. pl. 43. Paſch. 1688. Buxton v. Hutchinſon.

17. In a Bill for Tithes brought *in the Exchequer*, though the Right be ever ſo plain yet *the Decree* there *is*, *That he ſhall account and pay what Tithe is due to the Time of bringing the Bill*, but *not that he ſhall pay* Tithes *for the future*; *But in Chancery* it is *to the Time of the Decree.* 2 Wms's Rep. 463. in a Nota there ſays that it was ſaid and admitted Trin. 1728. in Caſe of Carleton v. Brightwell. The Editor makes a Quære if this be the eſtabliſhed Rule of Chancery, or done only of late in ſome few Inſtances. Ibid.

For more of Diſmes [or Tithes] in General, See Tit. **Glebe, Preſentation,** (C.) **&c. Prohibition,** and other proper Titles.

Diſſeiſin.

(A) Diſſeiſin *of* a *Rent.*

[And where it is by one it ſhall be ſaid to be by others.]

1. **If I have a** Rent-Charge **iſſuing** out of Lands of which there are ſeveral Tertenants, **and I** diſtrain **upon any of the Lands** and one of the Tertenants makes a Reſcous without the Conſent of the others, **yet the others are Diſſeiſors alſo, for the Diſtreſs is a Demand in Law, and the Non-payment a Denial, and ſo a Diſſeiſin. 39 Aſſ. 4. adjudged.** Fol. 658. Br. Diſſeiſin pl. 60 (59) cites S. C. and though one only made the Reſcous that all were adjudged Diſſeiſors. Br. ſays that it ſeems the Reaſon is becauſe all of them detain'd the Rent.——Fitzh. Aſſiſe, pl. 335. cites S. C. & S. P. but he that made the Reſcous only was awarded to Priſon.—— Ibid. pl. 339. cites 40 Aſſ. 3. S. P. ——Co. Litt. 161. b. S. P. as to a Reſcous by one Jointenant, but he that made the Reſcous is only the Diſſeiſor.

2. **If the** Grantee of a Rent-Charge demands the Rents, **and after** diſtrains, **and a** Stranger without the Aſſent of the Tenant makes Reſcous, **yet this is a Diſſeiſin in the Tenant, for the Non-payment was a Denial, and the Diſtreſs has not waived this Diſſeiſin. The Caſe aforeſaid of 39 Aſſ. 4. proved this. * 29 Aſſ. 51. dubitatur.** * Br. Diſſeiſin, pl. 60 cites S. C.—Fitzh. Aſſiſe, pl. 335. cites S. C.—

3. **If he who ought to have a Rent-Charge** comes to the Proctor of the Tenant of the Land out of which the Rent iſſues, and demands the Rent, and he refuſes **to pay it, this is a Diſſeiſin. 18 E. 3. Aſſiſe 78. adjudged.**

4. **If I have a Rent-Charge iſſuing out of Land, of which there are ſeveral Tertenants, a** Demand upon the Land in the Poſſeſſion of one of the Tenants, and Non-payment, **is a Diſſeiſin by all, for all the** Br. Diſſeiſin, pl. 60 (59) cites S. C.—See ſupra, pl. 1.

the Rent iſſues out of every Part. 39 Aſſ. 4. admitted by the Judges.

5. It was ſaid that *Detainer* of *Rent-charge* is a Diſſeiſin, but not of *Rent-ſervice*, quod nota. Br. Diſſeiſin, pl. 17. cites 3 Aſſ. 8.

6. Aſſiſe of Rent-charge againſt A. and B. in B. R. the Aſſiſe ſaid, that the Plaintiff was ſeiſed and *came to diſtrain*, and *A. would not ſuffer him*, and after *A. alien'd to B.* and the *Plaintiff demanded the Rent of B. and he would not pay it*, and both were awarded Diſſeiſors, and the *Diſſeiſin* of A. was *with Force and Arms*, and *countervails Reſcous*, and that *B. is a Diſſeiſor by his Contradiction*, by which the Plaintiff recover'd, quod nota. Br. Diſſeiſin, pl. 23. cites 9 Aſſ. 7.

7. In Aſſiſe it was awarded a ſufficient Cauſe of Diſſeiſin of Rent, becauſe the *Tenements* out of which the Rent is iſſuing were ſo *incloſed that the Lord could not enter* to diſtrain for the Rent, quod nota. Br. Diſſeiſin, pl. 58. cites 36 Aſſ. 7. & concordat Littleton tit. Rents.

Br. Diſſeiſin pl. 2. cites S C — In Aſſiſe the beſt Opinion was, That if a Man has *Rent iſſuing out of three Acres of Land incloſed in a Park of ancient Time*, and *comes to diſtrain and cannot for the Incloſure*, and the *Tenant denies to let him enter*, that this is no Diſſeiſin; For Denier is no Diſſeiſin for Rent-Service, and the Incloſure which is the Cauſe was not done by this now Tenant. Br. Diſſeiſin, pl. 88. cites 49 Aſſ. 6.

8. In Aſſiſe it was held by Parle that if *Rent iſſues out of* certain *Land* which is *incloſed in a Park of ancient Time* ſo that none can come to diſtrain becauſe the Gate is always lock'd, that of this Incloſure Aſſiſe does not lie, becauſe it is not inclos'd for this Purpoſe, and alſo it was made of ancient Time ſo that the Seiſor is dead; therefore Quære, where a Man at this Day keep ſuch Land inclos'd of Ancienty, and the Rent is demanded, if he ſhall not be a Diſſeiſor as well by the keeping it inclos'd, as if he himſelf had inclos'd it. Br. Seiſin, pl. 6. cites 49 E. 3. 15.

9. *Aſſiſe of Rent* by Prioreſs which was *taken for Default*, and ſhe made Title as to the Rent-Service, and it was found that the Tenant held of the Prioreſs, and that the Houſe was never out of Poſſeſſion, but the Predeceſſors had been ſeiſed of Land &c. And that the *Bailiff* of the Prioreſs *came to diſtrain*, and the *Tenant ſaid, that he ſhould have no Rent nor Diſtreſs there before he had recover'd it by Law, by which he dared not to diſtrain for doubt of Death.* And the Seiſin in the Time of her Predeceſſors is taken as well as Seiſin in her own Time. And *this Menace is* taken a good Diſſeiſin, and this in the Time of this Plaintiff, and therefore ſhe recover'd by Award. And ſhe recover'd likewiſe upon the like Title in three other Aſſiſes. Br. Aſſiſe, pl. 39. cites 46 E. 3. 14.

10. *And* where a Man *comes to enter* into Land *where he has Right* of Entry *and makes his Claim and dares not enter for fear of Death*, it ſhall be adjudg'd Seiſin, and Diſſeiſin by this Claim, quod nota, per Perſey. Ibid.

Denial is a Diſſeiſin of a Rent-Charge as well as of a Rent-Seck; Albeit he may diſtrain for the Rent-Charge as well as for a Rent-Service. Co. Litt. 161. b.

11. Denier is a Diſſeiſin of *Rent-charge or* Rent-*ſeck*, but *not of Rent-ſervice* unleſs there were a Reſcous made; Note the Diverſity. Br. Diſſeiſin, pl. 8. cites 8 H. 6. 58.

So if none be ready upon the Land *to pay it*, when it is demanded &c. Br. Diſſeiſin, pl. 103. cites Littleton, tit. Diſſeiſin.

12. If the Lord is going to the Land holden of him to diſtrain for the Rent behind, and the Tenant hearing this encountereth with him, and *foreſtalls him in the Way with Force and Arms, or menaces him* that he dare not come to the Land to diſtrain for his Rent behind, for doubt of Death or bodily Hurt, this is a Diſſeiſin, becauſe the Lord is diſturbed of the Mean whereby he ought to come to his Rent. Litt. S. 240.

13. There

13. There be *three Cauſes of Diſſeiſin of Rent-ſervice*, viz. *Reſcous*, *Replevin*, *and Encloſure*. Litt. S. 237.

You may make *ſix Diſſeiſins of a Rent-ſervice*, viz. *Reſcous* of a Diſtreſs, *Reſiſtance* to diſtrain, *Replevin*, *Incloſure*, *counterpleading* of the Title, and *vouching of a Record, and failing*. Co. Litt. 160. b.

Denier is no Diſſeiſin of a Rent-ſervice without *Reſcous* or *Reſiſtance*. Co. Litt. 161.

14. If by foreſtalling or *menacing* he that has a Rent-charge or Rent-ſeck is foreſtalled or dare not come to the Land to ask the Rent behind it is a Diſſeiſin. Litt. S. 240.

15. *Denier of Rent-charge upon the* * *Land* is a Diſſeiſin. *Contrà if it be off from the Land*, quod non negatur. Br. Diſſeiſin, pl. 69. cites 14 E. 4. 4.

* Orig. is (Tenant.)

16. *And* if *Leaſe* be made *rendering Rent, and for Default* of Payment *a Re-entry* there if the Tenant denies the Rent upon the Land, the Leſſor may re-enter, but Contra off from the Land; *Quære* inde. Br. Diſſeiſin pl. 69. cites 14 E. 4. 4.

17. If a Man grants a *Rent-Seck out of Land in one County payable at a certain Day and Place in another County*, and the Grantee is ſeiſed thereof, if the *Grantee comes to the Place appointed for the Payment*, and there demands the Rent upon the Day accordingly, if the Rent be denied this is no Diſſeiſin of the Rent as it ſhall be upon a Denial upon the Land where the Rent is payable upon the Land. Plowd. Com. 71. a. an Inference by the Reporter from what went before. Hill. 4 & 5 E. 6. in Caſe of Kidwellie v. Brand.

The Father granted a Rent-Seck of 4 l. per Ann. to B. his Son, iſſuing out of Houſe call'd the Unicorn in L. payable at Lady-Day and Michaelmas, at the Houſe of the ſaid B. in L. to begin at Michaelmas after his Deceaſe, and gave 6 d. in Name of Seiſin. The Jury found the Grant and the Seiſin, and the Demand at the ſaid Houſe called the Unicorn, and that none was there to pay it. Reſolved it was a good Demand, being made at the ſaid Houſe out of which it was iſſuing, though not made at the Houſe where it was payable, and a Diſſeiſin for Non-payment of it. Cro. C. 507. pl. 12. Trin. 14 Car. B R. Smith v. Smith.

18. Diſſeiſin *cannot be* of Rent but *at a Man's Pleaſure*. Kelw. 113. a. pl 46. Caſus incerti Temporis.

3 Rep. 85. a. — 2 Sid. 75.

19. Note, that when Books ſay that a *Detainer* of a Rent-charge or Seck is a Diſſeiſin, it muſt be intended *upon a Demand* made. Co. Litt. 161. b.

20. *There be two Cauſes of Diſſeiſin of a Rent-Seck*, viz. *Denial and Incloſure*. Litt. S. 239.

Incloſure is a Diſſeiſin of a Rent-Seck becauſe the Grantee cannot come upon the Land to demand it. Co. Litt. 161. b.

21. The Mirror ſaith, that *Diſturbance of one that is in peaceable Poſſeſſion* doth amount to Diſſeiſin; as if the *Lord* that is in quiet Poſſeſſion of his Rent cometh to diſtrain, and is by the Tenant *diſturbed ſo as he cannot take a Diſtreſs*, this Diſturbance is a Diſſeiſin of the Rent. 2 Inſt. 414.

22. So when the Lord taketh a Diſtreſs, and the Tenant pays not his Rent, but diſturbs him by unjuſt Suit of a *Replevin*. 2 Inſt. 414.

And though a Replevin be brought and thereupon the Sheriff makes a Redelivery of the Diſtreſs to the Party by the Courſe of Law, yet this is a Diſſeiſin of the Rent-Service, becauſe by the Reſcue and the ſuing the Replevin the Lord is diſturbed of the Means by which he ought to have and come at his Rent, viz. Of the Diſtreſs. Litt. 161. a.

23. There are four Cauſes of Diſſeiſin of a *Rent-charge*, viz. *Reſcous*, *Replevin*, *Incloſure and Denial*; for a Denial is a Diſſeiſin of a Rent-charge as is ſaid before of a Rent-Seck. Litt. S. 238.

You may *add a Fifth*, viz. *Reſiſtance* to diſtrain, *Counter-pleading* and *vouching a Record and failing*. Litt. 161. b.

24. A *Diſtreſs* for the Rent is a Demand in Law, and then the *Non-payment is a Denial and Diſſeiſin.* Co. Litt. 161. b.

25. Whereſoever there is a lawful Demand of a Rent, and the ſame is not paid, whether the Tenant be preſent or abſent yet this a Denial in Law although there be no Words of Denial. It appears here that the Demand muſt be made upon the Land, and although the Tenant or any for him be there, yet muſt the Grantee demand it, becauſe *without a Demand there can be no Denier* in Deed, nor any in Law. Co. Litt. 153. b.

(A. 2) Of what Eſtate it may be. Particular Eſtate.

1. IF one who is only *Leſſee for Years enters upon him that has a good Title* he is a Diſſeiſſor of all the Fee Simple; Per Anderſon and Periam J. Goldsb. 43. in pl. 22. Mich. 29 Eliz.

If the *King's Leſſee for Years* be ouſted by a Stranger, yet the Reverſion being in the King he cannot be out of Poſſeſſion but at his Pleaſure. Cro. E. 34 Eliz. C. B. Wingate v. Mark.

2. Note, It was ſaid by Sir Francis Bacon the King's Solicitor, that it was adjudged the 40 Eliz. in the Exchequer, that where *Leſſee of the King for Life* was ouſted by a Stranger it ſhould be ſaid a Diſſeiſin of the particular Eſtate, againſt the common Maxim, that a *Diſſeiſin cannot be of a leſs Eſtate than a Fee Simple.* Godb. 138. pl. 166. 40 Eliz. in the Exchequer.

(A. 3.) What Poſſeſſion is an Impediment of a Diſſeiſin.

1. IF A. is ſeiſed of a *great Cloſe* where &c. and a *Stranger enters and occupies Part*, but A. continues in the Poſſeſſion of the Reſidue, he ſhall be judged in Poſſeſſion of the *Reſidue*, becauſe it is an entire Thing, cites 4 E. 4. 2. 8 E. 3. 13. Seiſin of Part of the Services is Seiſin of the Whole, cites Betſworth's Caſe. 2 Rep. Brownl. 230. Mich. 11 Jac. in Dame Pett's Caſe;

2. The *Poſſeſſion of a Houſe* is the Poſſeſſion *of the Land* for the Leſſee againſt the Leſſor of that which paſſes by one Demiſe; but if a *Stranger enters, ſevers, and Parts by Metes and Bounds*, nothing is wrought by the Poſſeſſion of the Reſidue, Arg. Brownl. 230. Mich. 11 Jac. in Dame Pett's Caſe.

4 Mod. 48. Hannam v. Woodford. S. C. held accordingly. — Skinn. 300 pl. 4. S. C. held accordingly; Per Holt C J. and Eyre J. —— 3 Lev. 312. Stephens v. Hannam, held accordingly.

3. If *Conuſor of a Statute* continues to keep Poſſeſſion after the Return of *Liberari feci*, the Conuſee's Eſtate is turned to a Right like the Caſe of Diſſeiſee's making continual Claim as ſoon as ever the *Diſſeiſee* leaves the Premiſes, the Continuance of Poſſeſſion by the Diſſeiſſor make a freſh Diſſeiſin. See 1 Inſt. 156. Litt. 129. and this is not like the Caſe of *Mortgagor* who continues in *by Conſent* and not in Oppoſition to the Mortgagee; Per Holt Ch. J. 2 Salk. 563. pl. 1. Trin. 3 W. & M. in B. R. Hammond v. Wood.

(A. 4) What is a Diſſeiſin; And what an Abatement; And Pleadings in ſuch Caſes.

1. ENTRY *ſur Diſſeiſin* by D. againſt A. who ſaid that Actio non, for he ſaid *that T. was ſeiſed and infeoffed two who gave to the Baron who is dead, and to this Feme Tenant then his Feme in Tail*, and gave *Colour*, and the *Plaintiff ſaid, that before the Donors any thing had, L. was ſeiſed in Fee, and gave to his Father and Mother in Tail who had Iſſue the Demandant, and the Father died, and the Mother ſurvived and died proteſtando ſeiſed, and the ſaid T. abated and infeoffed the Donors named in the Bar*, and the *Tenant maintained his Bar and traverſed that the Tenant did not abate after the Death of his Mother* &c. prout &c. and per Danby Juſtice the Title is not good; for he has ſhewn that his Mother died proteſtando ſeiſed, after whoſe Death the Tenant abated, which cannot be unleſs the Mother died ſeiſed in Fact; for if ſhe was diſſeiſed in her Life, it cannot be called an Abatement but a Diſſeiſin; for he cannot plead Abatement but where there was a dying ſeiſed in Fact, which all the Juſtices agreed; and per Priſot clearly, if the Abatement was well alleged the other may well traverſe it, and ſhall not be compelled to traverſe the Gift in Tail, by which the Demandant was intitled, but may traverſe the Abatement. Br. Pleadings, pl. 56. cites 38 H. 6. 18.

2. Abatement cannot be but upon Maintenance of Seiſin in Fact, and *not by Proteſtation*; Quod Nota per Cur. Br. Pleadings, pl. 59. cites 39 H. 6. 5.

3. The Caſe was, that in *Formedon of the Gift of W.* the *Tenant ſaid, that before the Donor any thing had, J. N. was ſeiſed, and gave to his Anceſtor in Tail, who by Proteſtation died ſeiſed, and W. abated and died, as in the Writ, and the Tenant re-entered as Heir*, and the Demandant ſaid that W. did not abate after the Death of the Father of the Tenant prout &c. and no Iſſue; for where there is no Abatement then it is not traverſable, by which he omitted the Proteſtation; Quod Nota. Br. Pleadings, pl. 59. cites 39 H. 6. 5.

4. If *after the Deceaſe of the Father* a *Stranger firſt enters* into Land *and abates*, and the *youngeſt Son* enters upon him, and *diſſeiſes him, and dies ſeiſed*, this is an Entry by Diſſeiſin, and not by Abatement, and ſo ſhall not bind the Eldeſt. Co. Litt. 242. b. ad finem.

(A. 5) Of what Eſtate or Things it may be.

1. OF *Things not manourable*, Hæreditamenta Incorporea, As Common, Corody, Office, Rent, &c. he that is ſeiſed of them has Election to have Aſſiſe, and to admit himſelf to be out of Poſſeſſion; Reſolved. 9 Rep. 51. a. Trin. 8 Jac. in the Earl of Salop's Caſe. * S. P. by Hobart Ch. J. Hob. 322

2. Of *poſſeſſory Things* an Expulſion may be made as well as a Diſſeiſin; and therefore if a Man made a *Leaſe for Years* of Land, and a Stranger puts out the Leſſee, he does alſo diſſeiſe him in the Reverſion; but if the Leſſor put him out, there is no Diſſeiſin committed, and yet the Leſſee has loſt his Eſtate, and has but a Right to it, and that A Termor cannot be diſſeiſed Cro. J. 679. pl. 15. Mich. 21 Jac. Johns v. Ridler

that whether he will or no; for though it be true, that when two are in Poſſeſſion the Poſſeſſion is judged in him that has Right, for he only poſſeſſeth though the other be in Poſſeſſion too, and takes away the Trees, Corn, or the like; yet, when the true Owner is clearly put out and removed, then he has no longer Eſtate or Poſſeſſion, but Right only, and has no Election to be in Poſſeſſion or not in Poſſeſſion, as that Caſe ſtands, and therefore clearly he cannot now grant this Term; And if the Leſſor brings an Action of Debt for his Rent due at Michaelmas, the Leſſee ſhall plead that he did enter upon him and put him out, and he continued his Poſſeſſion at the Term, for he cannot have Rent out of that Land that he himſelf poſſeſſes; and if the Leſſor after ſuch Expulſion dies, the Land ſhall deſcend in Poſſeſſion to the Heir, and the Executor ſhall not claim that that was a Leaſe; for a Term never bears a Que Eſtate; but it is true, that there are certain Caſes wherein a Poſſeſſion cannot be gained; Per Hobart Ch. J. Hob. 322. Paſch. 17 Jac. in Caſe of Elvis v. York (Archbiſhop) & al'.

(B) Reſcous.

[*By whom. Stranger.*]

1. IF a Man diſtrains for a Rent-Service, and a Stranger reſcues the Diſtreſs in the Name of the Tenant, this is a Diſſeiſin of the Rent. 56 H. 3. Itinere Stafford 16. per Curiam.

2. If Lord and Tenant are, and the Tenant detains the Rent, and the *Lord diſtrains* for it, and *two Strangers make Reſcous*, *the Tenant being abſent*, they are all Diſſeiſors, and yet the Force is only in thoſe two that made the Reſcous; Per Dyer and Weſton. Mo. 53. pl. 155. Paſch. 5 Eliz.

(C) *What Act* ſhall be ſaid a Diſſeiſin.

Br. Aſſiſe, pl. 114 cites S. C. Brooke ſays it ſeems that the King did not take but for Year, Day, and Waſte, and

1. IF Baron and Feme purchaſe Lands in Fee, and after the Baron is attainted of Felony, and the King ſeizes the Land, and after the Lord, of whom it is held, upon his Suggeſtion hath it delivered to him out of the Hands of the King as his Eſcheat, this is a Diſſeiſin to the Wife, who had a joint Eſtate with her Huſband; for it was delivered out of the Hands of the King by a falſe Suggeſtion, and ſo a Diſſeiſin to the Feme. 4 Aſſ. 4. adjudged.

then the Entry of the Lord by the Livery obtained by falſe Suggeſtion made the Diſſeiſin, and was no Diſſeiſin during the Poſſeſſion of the King. —— Br. Reſeiſer, pro Rege, pl. 16. cites S. C. —— Br. Forfeiture de Terres, &c. pl. 28. cites S. C. —— Tit. Aſſiſe, (E) pl. 1. cites S. C. —— Fitzh. Aſſiſe, pl. 166. cites Mich. 4 E. 3. 47. S. P.

Cro. E. 639. pl. 41. Hemſley v. Price, S. C. & S. P. held accordingly

2. If a Man deviſes Capite Lands to his youngeſt Son, and dies, which is void for a third Part, and after the Deviſee enters into the whole generally, which is an Entry for the eldeſt Son alſo, and after leaſes the whole to another for Years, yet this is not any Diſſeiſin to the Eldeſt, for one Tenant in common cannot be ouſted without

ſee Co. Litt. 373. b. 374. a. as to coparceners.

out an actual Ejectment. M. 40, 41 Eliz. B. R. between *Hempſley and Brice*, per Curiam. per tot. Cur præter Fenner. ——

Mo. 546. pl. 729. Himley v. Brice, S. C. adjudged no Diſſeiſin becauſe there was no Expulſion, but held that Leaſe for Life with Livery would have made it a Diſſeiſin —— Where there were two Copartners of an Houſe, and the one entered generally, and made a Leaſe for Life by the Name of All that his Houſe &c. The Queſtion was, whether all or the Moiety only of the Houſe paſſed? Popham and Fenner held that the entire Houſe paſſed; for when he ſays, All that my Houſe &c. that intended the whole Houſe, and by his Livery made he gained the intire and gave the intire, altho' by his general Entry it is not intended that he entered into more than to what he had right; but Gawdy e contra; For as his Entry prima facie does not gain more than he had Right to demand, no more ſhall this Leaſe; And Foſter at the Bar cited, that it was adjudged in this Court in Reignold's Caſe according to the Opinion of Popham. Cro. E. 615. pl. 4 Trin. 40 Eliz. Gerry v. Holford.

3. So it will be if the Deviſee levies a Fine of the whole. Ibidem, per Curiam.

4. If a Man leaſes ſeveral Acres for Years, rendring one intire Rent, and * the Leſſee is ouſted of one Acre by a Stranger, and afterwards this notwithſtanding pays the intire Rent to the Leſſor, yet this ſhall not continue Seiſin of the Leſſor of the whole, but he is diſſeiſed of the ſaid Acre. M. 11 Ja. B. R. dubitatur. * Fol. 659. Brownl. 230 Dame Pett's Caſe, S. C. but no Judgment.

5. If a Man hath an Houſe and locks it, and departs, and another comes to his Houſe, and takes the Key of the Door into his Hand, and ſays that he claims the Houſe to himſelf in Fee without any Entry into the Houſe, this is a Diſſeiſin of the Houſe. P. 15 Ja. B. *Plot's Caſe*, admitted clearly upon Evidence at the Bar in an Aſſiſe taken by Default.

6. If A. cuts Trees in his own Soil, and B. that has Common there ſays the Soil is his Soil, and commands him that he cut nothing &c. upon which A. departs out of the Land, yet this is not any Diſſeiſin to him, for he that has no Right cannot be ſeiſed of a Freehold by Parol. 26 Aſſ. 17. adjudged. Br. Diſſeiſin, pl. 42, (41) cites S. C. —— Fitzh. Aſſiſe, pl. 237. cites S. C. ——

Br. Aſſiſe, pl. 263. (262.) cites S. C.

7. If a Man that has Right to enter into Lands, in coming towards the Land is diſturbed from entering, this is a Diſſeiſin. 26 Aſſ. 17. Br. Diſſeiſin, pl. 42 (41.) cites S. C. —— Br. Aſſiſe, pl. 263. (262.) cites S. C. —— Fitzh. Aſſiſe, pl. 237. cites S. C.

8. If a Stranger receives of my Tenant by voluntary Payment, without Coercion of Diſtreſs, the Rent due to me, this is a Diſſeiſin to me at my Election. 40 Aſſ. 19. Br. Aſſiſe, pl. 61 (60) cites S. C. —— If my Tenant pays his Rent to a Stranger without Coertion he is a Diſſeiſor, and if by Coertion, both are Diſſeiſors. Br. Diſſeiſin, pl 97. cites 23 H. 3. and Fitzh. Aſſ. 434 ——— Litt. S. 588, 589. and Co. Litt. 323 b. S. P. ——— S. P. by Hobart Ch. J. Hob 322. ——— 9 Rep. 51. a. S. P. reſolv'd ——— Cro. C. 503. Paſch. 9 Car. B. R. per Cur. S. P. ——— 2 Sid. 75. Paſch. 1658. B. R. in Caſe of Crouch v. Wills S. P. and cites Litt. ——— If one receives my Rents without my Conſent, I may charge him as my Receiver or make him a Diſſeiſor at my Election; Per Roll Ch. J. and Curiam. Sty. 407 Hill. 1654

9. If a Man enters into my Houſe by my Sufferance, without claiming any Thing from me, this is not any Diſſeiſin. 11 E. 3. Aſſiſe 86. adjudged.

10. If the King be ſeiſed in Fee of the Manor of B. and a Stranger erects a Shop in a vacant Plat of the Manor, and takes the Profits thereof without paying any Rent to the King, and after the King grants over the Manor in Fee, and the Stranger continues afterwards in S. C. cited Arg. 2 Le. 147. in pl. 182. Berry v. Goodman

——Ow. 96. S P. Arg. in S. C.—— In an Ejectment the

in the Shop, and occupies it as before, yet this Continuance is not any Diſſeiſin, becauſe the firſt Entry was not any Diſſeiſin. D. 9. 10 El. 266. 10 Co. 4. *Adams and Lambert* 103. reſolved.

Caſe was, The King was ſeiſed of Lands in Fee, and a Stranger intruded, and the King grants this Land to J. S. in Fee, and the Intruder continues Poſſeſſion, and dies ſeized; The Queſtion was if this Deſcent ſhall take away the Entry of J. S. Johnſon, ſaid it ſhall not; for none will affirm that an Intruder ſhall gain any Thing out of the King, but that the Land ſhall paſs to the Patentee, and the Continuance of the Intruder in Poſſeſſion, and his dying ſeiſed ſhall not take away the Entry; For he cannot be a Diſſeiſor, becauſe he gained no Eſtate at the Beignning. Cook contra; By this Continuance of Poſſeſſion he ſhall be accounted a Diſſeiſor, and the Freehold out of the Patentee, for another Eſtate he cannot have, for Tenant at Sufferance he is not, for he comes in at firſt by a Title; But a further Day was given Cook to ſhew Cauſe why Judgment ſhould not be given againſt him. Ow. 95. Hill. 31 Eliz. Beron v. Goodyne.

11. [So] If a Man enters into certain Land, Parcel of a Manor which is in Ward of the King by reaſon of the Monage of J. S. and takes the Profits as Owner thereof, and after J. S. ſues Livery, and after the Intruder continues the Poſſeſſion, and the taking the Profits as before, yet the Continuance ſhall not be any Diſſeiſin to J. S. becauſe the firſt Entry was not any Diſſeiſin. M. 17 Ja. B. R. between the Lord *Sands and* the College of *Corpus Chriſti* in *Oxon*, reſolved per Curiam, and the Jury directed accordingly.

12. If there be Tenant at Sufferance, and a Stranger not having any Right to the Land makes a Leaſe to him by Indenture, rendring Rent, without putting the Tenant at Sufferance out of Poſſeſſion, and the Tenant pays the Rent to the Stranger, this is not any Diſſeiſin to him that had Right. P. 3. Ja. B. R. between *Prenſon and Stone*, per Curiam, upon Evidence.

13. If Guardian by Nurture makes a Leaſe by Indenture to one, being under the Title of the Infant, rendring Rent to himſelf which is paid accordingly, yet this is not any Diſſeiſin to the Infant. P. 3 Ja. B. R. per Tanfield.

If a Guardian after the full Age of the Heir continues in Poſſeſſion, he is no Tenant at Sufferance but an Abator

14. If Guardian in Chivalry continues the Poſſeſſion of the Land in Ward after the full Age of the Ward, without Title, this is a Diſſeiſin to the Heir becauſe he comes in by the Law, and therefore the Continuance beyond the Time which the Law hath limitted, and againſt the Truſt repoſed in him by the Heir, and the Law makes it a Diſſeiſin to the Heir, who was never out of Poſſeſſion, but the Guardian was ſeiſed in his Right. 7 H. 4. 42. per Culpepper.

againſt whom an Aſſiſe of Mortdanceſtor lies. Co. Litt. 578. —— He is an Abator becauſe his Intereſt comes by Act in Law. Co. Litt. 271. a—— Ow. 28. Arg. cites S. C. that the Eſtate ſhall be judged in Fee. —— 2 Inſt. 134. S. P. and ſays this is proved there by the Statute of Marlbridge, cap. 16. —— Ow. 96. Arg. ſays that if a Guardian continues in Poſſeſſion after the Heir is of full Age he is no Diſſeiſor, nor ſhall gain any Eſtate.

15. If Leſſee for Years holds over his Term, yet he is not any Diſſeiſor, becauſe he comes in by the Act of the Party; but he is call'd (*) a Tenant at Sufferance; Tempore H. 8. S. 356. †9 H. 7. 24. per Curiam. Dubitatur, ‖ 22 E. 4. 38. b.

* Fol. 660.

† Br. Diſſeiſin, pl. 63. (62) cites S. C & S. P. unleſs the Leſſor enters in fact

‖ Br. Eſtates, pl. 46. cites S. C. but Brooke ſays, that it ſeems to him that he is not a Diſſeiſor before Regreſs of the Leſſor, but he continues by his firſt Entry, and therefore this ſeems to be the Reaſon why Writ of Entry ad Terminum qui præteriit lies againſt ſuch Termor as holds over his Term

If a *Termor holds over* his Term there an Eſtate in Fee is conſeſt to be in him by matter of Law. But it is a Doubt whether he be a Diſſeiſor or not. But it ſeemeth not, For a *Treſpaſs lies not againſt him before Regreſs*. Arg. Ow. 28. cites 22 E. 4. 38.

16. It

16. If *Guardian takes Feoffment* [*of the Infant*] *in Cuſtodia ſua* this is Diſſeiſin, and he ſhall be impriſoned if the Infant will bring Aſſiſe againſt him, and the Matter be found, quod nota. Br. Aſſiſe, pl. 451. cites 8 E. 2. and Fitzh. Aſſiſe, 395. Itinere Canc. Br. Diſſeiſin pl. 95 (94) cites S. C.

17. If a Man will *diſtrain for Rent-Service by Doors and Windows* and one prohibits him, this is a Diſſeiſin, but not with Force and Arms. Br. Aſſiſe, pl. 465. cites 3 E. 3. and Fitzh. Aſſ. 469.

18. If *two Infants are Jointenants*, and the *one releaſes to the other*, by which *he holds the Whole*, this is a Diſſeiſin as it is ſaid; For it ſeems that the Releaſe of an Infant is void as to the Intereſt of the Land; Contra if he made Livery. Br. Diſſeiſin, pl. 19. cites 7 Aſſ. 17.

19. *Guardian* of an Infant *infeoffed J. N. of the Land of the* Infant, and the Infant brought Aſſiſe without Entry, and the Plaintiff recovered; For *the Entry of the Feoffee is a Diſſeiſin*, quod nota, and this ſeems to be by the Statute of *Weſtminſter* 2. *cap.* 25. which wills that where a Guardian or Termor makes a Feoffment, that as well the Feoffor as Feoffee ſhall be taken for Diſſeiſors. Br. Diſſeiſin, pl. 22. cites 8 Aſſ. 28.

20. If *A. has Common in the Land of B.* and *B. comes with his* Family *and incloſes the Land* ſo that A. cannot uſe his Common, there *B. and his Family are Diſſeiſors. So if the Family come in Aid of him.* Br. Diſſeiſin, pl. 79. cites 8 Aſſ. 18.

21. In Aſſiſe the *Father infeoffed his Son within Age*, and after the *Father enter'd to the Uſe of the Infant as his Ward, and* after *infeoffed J. S.* and the Father died, and the *Infant brought Aſſiſe* againſt the Feoffee *without Entry*, and becauſe the Entry of the Father was to the Uſe of the Infant, and the Feoffee by his Entry was a Diſſeiſor, therefore the Infant recover'd. Br. Diſſeiſin, pl. 94 cites 8 E. 3 432. and Fitzh. Aſſiſe 146.

22. Where *a Man is diſturbed of the Mean, by which he cannot take his Profit of a Thing, this is a Diſſeiſin of the Thing itſelf.* As of miſturning of Water by which the Mill cannot Grind, Aſſiſe lies of the Mill, and of diſturbing my Way to my Common, Aſſiſe lies of the Common as it is ſaid elſewhere. Br. Aſſiſe, pl. 148. cites 9 Aſſ. 19. Br. Diſſeiſin pl. 25. cites 9 Aſſ. 19. S. P.

23. Note, Per Cur. in Aſſiſe that where a Man *gives to the Tenant in the Aſſiſe all the Tenements which he had in B. except a Chamber in which he lay ill, and after the Seiſin he gave the Chamber and removed himſelf into the Hall*; if this Removal be by the Sufferance of the Feoffee, claiming nothing to his own Uſe, and ſo pleaded or given in Verdict, this is not a Diſſeiſin; Quod Nota; and ſo ſee that *Entry by Sufferance claiming nothing to his own Uſe* is not a Diſſeiſin. Br. Tenant per Copie. pl. 7. cites 11 Aſſ. 6 Br. Diſſeiſin pl. 28. cites S. C,

24. In Aſſiſe *Baron and Feme purchaſed the Land in Fee*, and after the *Baron aliened to his youngeſt Son in Fee within Age*, and after the *Baron and Feme entered into the Tenements with Aſſent of the Feoffee* who was yet *within Age*, and after the Baron died, and the Feme continued Seiſin and died, and the eldeſt Son entered as Heir, and the youngeſt who was infeoffed brought Aſſiſe and recovered by Award; for the Aſſent was void, becauſe he was within Age, and ſo the *Entry of the Baron and Feme a Diſſeiſin*, Quod Nota. Br. Aſſiſe. pl. 169. cites 11 Aſſ. 14. Br. Diſſeiſin pl. 30. cites S. C.

25. A Man made *Simple Deed of Feoffment* and Letter of Attorney accordingly, and the *Attorney delivered the Seiſin upon Condition*, and therefore a Diſſeiſin by Award. Quære, where it is of two Acres and Livery of Seiſin of the one, for in one Caſe he exceeds his Warrant, and in the other he diminiſhes it. Br. Feoffments de Terres pl. 25. cites 12 Aſſ. 24. Br. Diſſeiſin, pl. 34. cites S. C. — So if a Man makes a Deed of *Feoffment with Letter of Attorney to deliver Seiſin upon Condition*, and *he delivers it ſimply* the Attorney is a Diſſeiſor, and the Feoffor may ſay that nothing paſſed by the Deed. Br. Diſſeiſin, pl. 71. cites 1 H. 4 3.

26. In

26. In Aſſiſe it was found that the *Conuſor upon a Statute-Merchant after Execution ſued againſt him took the Conuſee by Force and ſwore him that he ſhould render him the Land*, and *after he voluntarily releaſed all Actions of Debt and Treſpaſs, and alſo voluntarily ſurrendered the Land*, and this Oath he took for Fear of Death, and therefore notwithſtanding that the Surrender was made at Large, yet becauſe it was made by reaſon of Diſtreſs before, therefore Perning adjudged it a Diſſeiſin when the Conuſee entered by ſuch Surrender. Br. Dureſs pl. 11. cites 14 Aſſ. 20.

27. A Man *leaſes for Life rendering Rent with Clauſe of Re-entry for Non-Payment*, and came after and *diſtrained* for the Rent, *and being poſſeſſed of the Diſtreſs re-entered*, and this was awarded a Diſſeiſin, inaſmuch as he entered being poſſeſſed of the Diſtreſs. Br. Diſſeiſin, pl. 81. cites 14 Aſſ. 11.

S. P. nor he has not Day in Court to plead. Br. Diſſeiſin. pl. 41. cites S. C.

28. *Tenant in Tail is bound in a Statute-Merchant and dies*, and *Execution is ſued againſt the Iſſue*, this is Diſſeiſin; becauſe by ſuch Execution there is *no Garniſhment* made *to the Heir*. Br. Aſſiſe, pl. 214. cites 17 Aſſ. 21.

Br. Diſſeiſin, pl 92. cites S. C.

29. *Tenant in Tail* was *bound in a Statute-Merchant* and *died*, and the *Conuſee made his Executors and died*; the *Executors ſued Execution againſt the Iſſue*, and *made Joint Eſtate to two*, and *the ſame Day the Iſſue brought Aſſiſe*, and all this found, by which the Plaintiff recovered, and yet the Jointenancy was pleaded, but becauſe the Joint-Eſtate was made the Day of the Teſte of the Writ, and the Executors were named who were Tenants the Day of the Writ, and the Seiſin and Diſſeiſin found, therefore the Plaintiff recovered; for *the Execution was a Diſſeiſin to the Iſſue*, quod mirum; for it is *made by the Sheriff by Writ* as it ſeems. Br. Aſſiſe, pl. 406. cites P. 18. E. 3. Fitzh. Aſſ. 77.

30. *Guardian* in Chivalry *aſſigned Dower to one who was not the Wife of the Ward's Father*; if *ſhe enters* ſhe is a Diſſeiſoreſs as to the Ward. Br. Receipts, pl. 50. cites 21 E. 3, 4.

S. P. Br. Diſſeiſin pl. 104.

31. *Reaping of Grain with Sickles* is Diſſeiſin with Force. Br. Brief, pl. 430. cites 21 E. 3, 34.

32. *If none inhabit or manure the Land*, and the Rent is demanded, it is Diſſeiſin, and Aſſiſe lies thereof, and *Reſcous, Replevin and Incloſure*, are Diſſeiſins *of Rent-Service*; And Reſcous, Replevin, Incloſure and Denier, are Diſſeiſins of *Rent-Charge*; And Denier and Incloſure are Diſſeiſins of *Rent-Seck*; And Menace is a Diſſeiſin of all thoſe Rents; And ſo ſee that the ſuing of Replevin is a Diſſeiſin of Rent-Service and Rent-Charge. Br. Diſſeiſin, pl. 103. cites 21 E. 3, 4.

Br. Diſtreſs, pl. 33. cites S. C.

33. In Aſſiſe it was ſaid, that *Sovent Diſtreſs* is no Diſſeiſin but *where the Lord diſtrains*; for if a Stranger diſtrains the Tenant may make Reſcous as it ſeems; Quære, for the Plaintiff durſt not demur. Br. Diſſeiſin, pl. 46. cites 27 Aſſ. 51.

34. If a Man *incroaches* 10 *s. Rent of my Tenant* by Diſtreſs *who holds of me by* 10 *s. Rent* yet this is no Diſſeiſin to me; for it cannot be intended my Rent, and if I diſtrain and the Tenant and he who incroaches make Reſcous I ſhall have Aſſiſe againſt my Tenant alone, and not againſt the Incroacher; per Thorp. But Brooke ſays, It ſeems that he ſhall have Aſſize againſt both if he will. Br. Diſſeiſin, pl. 14. cites 24 E. 3, 40.

35 If a *Ward enfeoffs his Guardian in Socage* the Entry of the Guardian upon this Feoffment is a Diſſeiſin. 2 Roll Remitter, (G) pl. 3. cites 35 Aſſ. 8. adjudged.

36. *So* if Attorney be to deliver Seiſin *after the Feoffor's Death and he delivers it during his Life* he is a Diſſeiſor. 2 Roll 9. (S) pl. 1. cites 40 Aſſ. 38. Curia.

37. In

37. In an Aſſiſe between two *Tenants in Common* a *Forbidding by Word of Mouth* to the Tenant to pay his Rent was adjudged a Diſſeiſin. Raym. 371. cites Mich. 47 E. 3. 22. a. pl. 51.

38. *Menance of Death*, and *Incloſure of Land*, ſo that the Lord cannot diſtrain, are Diſſeiſins of Rent-Service, Quod Nota. Br. Diſſeiſin, pl. 87. cites 49 Aſſ. 5.

38. If a Man *makes Diſſeiſin and carries away Goods*, he ſhall be adjudged Diſſeiſor with Force, and ſhall be impriſoned; Per Tremail and Hank. Br. Damages, pl. 51. cites 11 H. 4. 16.

39. If a Letter of *Attorney be to deliver Seiſin upon Condition*, *and he delivers it without* Condition, this is not good, but is a Diſſeiſor. 2 Roll. 9. pl. 14 cites 11 H. 4. 3.

40. When any *diſtrains ſo outragiouſly*, that is, ſo often as the Tertenant cannot plough, or duly uſe his Ground, this amounts to a Diſſeiſin. 2 Inſt. 414. cites the Mirror, cap. 2. S. 25.

41. A Diſſeiſin *is* properly where a Man enters into any Lands or Tenements where his Entry is not lawful and ouſts him that has the Freehold. Litt. S. 279.

Co. Litt. 181. a. notes here, that every Entry is not a Diſſeiſin unleſs there be an Ouſter alſo of the Freehold. —— And. 134. pl. 184. Hill. 27 Eliz. S. P. cites 41 E. 3. 40. and 5 E. 4. 6.

42. Note for Law, if *Tenant at Will*, *or at Sufferance*, *makes Feoffment in Fee*, he is a Diſſeiſor, viz. the Tenant at Will, by making of the Feoffment. Br. Diſſeiſin, pl. 64. cites 3 E. 4. 17.

43. Where the *King enters* into my Land *without Title*, the *Franktenement remains in me.* Br. Diſſeiſin, pl. 65. cites 7 E 4. 19.

44. If *Tenant at Will or for Years makes a Feoffment* he is a Diſſeiſor by the Common Law, and the Statute of Weſtm. 2. cap. 25. *Quod vivente altero eorum* is only a Recital of the Common Law. Br. Diſſeiſin, pl. 66. cites 10 E. 4. 18.

45. If *Tenant at Will*, *or* Tenant *by Sufferance* at Will, *make a Leaſe for Years*, this is a Diſſeiſin to the firſt Leſſor, and the Tenant at Will thereby gains Franktenement; By all the Juſtices. Br. Diſſeiſin, pl. 68. (67.) cites 12 E. 4. 12.

46. If *an Infant makes a Leaſe for Years*, and the *Leſſee enters*, the Infant ſhall have Aſſiſe; Per Brian, and affirmed by Huſſey, Fineux, and Frowicke. Br. Diſſeiſin, pl. 63. cites 9 H. 7. 24

47. *And* if a Man makes *a Leaſe by Dureſs*, and the *Leſſee enters*, the Leſſor ſhall have Aſſiſe. Br. Diſſeiſin, pl. 63. cites 9 H. 7. 24.

48. *But* if an *Infant makes a Feoffment and* makes *Livery*, the Infant ſhall not have Aſſiſe. Br. Diſſeiſin, pl. 63. cites 9 H. 7. 24.

49. *So* of *Feoffment and Livery by Dureſs*, the Feoffor ſhall not have Aſſiſe. Br. Diſſeiſin. pl. 63. cites 9 H. 7. 24.

50. *But* if the *Infant*, *or a Man in Priſon*, *makes Letter of Attorney to deliver Seiſin*, there they ſhall have Aſſiſe. Br. Diſſeiſin, pl. 63. cites 9 H. 7. 24.

51. *But* where a Man *leaſes for* Term de *auter Vie*, *or* for *Years*, *and Ceſty que Vie dies*, *or the Term expires*, the Leſſor *ſhall not have Aſſiſe againſt the Occupier without Entry in Fact.* Br. Diſſeiſin, pl. 63. cites 9 H. 7. 24. per Brian, and affirmed by Huſſey, Fineux, and Frowike, quod fuit conceſſum per tot. Cur. and Brooke ſays it ſeems to be good Law.

52. Leſſee for Life makes Deed of Feoffment, and delivers it, and makes Letter of Attorney to A. who *enters and makes Livery accordingly*; Adjudged that the *Attorney* is a Diſſeiſor. 4 Le. 7. pl. 29. 26 Eliz. B. R. King v. Cotton.

53. If a *Wife grants a Rent-Charge*, or makes a *Leaſe*, and the *Grantee enters*, this is a Diſſeiſin; Arg. Goldsb. 13. pl. 13. Paſch. 28 Eliz.

54. Where a Man has Poſſeſſion of Lands, his Continuance therein cannot gain to him any Intereſt, or increaſe his Eſtate, without ſome other Act done of later Time. If the Guardian *continues in Poſſeſſion* after the full Age of the Heir, he is not a Diſſeiſor, nor has any greater Eſtate in the Lands. And upon the Book of 21 E. 3. 2. this Caſe was collected; The Tenant of the King dies, his Heir within Age; a Stranger intrudes; the Heir at full Age ſues his Livery out of the King's Hands; the Intruder dies in Poſſeſſion. The ſame Deſcent ſhall not take away Entry. 2 Le. 147. pl. 182. Trin. 30 Eliz. B. R. in Caſe of Berry v. Goodman.

55. If *Copyholder in Fee* dies ſeiſed, and the Lord *admits a Stranger* to the Land who enters, he is but Tenant at Will, and not a Diſſeiſor to the Copyholder who has the Land by Deſcent, becauſe he comes in by the Aſſent of the Lord &c. 3 Le. 210. pl. 274. Trin. 30 Eliz. B. R. Anon.

56. Woman Tenant in Tail marries; Husband makes Feoffment in Fee and dies; *Wife without any Entry made leaſe for Years.* The Freehold is not reduced without Entry. Le. 122. pl. 165. Trin. 30 Eliz. B. R. Page v. Jordan.

58. *General Entry* amounts to a Diſſeiſin. As if *A. makes Leaſe* for Years *of the Land of B.* Leſſee enters by Force of that Leaſe; now Leſſor *without any Entry* is a Diſſeiſor. Le. 122. pl. 165. Trin. 30 Eliz. B. R. Page v. Jordan.

But if *Leſſee at Will makes a Leaſe for Years to commence in futuro*, it is not a *preſent Diſſeiſin.*

59. If *Tenant at Will, or* for *Years, or at Sufferance, make a Leaſe for Years* this is a Diſſeiſin, and a Tenant at Will doth thereby gain a Freehold, and claims a greater Eſtate than he ought; Per all the Juſtices. Ow. 28. Rouſe's Caſe.

Noy 56. in Caſe of Cooper v. Columbell.

But if he holds over againſt the Will of his Leſſor, then he is a Diſſeiſor.

60. *Leſſee Pur auter Vie holds over* after the Death of Ceſty que Vie; He is only Tenant at Sufferance, and not Diſſeiſor, and has no Fee. Ow. 27. 29. Rouſe's Caſe.

2 Le. 45. pl. 59. Hill. 29 Eliz. B. R. Arg. in Caſe of Rouſe v. Artois, S. C. cites 10 E. 4.

So if he does act after ſuch Continuance of Poſſeſſion contrary to the Will of his Leſſor, he is a Diſſeiſor. Ibid. cites S. C.

4 Le. 30 pl. 84. S. C. in totidem Verbis. —— But if a *Stranger enters upon the King's Farmer*, he by ſuch Entry hath gained the Eſtate for Years, and if he makes a Leaſe to another, his Leſſee may maintain Ejectment. 3 Le. 206. pl. 265. Paſch. 30 Eliz. in the Exchequer. —— It was ſaid by Bacon, the King's Solicitor, to be adjudged, 40 Eliz. in the Exchequer, that where *the King made a Leaſe for Life, and the Leſſee was ouſted by a Stranger*, that the ſame ſhould be ſaid a Diſſeiſin of the Particular Eſtate contrary to the common Ground, viz. That a Man cannot be diſſeiſed of a leſs Eſtate than of a Fee-Simple.

61. A *Copyholder of Inheritance* of a Manor in the Hands *of the King is ouſted* [by J. S.] It was held in ſuch Caſe, that he [J. S.] has not gained any Eſtate ſo as he may make a Lease for Years, upon which his Leſſee may maintain Ejectment, but he has only a Poſſeſſion againſt all Strangers. 3 Le. 221. pl. 294. Paſch. 30 Eliz. B. R. Anderſon v. Hayward.

62. If *Conuſor of a Fine* ſur Conuzance de Droit come ceo &c. *continues Poſſeſſion*, he is a Diſſeiſor, and not Tenant at Will or Sufferance, and a Præcipe lies againſt him. Goldsb. 82. pl. 24. Hill. 30 Eliz.

63. If

63. If *Tenant par auter Vie is diſſeiſed and dies*, yet he remains a Diſſeiſor, and the Occupancy does not qualify ſuch Diſſeiſin; ſaid Arg. 2 Le. 121. pl. 167. Mich. 33 Eliz.

64. *A. ſeiſed* of Land *makes a Feoffment* thereof *to B, upon Condition to convey it to A. for Life*, Remainder *to the eldeſt Son of A. in Fee. A. takes the Profits, and makes a Leaſe* of the Land *to C. for Years*, and yet *continues the Poſſeſſion* in himſelf. B. acknowledges a Statute to a Stranger. The Years expire. A. makes a Feoffment of this Land with Warranty to his ſecond Son. B. enters in the Life of A. and infeoffs the elder Son. This Feoffment was good and lawful, and ſo adjudged and affirmed in Error. Reſolved, That A's taking the Profits, and making a Leaſe for Years, was a Diſſeiſin to B. aud ſuſpended the Condition. Ceſtuy que Uſe at Common Law, or *Ceſtuy que Truſt*, at this Day, *takes the Profits*; it is not a Diſſeiſin; for the *Feoffee conſentit tacendo*, and in the principal Caſe there was neither Uſe nor Truſt, but an Eſtate paſſed upon Condition. Jenk. 253. pl. 44.

65. A. *Tenant for Life*, the Remainder *in Fee to B.—A. made a Leaſe for Years to* J. S. The *Leſſee entered. A. granted* the Tenements *to C. habendum from* the Feaſt of *Michaelmas following for Life. J. S. attorns. C. enters, and makes a Leaſe at Will, to whom A. levied a Fine* come ceo &c. *B. entered.* In this Caſe it was reſolved, that when C. entered by Colour of the Grant, he was a Diſſeiſor. 2 Rep. 55. b. the 3d Reſolution, Mich. 39 & 40 Eliz. in Buckler's Caſe.

67. A Diſſeiſin *is* when one enters intending to uſurp the Poſſeſſion, and to ouſt another of his Freehold. Cro. C. 303. cites Co. Litt. 153. b.

68. If *Tenant at Will grants over his Eſtate* to another, and the *Grantee enters*, he is a Diſſeiſor, and the Leſſor may have an Action of Treſpaſs againſt the Grantee, for although the Grant was void, yet it amounted to a Determination of his Will. Co. Litt. 57. a.

This Caſe is queſtioned, 3 Mod. 150. and ſays, that it is not known what Ground Lord Coke had for ſuch Opinion, that the Year Books quoted in the Margin will not warrant it; for they are in no Sort parallel; that the Caſe in 27 H. 6. 3. is no more than that Tenant at Will cannot grant over his Eſtate, becauſe he has no certain or fixed Intereſt in it, and much to the ſame Purpoſe is the Book of 22 E. 3. there cited.

69. If *Bargainor after Inrolment* continues Poſſeſſion, he is a Diſſeiſor; for the Statute transfers the Franktenement to the Bargainee. Noy 106. Bellingham v. Alſop.

70. When the *Leſſee* by his own Act or Sufferance *does a Thing* in alteration of the Poſſeſſion, of which by common Intendment the *Leſſor* cannot have or take Notice, there the Law will not prejudice the Leſſor, ſo as to make it a Diſſeiſin. Arg. Brownl. 230. Mich. 11 Jac. in Dame Pett's Caſe.

71. If *A.* be *ſeiſed of a great Cloſe*, where &c. and a *Stranger enters and occupies Part* of the Cloſe, yet notwithſtanding *A. continues the Poſſeſion of the Reſidue.* The Queſtion was, Whether this ſhall preſerve his Poſſeſſion in the Reſidue and he ſhall be judged to be in Poſſeſſion of that becauſe it is an intire Thing? Haughton was of Opinion that it was a Diſſeiſin, and Doderidge ſaid it would be miſchievous if it ſhould. Brownl. 230. Mich. 11 Jac. Petts's Caſe.

72. Father dies, the *eldeſt Son beyond Sea*, the Youngeſt may enter; But if he keeps out his Brother after his *Return*, he is now Diſſeiſor. Per Doderidge J. Palm. 416. Paſch. 1 Car. B. R. Mayo v. Strumpling.

73. *Entry*

Such * Entry is a Diſſeiſin though he continu'd his Poſſeſſion after the Commencement of the Term. Lev. 45 Hennings v. Brabaſon.—Clayt. 27 Metcalf v. Stavely.——— 8 Mod. 53. Sheers v. Lammas, but no Judgment.——But adjudg'd, 54 Mackdonald v Weldon; That it is no Diſſeiſin where the Continuance in Poſſeſſion was † by the *Conſent of Leſſor*.——If there was any Agreement or Aſſent that the Leſſee ſhould enter it cannot be any Diſſeiſin. Arg. Le 296. in Caſe of **Criſp v. Golding.** ——— And if *Rent incurrs afterwards*, Debt lies for the Leſſor on the Privity of Contract. Cro. E. 169. Alexander v. Dyer.———For the Leſſee cannot deſtroy the Contract unleſs he makes a Feoffment. Per Jones J. Godb. 384. pl. 472. Paſch. 3 Car. B. R. Green v. Moody. —— He hath not but for Years in reſpect of his Claim. See Godb. 385. in Caſe of Green v. Moody.

* Cro. E. 766. in Caſe of Douglaſs v. Shank.

† Cro. E. 906. Waller v. Campion.

73. *Entry of Leſſee by Deed for Years before the Term* is no Diſſeiſin, unleſs an Expulſion is alleged. Cro. J. 684. pl. 2. Hill. 21 Jac. B. R. Brookbank v. Taylor.

Litt. S. 588, 589. S. P.

74. If a Man receives my Rent, it is at my Election if I will charge him with a Diſſeiſin, by bringing an Aſſiſe or other Action, or have an Account. Cro. C. 303. in pl. 6. Paſch. 9 Car. B. R.

75. There were *two Tenants in common of an Houſe*, and *one of* them *nailed up the Doors*, and made up a Wall againſt the Houſe *to prevent the others getting into the Houſe*, and this was reſolved no Diſſeiſin, and ſo the Jury was diſcharged. All. 8. Paſch. 23 Car. B. R. Water's Caſe.

2 Le. 121. pl. 167. Mich. 33 Eliz. in the Exchequer. Arg. S P.

76. Leaſe dated 24 June to commence a Die Datus, *Leſſee enters the ſame 24 June*, He is a Diſſeiſor. Sid. 8. pl. 3. Mich. 12 Car. 2. C. B. Goodgaine v. Wakefield.

77. *Leaſe by Ceſty que Truſt* to T. is no Diſſeiſin but only at the Election of the Truſtee, but it is good between Leſſor and Leſſee at leaſt. Keb. 24. pl. 71. Paſch. 13 Car. 2. B. R. in Caſe of Thorn v. Burton.

Two Tenants in comcom of an *Advowſon* one alone preſents, vet at the next Avoidance they may join, and if they are diſturbed, Quare impedit lies as in the Caſe of Coparceners. Quære. And. 63. Harris v Nicholls —— Cro. E 18. S. C. per 3 J. makes a Difference between Grantees of Copaceners, and meer Tenants in Common, that in the firſt Caſe an Uſurpation of one ſhall not put the others out of Poſſeſſion; but that perhaps would be otherwiſe in the laſt, unleſs they were ſuch as derived their Eſtates from Coparceners, and yet 22 E 3. 9 is that between Strangers in Blood or where two make Compoſition to preſent by Turn, if one uſurp upon the Turn of the other, this ſhall not put him out of Poſſeſſion, but Anderſon doubted.

78. A Man cannot be diſſeiſed of an *undivided Moiety*. 2 Salk. 423. pl. 10. Hill. 1 Ann. B. R. Reading v. Royſton.

79. If a *Leaſe* be made *to A. which in Truth determined before it began*, and *A. leaſes to B.* the ſame Land *rendring Rent*, and for Rent arrear *A. diſtrains*, B. brings Treſpaſs, and A. avows, and in the Pleadings of A. the Determination of the Leaſe to A. appears, whereupon B. inſiſted that A. had failed in his Title, and that the Leaſe to A. failing, the Leaſe by A. to B. muſt fail alſo. But it was anſwered, that if B. has failed in deriving to himſelf a lawful Ability to make a Leaſe to B. then the Conſequence will only be that that *Entry* which A. ſet forth to be *Virtute of ſuch Leaſe* muſt be taken to be a Diſſeiſin, and *a tortious Fee Simple ſufficient to ſupport the Leaſe*. See 10 Mod. 265. Mich. 1 Geo. B. R. Potter v. Pinkney.

(C. 2) What is a Diſſeiſin. Act in Law.

1. IF a Man *recovers Land by Default againſt a Feme Covert* this is a Diſſeiſin, and ſhe and her Baron ſhall have Aſſiſe, and if the Baron dies the Feme ſhall recover by Aſſiſe, and if Scire Facias be ſued upon ſuch Recovery by Scire Facias the Feme ſhall extort the Execution; Per Trench, which was denied becauſe the Judgment ſtands in Force, and Execution is awarded of Damages, et quod habeat corpus coram Rege at a certain Day. Br. Error, pl 86. cites 24 E. 3. 24. 43. But Brooke ſays, Quod Mirum, becauſe it ſeems that the Matter is Error.

2. In Aſſiſe if the *Plaintiff makes Title*, and the *Defendant counter-pleads it*, the Aſſiſe ſhall not inquire of the Seiſin and Diſſeiſin (as was touch'd by the Court) if they find the Title for the Plaintiff, but inquire over of the Damages only; For the Defendant *is a Diſſeiſor by his Counter-plea of the Title of the Plaintiff*, quod nota, and the Title was found for the Plaintiff and he recover'd. Br. Diſſeiſin, pl. 47. cites 27 Aſſ. 65.

3. In Aſſiſe, becauſe the *Tenant had confeſſed Eſtate in the Plaintiff, and pleaded in Bar* that which was adjudg'd no Bar, the Aſſiſe was awarded in right of Damages, and he adjudg'd a *Diſſeiſor by his Counter-plea*, and was taken, quod nota. Br. Diſſeiſin, pl. 48. cites 28 Aſſ. 21.

4. An *Infant* ſhall not be adjudg'd a Diſſeiſor *by his Conuſance or Nient Dedire*, and therefore when he had pleaded that Ne unques * Accouple againſt the Plaintiff, and this is certified againſt him, the Aſſiſe was taken in point of Aſſiſe, and found for him, and the Plaintiff barr'd, quod nota. Br. Diſſeiſin, pl. 52. cites 28 Aſſ. 52.

* Original is (Accompt)

5. A Man *granted a Rent and died before Attornment*, and after the *Tertenant paid the Rent to the Grantee*, and he received it, and *the Heir of the Grantor brought Aſſiſe againſt the Pernor of the Rent*, who *counter-pleaded the Aſſiſe by the Grant and Attornment*, and it was found as above, and by Judgment the Plaintiff recover'd, and the *Pernor adjudged a Diſſeiſor for the Counter-plea of the Aſſiſe without Title*, quod nota. But *if the Pernor* above *had not counterpleaded the Aſſiſe* he had not been a Diſſeiſor by the Receipt of the Rent, where the Tenant paid him gratis, *but* there *the Tenant is a Diſſeiſor* as it ſeems. Br. Diſſeiſin, pl. 61. cites 40 Aſſ. 19.

(C. 3) Diſſeiſin with Force. What is.

1. MOWING *the Land, Fiſhing, Cutting* &c. which cannot be done ſine Manu Opere are Diſſeiſins with Force and Arms; Per Wilby. Brooke ſays, Quære, For they are clearly Diſſeiſins, but *Quære of Force.* Br. Diſſeiſin, pl. 33. cites 11 Aſſ. 25.

2. Lord and Tenant, and the *Lord came to diſtrain* for the Rent, and the *Tenant would not ſuffer him to enter the Houſe to* diſtrain, *but Interrupted him with Force*, and therefore he was adjudged a Diſſeiſor. Br. Diſſeiſin, pl. 53. cites 29 Aſſ. 49.

3. A Diſſeiſor made Diſſeiſin but not with Force, and by examining it appeared that *the Diſſeiſor had cut Wood*, but this was *after his firſt Entry*, and notwithſtanding this he was adjudged a Diſſeiſſor with Force and Arms, Quære. Br. Diſſeiſin, pl. 55. cites 30 Aſſ. 50.

4. If a Man levies my Rent of my Tenant by *Coercion of Diſtreſs*, this is a Diſſeiſin with Force and he ſhall go to Priſon, quod Nota Bene, and yet the Tenant might have thereof Treſpaſs, for it is a double Tort. Br. Diſſeiſin, pl. 62. cites 43 Aſſ. 9.

5. *Two* may be *Diſſeiſors*; and the *one with Force*, and *the other not*, As if I command one to make a Diſſeiſin and he makes a Diſſeiſin with Force, and alſo if one enters with Force to my Uſe, and after I agree he is a Diſſeiſſor with Force and I am not ſo, and thoſe Caſes will anſwer the Books of Aſſiſes, for in thoſe Caſes they were preſent but in theſe not, and ſo I hold that he which is *preſent when Force is made*, is a Diſſeiſor with Force; Per Anderſon. Gouldsb. 42. Paſch. 29 Eliz. in Caſe of Dickſey v. Spencer.

(D.) *What Perſon* may be a Diſſeiſor.

*Br. Diſſeiſin pl. 67. (66) cites S. C.—

1. A Feme Covert ſhall not be a Diſſeiſoreſs by the Act of the Baron. 7 E. 4. 7. b. * 12 E. 4. 9. b.

Fitzh Diſſeiſin, pl. 3. cites S. C. —— F. N. B. 179. (G) S. P.——See (F.) pl. 3. &c.

Br. Diſſeiſin, pl. 43. cites S. C.

2 In Aſſiſe the *Father made Feoffment in Fee upon Condition and died*, having *two Daughters*, the *one of full Age* and the *other an Infant*, and the *eldeſt thinking the Condition broken, which was not* broken, *entered claiming for her and her Siſter* who was an Infant; ſhe of full Age is *Diſſeiſoreſs* only, and the other who is an Infant not, for nothing veſted in her; Per Skipwith. Br. Ent' Cong. pl. 60. cites 26 Aſſ. 39.

3. If my *Tenant pays* his *Rent to a Stranger without Coertion*, he alone is Diſſeiſor, and *if by Coertion* both are Diſſeiſors. Br. Aſſiſe, pl. 455. (454) cites 23 H. 3. and Fitzh. Aſſiiſe 439.

‡ But they did not aſſiſt in making of the Ditch, 8 E. 3. 39. 30. pl. 3.

4. Aſſiſe *by making of a Ditch by the Defendant* where his Servants came in Aid, but they did not ‡manure the Land, and yet they were Diſſeiſors, Quod Nota. Br. Aſſiſe, pl. 448. (447) cites 8 E. 3. and Fitzh. Aſſiſe 145.

5. An *Infant purchaſed*, and *one as his Guardian takes him and made Feoffment and died*, and the *Feoffee was adjudged a Diſſeiſor* by the Statute of *Weſtminſter 2. cap. 25.* For living either of them the ſaid Writ ſhall hold Place, and therefore the taking of the Infant only as Guardian is no Diſſeiſin, Quod Nota, by Judgment. Br. Aſſiſe, pl. 449. cites 8 E. 3.

6. A man *recovered againſt him who had nothing, and infeoffed B.* and one C. deliver'd Seiſin, and the Aſſiſe was brought againſt B. and C. and the Plaintiff recovered, the Feoffor not being named; and ſo ſee the *Attorney who delivered Seiſin was a Diſſeiſor.* Br. Diſſeiſin, pl. 27. cites 10 Aſſ. 22.

Br. Diſſeiſin, pl. 32. cites

7. In Aſſiſe *N. and A. his Feme were ſeiſed* and *leaſed to W. and his Heirs for* 17 *Years, W. died within the Term, and P. his Son and Heir entered*

entered and levied a Fine to M. who rendered to P. and K. his Feme in Fee, and *P. died*, and *N. died*; the *Term expired*, and *A.* who durſt not approach in the Life of N. *offered now to enter*, and *K. diſturbed him*, and the ſaid *A. brought Aſſiſe againſt K.* and recovered and Damages to the Time of the Diſturbance; for K. was no Diſſeiſor till the Diſturbance; for the was Covert before, and *P. was Diſſeiſor alone till K. was Sole and made the Diſturbance.* Br. Aſſize, pl. 172. cites 11 Aſſ. 21. S. C. Brooke ſays, Et ſic Vide, that *K. made no Diſſeiſin till the Diſturbance.*

8. A *Villein made a Feoffment* of his Land which he held in Villeinage, the *Feoffee* is no Diſſeiſor; Per Cur. Br. Aſſiſe, pl. 454. cites 20 E. 3. S. P. Br. Diſſeiſin, pl. 96. cites 20 H. 3. and Fitzh. Aſſize 432.

9. Aſſiſe *againſt the Baron and Feme and W. N—W. made Default*, and the Aſſiſe was awarded againſt him by Default, the *Baron and Feme pleaded Record in Bar of Aſſiſe, which was denied*, and they were *adjourned*, at which Day the *Baron made Default*, and the *Feme was received* notwithſtanding the Statute of Weſtminſter 2. cap. 25. Quod habeantur pro Diſſeiſitoribus abſque Recognitione Aſſiſæ. And ſo ſee that *Feme Covert by Reaſon of the Receipt is not bound by it to be a Diſſeiſor*; for it ſeems of be the Act of the Baron. Br. Aſſiſe, pl. 186. cites 13 Aſſ. 1. Br Coverture, pl. 35. cites S. C.

10. In Aſſiſe a Man *leaſed Land for Life, rendering Rent*, and *went beyond Sea*, the *Tenant for Life died*, and *T. N. counſelled H. W. the Heir of the Leſſor to enter, who entered and enfeoffed P.* And the *Leſſor came and would have entered*, and *P. diſturbed him*, and he brought Aſſiſe againſt P. and the Counſellor, and omitted him who entered, and the Plaintiff recovered, for the *Counſellor is Diſſeiſor*, and ſo it is ſufficient if Diſſeiſor &c. be named in the Writ, quod Nota. Br. Aſſiſe, pl. 193. cites 14 Aſſ. 12. Br. Diſſeiſin, pl. 37. cites S. C. and 17 Aſſ 14. accordingly, where the Counſellor was awarded to Priſon; for the Diſſeiſin was Vi et Armis —— Br. Diſſeiſin, pl. 40 cites 17 Aſſ. 14 —— S. P. and ſo of him who commands. Br. Diſſeiſin, pl. 45. cites 27 Aſſ. 30.

11. In Aſſiſe, the *Tenant vouched Record and failed* at the Day, he is a Diſſeiſor by the Statute. Br. Aſſiſe, pl. 202. cites 15 Aſſ. 16.

12. In Aſſiſe, the *Father made Feoffment in Fee upon Condition and died*, having *two Daughters*, the *one of full Age*, and the *other an Infant*, and the *Eldeſt thinking the Condition broken, which was not* broken, *entered, claiming for her and her Siſter* who was an Infant, ſhe of full Age is *Diſſeiſoreſs* only, and the other who is an Infant not, for nothing is veſted in her; Per Skipwith. Br. Ent. Cong. pl. 60. cites 26 Aſſ. 39. Br. Diſſeiſin, pl. 43. cites S. C.

13. If one *enters claiming as Guardian* of the Body and Land where he had no Right, and after deviſes over the Wardſhip, ſuch *Deviſee* is a Diſſeiſor as well as his Grantor. Br. Diſſeiſin, pl. 85. cites 28 Aſſ. 11. but adds quod mirum eſt! for that he was not the firſt who entered, but the Deviſee of him.

14. Aſſiſe *againſt an Infant who pleaded Record and failed* at the Day, yet he may plead other Matter. and ſhall not be a Diſſeiſor notwithſtanding the Statute wills that they ſhall be taken for Diſſeiſors, & concord' 33 E. 3. and there per Finch the Aſſiſe ſhall be at large; Quod quære. Br. Aſſiſe, pl. 460. cites 36 E. 3.

15. *A. has Right to recover in a Formedon againſt B.* Tenant of the Land. *A. by Covin* with C. *cauſes C. to diſſeiſe B.* to the Intent that C. ſhould make Default in a Formedon againſt him, and *that A. ſhould recover by Default.* A. recovers the Land againſt C. accordingly by this Covin, by Default, or Confeſſion. A. enters. He is not remitted. B. enters, and A. ouſts him. Reſolved, by all the Sages in Parliament, that

that this Covin makes A. a *Diſſeiſor of his own Land.* 3 Rep. 77. Farmer's Caſe. Coke has many Caſes to this Effect. Fraus & Dolus nemini patrocinentur. Jenk. 46. pl. 88. cites 41 Aſſ. 28.

16. *Leſſee for Life is diſſeiſed.* He in the *Reverſion ouſts the Diſſeiſor.* The Diſſeiſor brings an Aſſiſe againſt him; and it well lies during the Life of Leſſee for Life. Jenk. 52. pl. 99. cites 44 Aſſ. 35.

17. Aſſiſe againſt *Baron and Feme*; they *pleaded in Bar and confeſſed an Ouſter*, and the Plaintiff traverſed the Bar, and after the *Baron made Default*, and the *Feme was reſceived and pleaded the ſame Plea*, and the Plaintiff traverſed it, and the Aſſiſe found for the Plaintiff, and that he was ſeiſed and diſſeiſed, but that there is not any Diſſeiſor named in the Writ. Digg. ſaid the Baron by his Plea confeſs'd an Ouſter, and the Feme has maintained the ſame Plea, and ſo Diſſeiſor by Confeſſion; Per Tank. the Aſſiſe is not taken upon the Plea of the Baron, and *when the Feme was received the Baron was out of Court*, and his Plea nothing of Record to prejudice his Feme, and a Feme Covert cannot be ſaid a Diſſeiſor by her Plea, & concord' Belke, & adjornatur. Br. Aſſiſe, pl. 24. cites 44 E. 3. 23.

18. If *Tenant for Years*, or Guardian, *aliens for Life*, *the Remainder* over *in Fee*, he in *Remainder* who *enters after Death of Tenant for Life is a Diſſeiſor* as well as the Leſſee for Life; for all is but one and the ſame Eſtate in Law. Br. Ent. Cong. pl. 27. cites 50 E. 3. 21.

Where the *King* enters by a void or inſufficient Office, or enters without Title,

19. If the *King enters* by Title, or *without Title*, the *Party cannot enter upon him*, nor is he a Diſſeiſor; and this ſeems to be, *where he enters without Record or Office this is without Title*, but there *he ſhall ſue by Petition*, nor the King in this Caſe is not a Diſſeiſor. Br. Ent. Cong. pl. 95. cites 3 E. 4. 24, 25.

and grants the Land by Patent, Aſſiſe lies againſt the Patentee; for the King cannot be a Diſſeiſor, and therefore the *Patentee* is Diſſeiſor; for inſufficient Office does not give Seiſin to the King. Br. Office devant &c. pl. 42. cites 7 E. 4. 16. and 22. —— Br. Diſſeiſin, pl. 65. cites 7 E. 4. 17. S.C. & S. P.

20. The *King cannot* be a Diſſeiſor. Br. Office devant &c. pl. 42. cites 7 E. 4. 16. and 22.

Br. Diſcent, pl. 15 cites 21 H. 7. 35. S. P. per Fineux. —— 10 Mod. 125. Arg. ſays that the Authorities are many that a Monk may be a Diſſeiſor; but that it particularly appears to be ſo for this, that a Writ of Aſſiſe lies againſt a Monk, and the Judgment in ſuch Writ is, Quod recuperet Seiſinam, which ſuppoſes a Monk to have a Freehold.

21. If a *Monk diſſeiſes* a Man *to the Uſe of a ſecular Man*, this is no Diſſeiſin; For he has no Capacity to take Franktenement, and it ſeems that though the ſecular Man agrees afterwards he has no Franktenement; Per Fineux Ch. J. Keilw. 91. b. pl. 3. Trin. 22 H. 7.

22. If I diſſeiſe one *to the Uſe of the Dean and Chapter*, they cannot agree but by Writing. Br. Corporations, pl. 34. cites 14 H. 8. 2. 29.

23. The *King cannot be diſſeiſed*, but all Intruders are but Treſpaſſors to him, and if he will he may charge them by Actions of Account, as Bailiffs, yet he may if he will bring a Writ of Right of Advowſon; Per Hobart Ch. J. Hob. 322. Paſch. 17 Jac. in Caſe of Elvis v. York (Archbiſhop) & al'.

24. An *Infant* cannot be a Diſſeiſor. Arg. Godb. 364. pl. 456. Trin. 2 Car. B. R. in Caſe of Aſhfield v. Aſhfield.

25. If an *Infant makes Letter of Attorney to make Livery* and Seiſin, and the Attorney makes Livery accordingly, he is a Diſſeiſor. Arg. Godb. 387. in pl. 474. Paſch. 3 Car.

(E)

(E) By *Agreement.*

1. AS if the Baron diſſeiſes another to the Uſe of the Feme, the Feme is not a Diſſeiſoreſs by this Act of the Baron. 12 E. 4. 9. b. Br. Diſſeiſin, pl. 67. (66) cites S. C.— Fitzh. Diſſeiſin, pl. 3 cites S.C.

2. So it ſhall be though the Wife agrees to it during Coverture, for her Agreement is void.

3. If one Man diſſeiſes another to the Uſe of a Feme Covert, if the Feme agrees during the Coverture, yet ſhe is not any Diſſeiſoreſs, for her Agreement is void.

4. So if the Baron agrees to the Diſſeiſin, this ſettles an Eſtate in the Feme; but ſhe ſhall not be a Diſſeiſoreſs by the Agreement of the Baron. 12 E. 4. 9. b. Br. Diſſeiſin pl. 67. (66) cites S. C.— Fitzh. Diſſeiſin, pl 3. cites S. C.——Br. Agreement, pl. 4 cites S C.

5. The ſame Law if both agree, yet the Feme is not a Diſſeiſoreſs. Contra, 15 E. 4. 15. b. admitted. Br. Diſſeiſin, pl. 11. (12) cites S. C.

But not S. P.—— If a Man *diſſeiſes another to the Uſe of Baron and Feme*, and the *Baron after agrees*, the Franktenement by this is in him and his Feme, but thereby the Feme ſhall not be a Diſſeiſoreſs. Br. Diſſeiſin, pl. 67. cites 12 E. 4. 9.

6. But after the Death of the Baron, if the Feme agrees to the Diſſeiſin ſhe ſhall be a Diſſeiſoreſs. 12 E. 4. 9. b. Curia. Br. Diſſeiſin, pl. 67 (66) cites S C. — Fitzh. Diſſeiſin, pl. 3. cites S. C. —— Br. Agreement, pl. 4. cites S. C.

7. If a Man diſſeiſes another to the Uſe of an Infant, yet the Infant ſhall not be a Diſſeiſor by his Agreement thereto. Dubitatur, 2 E. 3. 32. *By Diſſeiſin to the Uſe of an Infant*, the Infant is not Diſſeiſor nor Tenant without actual Entry; For *Agreement of an Infant* to a Tort does not make him a Tort Feiſor et adjournatur. Br. Aſſiſe, pl. 46. cites 3 H. 4. 16. in the written Book —— Br. Diſſeiſin, pl. 5, cites S. C. Brook ſays and ſo ſee that he who may agree is a Diſſeiſor by his Agreement, as well as Tenant. Br. Diſſeiſin, pl. 5. cites 3 H. 4. 17. S. C.

It was adjudg'd in Writ of Error that if two diſſeiſe *another to the Uſe of an Infant*, and the Infant agrees to it, yet he is not Diſſeiſor nor Tenant; For agreement of an Infant is void; *But if he enters* then he is by this Tenant, quod nota. Br. Agreement, pl. 9 cites 3 H 4. 17. in the written Book. —— Brooke ſays and ſo ſee that the Franktenement ſhall not be adjudg'd in him by the Entry of the two to his Uſe, till the Infant himſelf agrees to it by his actual Entry. Ibid.

8. If the *Bailiff of an Infant, who lies in a Cradle*, diſſeiſes a Man to the Uſe of the Infant, the Bailiff only is a Diſſeiſor; and if an Infant commands a Man to enter into another's Land which he does, he who enters only is Diſſeiſor. Br. Diſſeiſin, pl. 16. cites 2 Aſſ. 2.

9 If a Man makes *Diſſeiſin of Common* &c. and *J. N. comes in Aid* of him, J. N. is a Diſſeiſor. Br. Diſſeiſin, pl. 21. cites 8 Aſſ. 18.

10. If a Man *grant a Seigniory with Condition of Payment*, and Non-payment, and *the Grantor tenders the Money according to the Condition*, and the *Grantee refuſes it*, and after the *Tertenant pays the Rent of the Lord to the Grantee*, and the Grantor brings Aſſiſe, this ſhall be againſt the Tertenant and the Grantee; For the Grantee is Tenant of the Rent, by the Receipt by him had after the Tender according to the Condition. Br. Diſſeiſin, pl. 82. cites 15 Aſſ. 22.

11. In Aſſiſe of Rent it was found that the *Reſcous* of the Diſtreſs taken by the Plaintiff was made *by a Stranger*, to which Reſcous the *Tertenant named in the Aſſiſe agreed*, and therefore the Aſſiſe well brought againſt him only, and he a Diſſeiſor by the Agreement. Br. Diſſeiſin, pl. 38. cites 15 Aſſ. 11.

12. Land *deſcended to an Infant*, and one *J. N. enter'd, claiming Ward only, and deviſed it to W. N. and died*, and *W. N. enter'd* and the Infant brought Aſſiſe againſt him, and *he was awarded a Diſſeiſor as well as his Grantor.* Quod Mirum; For he was not the firſt who enter'd, but the Deviſee of the Diſſeiſor. Br. Diſſeiſin, pl. 85. cites 28 Aſſ. 11.

13. If a Man *does an Act in my Right where I have no Right*, there if *I agree thereto* after, I am a Treſpaſſor. And by the ſame Conſequence in other Caſe Diſſeiſor by Agreement, as it ſeems. Br. Diſſeiſin, pl. 99. cites 38 Aſſ. 9.

S. P. For all is but one and the ſame Eſtate. Br. Diſſeiſin, pl. 3. cites 50 E. 3 22.

14. Per omnes Præter Finchden; If *Tenant for* Term of *Years aliens for Terms of Life or in Tail the Remainder over*, and *the Tenant for* Term of *Life dies, or* if the Tenant *in Tail dies without Iſſue*, and he in *Remainder enters*, there he in Remainder is a Diſſeiſor as well as he who alien'd, and this by the Statute of Weſtminſter 2 cap. 25. For the *Entry of him in Remainder is an Agreement to the firſt Livery*; For the Statute of Weſtminſter 2 cap. 25. wills Quod Vivente altero eorum locum habet Prædictum breve. Br. Diſeiſin, pl. 86. cites 43 Aſſ. 45. & 59. And adds Nota, That there are not ſo many of the Pleas in this Year.

Br. Aſſiſe, pl. 10. cites S. C.

15. If a Man enters into Land and makes Diſſeiſin to my Uſe, and *takes the Profits to my Uſe*, this does not make me a Diſſeiſor till I agree to it. Br. Agreement, pl. 10. cites 37. Aſſ. 8.

16. If I leaſe Land at Will, and *my Tenant at Will enters into the Land adjoining, claiming to my Uſe, and paſtures the Soil, and cuts Wood, and cuts Oaks*, by which the Tenant of the Franktenement thereof *voids the Poſſeſſion, and brings Aſſiſe*, and this Matter is found, but *the Leſſor has nothing of the Profit*, but the Diſſeiſee might have taken the Profits if he would, and that the Leſſor *did not command his Tenant ſo to do.* But the Jury ſaid, that they thought that foraſmuch as the Leſſor after he knew that his Tenant had ſo occupied, did not make him to make Gree to the Diſſeiſee, that therefore the Leſſee agreed to the Acts of his Leſſee at Will. But per Cur. *this is no Agreement*, and therefore by Award the Leſſor was no Diſſeiſor; and from hence ſee clearly, that if there had been an Agreement, the Leſſor by this had been a Diſſeiſor, quod nota. Br. Diſſeiſin, pl. 59. cites 37 Aſſ. 8.

S P. Br. Diſſeiſin, pl. 104.

16. If my *Bailiff diſeiſes another to my Uſe*, and I agree to it after, I for this am a Diſſeiſſor; Per Clam. Br. Ejectione &c. pl. 8. cites 38 Aſſ. 9.

Br Diſſeiſin, pl. 67. cites S. C.

17. Where Diſſeiſin is made by the one to the Uſe of another, this *does not gain Franktenement to the other till the other agrees*, and by Agreement he is a Diſſeiſor, and Tenant of the Franktenement; but *Agreement of the Baron* ſhall not make the Feme to be Diſſeiſor, but contra, if *ſhe agrees after the Death of her Husband.* Br. Agreement, pl. 4. cites 12 E. 4. 9.

Kelw. 91. b. 92. a. is a Quære of a Diſſeiſin made by a Feme Covert to the Uſe of her Baron; Per Finenx.

18. If one who has not Capacity as *Feme Covert diſſeiſes another to the Uſe of her Baron, without his Aſſent*, the Franktenement is not in him, and Aſſent after does not make a Diſſeiſin in him; but contra of an Aſſent before. Br. Diſſeiſin, pl. 15. cites 21 H. 7. 35. Per Fineux.

It is regularly true that a *Feme Covert* cannot

19. Upon Evidence it was held by Anderſon, That if a *Feme Covert ejects one*, and that afterwards the *Husband aſſents*, that yet the Husband is not an Ejector; for an Ejectment is made in an Inſtant, and has

has not a Continuance; otherwiſe of a Diſſeiſin. Noy 52. 37 & 38 Eliz. Broth v. Archer.

be a Diſſeiſoreſs *by her Commandment* or Procurement precedent, *nor by her Aſſent or Agreement ſubſequent*, but by her actual Entry or proper Act ſhe may be a Diſſeiſoreſs. Co. Litt. 357. b.

(F.) *By what Perſons, and to whom* it may be made.

1. AN Infant of **the Age of** 18 Years **may be a Diſſeiſor with Force** by actual Entry. 12 H. 4. 22. b.

2. An Infant **may be a Diſſeiſor by actual Entry.** 3 H. 4. 17. Br. Aſſiſe, pl. 46. cites 3 H. 4. 16. S. C. —— Br. Agreement, pl. 9. cites S. C. —— Br Diſſeiſor, pl. 5 cites S. C.

3. So **may** a Feme Covert **by actual Entry.** 9 H. 4. 6. * 12 E. 4. 9. b. Curia. 7 E. 4. 7. b. * S. P. Br. Diſſeiſin, pl. 67(66) cites 12 E. 4 9. S. C. —— Fitzh. Diſſeiſin, pl. 3. cites S. C. —— Co. Litt. 357. b. S. P. —— But without actual Entry ſhe ſhall not. F. N. B. 179. (G)

4. But **an** Infant **ſhall** not **be a Diſſeiſor** by Agreement **to a Diſſeiſin to his uſe.** 3 H. 4. 17. 12 H. 4. 22. b. Br. Aſſiſe, pl. 46. cites S. C. —— Br. Agreement, pl. 9. cites S. C. —— Br Diſſeiſor, pl. 5. cites S. C.

5. If **the** Baron and Feme enter into Land in the Right of the Feme where ſhe hath no Right, **the** Feme **is not a Diſſeiſoreſs.** 9 H. 4. 6. **See** † 35 Aſſ. 5. **Contra** 28 Aſſ. 37 **Curia, for this ſhall be taken to be the Act of the Husband only.** S. P. Br. Diſſeiſin, pl. 67. cites 12 E. 4. 9. — † Br. Aſſize, pl. 340 (339) cites S. C. —— Br. Coverture, pl 41. citea S. C. —— Fitzh Aſſiſe, pl. 321. cites S C. but that is that the Writ abated by the not naming of the Feme. —— Br. Aſſize, 287. (286) cites S. C. that where the Baron is dead after the Diſſeiſin is made by them, the Writ ſhall abate; For the Feme has now loſt the Name of the Feme, and in Aſſiſe there ought to be Diſſeiſor and Tenant, Quod Nota.

6. If a Man takes a Diſtreſs for Rent iſſuing out of the Land of a Feme Covert, **and** the Baron and Feme make Reſcous, **they both are Diſſeiſors.** 21 E. 4. 53. **Curia.** Br. Diſſeiſin, pl 89 (88) cites S C. and Brooke ſays, Et ſic cites S. C. by Brian Ch. J. Quod fuit conceſſum.

Vide, that a Feme Covert may be Diſſeiſor, Quod Nota bene. —— Ibid. pl. 70. (69)

7. If **the** Baron diſcontinues the Land of his Wife, the Feme being in Poſſeſſion, and **diſagreeing to the Feoffment,** claiming her firſt Eſtate, **the Feme is a Diſſeiſoreſs thereby.** 21 E. 3. 6. b.

8. In Aſſiſe it was found that Land was *given to Baron and Feme in Tail*, the *Baron went out of the Country*, and the *Feme infeoffed O. who leaſed to the Feme for Life*, the *Baron died, and the Feme died without Iſſue*, and the *Donor entered*, and O. ouſted him, and the Entry of the Donor adjudged lawful; For the Feoffment of the Feme was a Diſſeiſin to the Baron, and by the re-taking of Eſtate ſhe was remitted, and therefore the Reverſion in the Donor, and his Entry lawful; Per tot. Cur. Br Remitter, pl. 17. cites 9 Aſſ. 20. Br. Diſſeiſin, pl 24 cites S. C. ſays it is a Diſſeiſin to the Baron, and therefore a void Feoffment, and therefore the Feoffee only is a Diſſeiſor, as it ſeeems.

9. Aſſiſe

9. Aſſiſe againſt an *Infant* who *pleaded Releaſe of the Plaintiff in Bar*, and it was admitted; and it was ſaid there that by his Plea he *ſhall not be attainted Diſſeiſor by Reaſon of his Infancy*. Br. Diſſeiſin, pl. 26. cites 10 Aſſ. 1. & concordat the ſame Year, p. 13.

10. In Aſſiſe it was ſaid, That before the Poſſeſſion of the King none can make Diſſeiſin to the Tenant of the Franktenement. But by the Reporter, if the *King be ſeiſed in Auter Droit* and *a Man abates upon the Poſſeſſion of the King*, this is a Diſſeiſin to the Tenant of the Franktenement; Quære. Br. Diſſeiſin, pl. 56. cites 31 Aſſ. 1.

11. A Man cannot gain Franktenement by Entry *upon the King nor upon the Farmer* of the King, nor this cannot veſt in him as a Diſſeiſor nor by Diſſeiſin. Br. Diſſeiſin pl. 4. cites 2 H. 4. 7.

12. Where a Man *abates upon the Poſſeſſion of the King in Land which he has in Ward*, yet the Franktenement remains in the Heir, by which he cannot deveſt the Poſſeſſion out of the King &c.; Per Gaſcoign and Huls. Br. Diſſeiſin, pl. 6. cites 8 H. 4. 17. & concordat H. 21 E. 3. fol. 1. 2. Brooke ſays, from hence it ſeems that a Man cannot be a Diſſeiſor ſo long as his Termor remains upon the Land.

13. Aſſiſe againſt divers, who pleaded Nul tort &c. The Aſſiſe found that all the Defendants were Diſſeiſors, but that one of them made the Diſſeiſin with Force. Harper thought the Verdict not good, but Dyer and Weſton e contra; for that the Force and Diſſeiſin are two diſtinct Things; for Force is aided by the Statute, and is not incident to every Diſſeiſin; for it ſhould be inquired by the Aſſiſe if they, or any of them, had done the Diſſeiſin with Force; and if Leſſee for Years be re-ouſted with Force, and he in Reverſion brings an Aſſiſe, and the Diſſeiſin is found with Force, yet the Force is not puniſhable; for the Force was to the Leſſee for Years. Mo. 53. pl. 155. Paſch. 5 Eliz. Anon.

14. The *Queen as Dutcheſs of Lancaſter* cannot be diſſeiſed; for tho' ſhe be not ſeiſed in Jure Coronæ, yet it is in Seiſin of the Queen, and cannot be taken from her in reſpect of her Perſon; Reſolved. Ow. 15. Paſch. 36 Eliz. B. R. Rot. 41. Leigh's Caſe.

(F. 2) Diſſeiſin by one, where it ſhall be ſaid a Diſſeiſin by others.

1. IF *two Siſters have Title of Action where their Entry is tolled*, and the *one enters for her and her Siſter*, this does not make the other to be a Diſſeiſor. Br. Diſſeiſin, pl. 76. (75.) cites 14 E. 3. 3. and 42.

If A. diſſeiſe one to the Uſe of B. who knows not of it, and B. aſſents to it, in this Caſe till the Agreement A. was Tenant of the Land, and after Agreement B. is Tenant of the Land, but both of them be Diſſeiſors; for Omnis Ratihabitio retrotrahitur & mandato equiparatur. Co. Litt. 180. b.

2. If one makes a *Diſſeiſin to my Uſe without my Commandment with Force*, and *afterwards I agree* to the Diſſeiſin, I am Diſſeiſor, but all *the Force is only in the Coadjutor*; but *if he agrees ſpecially to the Diſſeiſin with Force*, then peradventure he ſhall be guilty of the Force alſo; Per Dyer and Weſton. Mo. 53. in pl. 155. Paſch. 5 Eliz. Anon.

(G) What

(G) What *Perſon* may be a Diſſeiſor.

To the Uſe of another.

1. A Feme Covert **cannot make a Diſſeiſin** to the Uſe of her Husband. 8 H. 14. b. Curia (**becauſe though ſhe gains an Eſtate by her Entry, yet ſhe has not Power to diſpoſe thereof to another, being Covert, as ſhe ought if ſhe could make a Diſſeiſin to another uſe.**) **Contra.** 21 H. 7. 35. Br. Diſſeiſor, pl. 15. cites S. C.

2. A Feme Covert **cannot diſſeiſe a Man** to the Uſe of a Stranger, **for the Cauſe aforeſaid. Contra** 21 H. 7. 35. Fol. 661.

A Feme Covert cannot diſſeiſe another but to the Uſe of another, for ſhe herſelf cannot take any thing; but ſhe may diſſeiſe one to the Uſe of another. Br. Diſſeiſin, pl. 15. cites S. C.

3. But **it ſeems a** Monk may **diſſeiſe a Man to the uſe of another, becauſe he is not capable of an Eſtate to his own Uſe.** 21 H. 7. 35. **admitted.** Br. Diſſeiſin, pl. 15. cites S. C. —— Keilw. 91. b. pl. 3. Trin.

22 H. 7. per Fiueux, S. P. that it is no Diſſeiſin.

4. A Corporation aggregate **cannot make a Diſſeiſin to the uſe of another.** 8 H. 6. 14. b. Br. Corporations, pl. 24. cites S. C.

by Cand. but it ſeems the contrary if one enters for them by Authority in Writing under their common Seal, where their Entry is not congeable.

5. **If a** Corporation aggregate **diſſeiſes one to the uſe of another Man, they** are Diſſeiſors in their natural Capacity. 8 H. 6. 14. b. Br. Corporations, pl. 24. cites S. C.

6. **If a** Man brings an Infant **with him** into the Lands of J. S. and there claims the Lands to the Uſe of himſelf and the Infant, **yet the Infant is not any Diſſeiſor, becauſe he made no Claim.** 26 Aſſ. 39. **per Skipwith.**

7. Treſpaſs upon the 5 R. 2. The Defendant pleaded Bar by J. and his Feme, and gave Colour. The Plaintiff ſaid, that before the ſaid J. and his Feme any Thing had, *W. S. was ſeiſed in Fee and infeoffed the Plaintiff in Fee, who was ſeiſed, till by the Defendant diſſeiſed, to the Uſe of J. and his Feme, to which Diſſeiſin J. and his Feme agreed* &c. Jenney ſaid, that now he ought to plead that all three diſſeiſed him by reaſon of the Agreement; But Littleton J. ſaid No; For there is a *Diverſity where a Man is privy to the Diſſeiſin at firſt, and where not*; for where I *command a Man to enter unlawfully for me*, both are Diſſeiſors, and ſo it ſhall be pleaded; for *there the Franktenement is in me immediately*; *But* in the Caſe of the Diſſeiſin to the Uſe &c. the Franktenement *is not in Ceſtuy que Uſe before Agreement*; Quod Nota. And ſo it ſeems that *he who agrees and was not privy before is Tenant only by his Agreement, but not Diſſeiſor.* Contra of him who commands &c. Br. Diſſeiſin, pl. 12. cites 15 E. 4. 15.

8. The *Demandant and others* in a Præcipe *did diſſeiſe the Tenant to the Uſe of the others*, and the Writ did not abate, for the *Demandant was a Diſſeiſor, but gained no Tenancy* in the Land, for that he *was but a Coadjutor.* Co. Litt. 180. b.

9. A Man *diſſeiſes Tenant for Life to the Uſe of him in the Reverſion*, and after he in the *Reverſion agrees* to the Diſſeiſin; It is ſaid, that he in the Reverſion is Diſſeiſor in Fee, for by the Diſſeiſin made by the Stranger the Reverſion was deveſted, which (they ſay) cannot be reveſted by the Agreement of him in the Reverſion, for that it makes him a Wrong-doer, and therefore no Relation of an Eſtate by wrong can help him. Co. Litt. 180. b. 181. a.

(H) Who ſhall be ſaid no Diſſeiſor *at the Election* of the Tenant.

S. P. and ſo if he enters claiming as Guardian by Nurture where he is not, and cites 49 E. 3. 10. 40 E. 3. Accompt, 35. and 33 H. 6. 2. and ſays, 9 Car. —— S. P. Arg. Cart. 162.

1. IF a Man enters **into the Land of another,** claiming as Guardian where the Land is not held of him, or where he ought to be Guardian, **though he is a Diſſeiſor at the Election of the Heir, yet the Heir may elect him to be no Diſſeiſor.** 28 Aſſ. 11. **adjudged**; for **ſuch Guardian after Entry granted the Ward over, and the Grantee entered, and he adjudged a Diſſeiſor, and therefore the firſt Guardian was no Diſſeiſor by Election, for if he was a Diſſeiſor, the ſecond Guardian could be no Diſſeiſor to him.**

that many other Books are ſo; Per Jones, Berkley, and Crooke. Cro. C. 303. Paſch.

Cro. C. 302. 303. pl. 6 S. C. in B. R. and the Judgment in C. B. was reverſed by three Juſtices, but Richardſon Ch. J. e contra. And the Reporter adds a Nota fol. 166. at the End of the Caſe, that Sir Robert Heath Ch. J. of C. B. and Crawley J. Baron Denham and Baron Trevor agreed with this Judgment in B. R. and conceived, that it would be very miſchievous if it ſhould be adjudged otherwiſe. But Sir Humphry Davenport ſeemed to doubt whether the Leſſee for Years ought not ſtrictly to be taken for the Diſſeiſor and Tenant. —— Jo. 315. pl. 3. Blundell v. Baugh. S. C. in. B. R. and the Judgment in C. B. reverſed. —— Litt. Rep. 372. Vaugh v. Blundell, S. C. in C. B. adjornatur. —— Lat. 53. Jones J. ſaid, that if Leſſee at Will makes a Leaſe for Years, and the Leſſee enters, there this is a Diſſeiſin at the Election of him that has the Franktenement, and not otherwiſe; and cited the Caſe of Parſley [Powſeley] v. Blackman, and cited Mich. 7 Car. Blundſden's Caſe adjudged in C. B. that Leſſee for Years only was the Diſſeiſor. —— S. C. cited Cart. 162. Arg. as reſolved that it is no Diſſeiſin but at Election, and if it be a Diſſeiſin, that the Tenant at Will is the Diſſeiſor, and not the Tenant for Years. —— 3 Mod. 197. cites S. C. held that the making the Leaſe was no Diſſeiſin of the Freehold; For it was found in that Verdict, that he occupying at Will, and entering by his Father's [the Leſſor's] Aſſent, the Leaſe was alſo intended to be made by his Aſſent.

2. If Leſſee at Will makes a Leaſe for Years, **this is a Diſſeiſin at the Election of the Leſſor at Will that hath the Fee, for if he diſpoſes of the Land as if no Diſſeiſin had been, then it is no Diſſeiſin. P. 9 Car. B. R. between** *Blunden and Baugh*, **adjudged in a Writ of Error per Curiam; contra Richardſon; and the Judgment given to the contrary in Banco by the Court againſt Hardy reverſed accordingly. Intratur, Hill. 7 Car. B. R. Rot. 1106. where after the Leaſe for Years made by the Leſſee at Will, the Leſſee at Will and Leſſor at Will joined in a Fine, and declared the Uſes of a Fee, and adjudged good. This was for the Manor of Blechingly, which concerned the Earl of Nottingham.**

3. And **in the Argument of this Caſe, another Caſe was vouched to be adjudged between** *Powſely and Blackman* **accordingly. Tr. 18 Ja. Rot. 130. B. R.**

The Caſe was, A Man *mortgaged*

4. **But Judgment was given the 20 Jac. where after a** Leaſe for Years **made** by Tenant at Sufferance upon a Mortgage, **the** Deviſe of the

the Mortgagee **was adjudged good, and ſo no Diſſeiſin at his Election.** *Lands by Deed inrolled upon Payment of Money at the End of five Years*, and by the Indenture it was *agreed that the Mortgagor ſhould enjoy and take the Profit* of the Lands *in the Interim*. The *Mortgagor made a Leaſe for ſix Years*; the *Leſſee entered and ſurrendered his Intereſt to the Mortgagee*, at the Day *the Money was not paid*; the Mortgagee without any Entry deviſed the Term and died. Adjudged that the Deviſe was good, which it could not be if the ſaid Leaſe was a Diſſeiſin Nolens Volens to the Mortgagee. Jo. 316. Paſch. 9 Car. B. R. cited per Cur. as adjudged in B. R. 5 or 15 Jac. Powſeley v. Periman. [Blackman] —— Cro. J. 659. pl. 9. Hill. 20 Jac. B. R. the S. C. adjudged per tot. Cur. accordingly. —— 2 Roll Rep 241. 284. 285. S C. adjudged that the Deviſe was good; but the Reporter ſays that no Reaſon was given. —— Bridgm. 12. Poneſley v. Blackman, S. C. after many Arguments adjudg'd accordingly. —— Palm. 201. S. C. adjudged accordingly. —— S. C. cited per Cur. Cro. C. 304. Paſch. 9 Car. B. R.

5. **If a Man** enters into the Land of an Infant by his Aſſent, **this is a Diſſeiſin to the Infant at his Election; for the Infant cannot prejudice himſelf by his Aſſent. 11 E. 3. Aſſ. 87. adjudged.** *Infant leaſes* for Years, rendering Rent and Leſſee enters, it is at the Election of the Infant to charge him in Aſſiſe, or bring Debt for the Rent, or accept the Rent at his full Age. Cro. C. 303. Hill. 9 Eliz. B. R. per three Juſtices, cites 1 E. 4. 6. and Ibid. 306. Richardſon Ch J. agreed to this Caſes

6. **If A. be ſeiſed of Lands in Fee, and a** Stranger enters **upon him** by Colour of a Leaſe for Years, which is void, and pays the Rent **to him, this is not any Diſſeiſin at Election; for if A. after covenants to ſtand ſeiſed to the uſe of himſelf in Tail, the Eſtate ſhall well riſe. D. 6 Ja. B. *Molineux's* Caſe, per Curiam.**

7. If A. ſeiſed in Fee makes a **Deed of** Leaſe, **by which he demiſes** it to B. habendum a Die datus for Life, with a Letter of Attorney in the Deed to make Livery, **and reſerving 6s. 8d. Rent, and the** Attorney makes Livery the ſame Day **of the Date, according to the Form of the Charter, and the** Leſſee enters, claiming it by Force of the Indenture and Livery, and pays the ſaid Rent **to the Leſſor according to the Form of the Indenture; this is not any Diſſeiſin to A. at his Election, though prima facie he was a Diſſeiſor, yet inaſmuch as** (*) he claimed but a **Leaſe, and paid his Rent accordingly, the** Leſſor may elect that he **ſhall not be a Diſſeiſor. Mich. 10 Car. B. R. between** † *Bull and Wiat*, **Intratur Trin. 9 Car. Rot. 514. upon a ſpecial Verdict for a Garden in Briſtol. The Court ſeemed at firſt e contra; but after they gave a peremptory Rule for Judgment for the Plaintiff upon the Non-Attendance of the Defendant, by which they adjudged it to be no Diſſeiſin at Election, where the Caſe was, That the** Heir of the Leſſor after the Leaſe **made** ſuffered a common Recovery of the Land upon a Præcipe brought againſt him without any Entry into the Land, **and by Conſequence it was adjudged, that this Recovery was good. But it ſeems that they adjudged it upon the laſt Point of the Recovery. Et P. 11 Car. B. R. between** *Sir Kenelm Digby and Jordan*, **per Curiam, upon Evidence at the Bar, reſolved, That** this is an abſolute Diſſeiſin, becauſe the Leſſee entered claiming his Eſtate for Life, **and that it had been** otherways if he had claimed as Leſſee at Will.

† Cro. C. 388. pl. 21. S. C. ruled that if Cauſe were not ſhewn &c. Judgment ſhould be entered for Fol. 662. the Plaintiff; For that the ſuffering a Recovery was an Eſtoppel to him and all under him to ſay that ſhe was not Tenant of the Freehold.

8. If A. leaſes the Demeſnes of a Manor for Years to B. and after aſſures a Jointure of the ſame Land to his Wife **for her Life,** and after aliens the Fee, **and** the Alienee enjoys the Rent **by the Hands of the Termor, and after** A. dies, **and the** Wife enters claiming her Jointure, and there keeps Court **&c. and** B. aſſents **thereto,** and attorns **to the Wife, and pays to her the Rent; this is a** Diſſeiſin to the Alienee or not at his Pleaſure, **notwithſtanding the Continuance of the Poſſeſſion of the Termor. D. 2 El. 178. pl. 38.**

9. In

9. In *Aſſiſe of Rent or Common*, be it in *Groſs or Appendant*, a Man is in Seiſin and out upon Diſturbance made at his Pleaſure; for he may chuſe to take for Diſſeiſin or not. Br. Seiſin, pl. 17. cites 8 Aſſ. 4.

10. In Aſſiſe it was found that the *Plaintiff at full Age was diſſeiſed, and afterwards came upon the Land, and put his Foot within*, but *took no Profits*, and *the other ouſted him*, and by Award he recovered Damages for the firſt Diſſeiſin; the Reaſon ſeems to be inaſmuch as it is at the Election of the Plaintiff if he will take this Matter for a Seiſin or not, and the *Diſſeiſor, who is a tortious Seiſor, cannot plead it*; for this was found by Verdict at Large. Br. Diſſeiſin, pl. 84. cites 26 Aſſ. 24.

Co. Litt. 55. a.

11. If one enters and *claims as Guardian in Socage*, or by *Nurture*, where he is not, the Infant may bring Aſſiſe, or charge him as Guardian, thereby admitting him to be in without Wrong. Cro. C. 303. cites 49 E. 3. 10. 40. E. 3. Accompt. 35. and 33 H. 6. 2.

12. If a Man *receives my Rent of my Tenant*, this is no Diſſeiſin to me, but at my Pleaſure; contra if I bring thereof Aſſiſe. Br. Diſſeiſin, pl. 100. cites 15 E. 4. 8.

S. C. cited Jo. 317. per Cur.

13. If *Leſſee for Years ſurrenders* his Eſtate to the Leſſor, and *yet continues in Poſſeſſion, and always after pays the Rent to the Leſſor*, this was held not to be any Diſſeiſin to the Leſſor, but at his Pleaſure. D. 62. a. pl. 33. Paſch. 38 H. 8. Pennington v. Morſe.

14. *Leſſor by his Bailiff diſcharged his Leſſee at Will*, and nevertheleſs he continues Poſſeſſion and pays his Rent; it is at Leſſor's Election to take him as Diſſeiſor. Jo. 317. cites it as 2 Eliz. the Caſe of Hayman v. Hatch.

4 Le. 48. pl. 126. S. C. cited per Coke in the very ſame Words.—And 134. pl. 184. Hill. 27 Eliz. Skipwith v. Conies, S. C. and ſtates it that after the Father's Death *the Son likewiſe entered* Generally, *and paid the Rent*, and this was adjudged to be no Diſſeiſin.——The Words (in Tail) are miſprinted, and ſhould be (at Will) and ſo they are in Anderſon.

15. *Grandfather Tenant* in Tail [*at Will*] *Father and Son.* The *Grandfather died*; The *Father entered and paid the Rent to the Leſſor, and died in Poſſeſſion*; Adjudged that it was not any Deſcent. For the Paying the Rent explains by what Title he enter'd, aud ſo he ſhall not be a Diſſeiſor but at the Election of another; cited by Coke Arg. Le. 121. pl. 163. as adjudged in C. B. Skipwith's Caſe.

Le. 121. pl. 163. S. C. in totidem Verbis.

16. L. *Tenant in Tail leaſed for Years to J. S. who aſſigned over to P. the Plaintiff's Father. L. died. W. his Son entered upon P. who re-enter'd. W. without other Words demiſed the Lands to P. for Life* the *Remainder to Joan his Wife for Life*, the *Remainder to P.'s Son for Life with Warranty*, and a *Letter of Attorney to re-enter and deliver Seiſin* accordingly. *P. died before the Livery executed*, and afterwards the *Attorney made Livery to Joan. W. died. E. the Son and Heir of W. entered on Joan* his Wife. Joan re-entered and leaſed to the Plaintiff, who upon Ouſter brought an Ejectment. It was inſiſted that P. by his Entry was not a Diſſeiſor but at the Election of W. for when P. accepted ſuch a Deed from W. it appears his Intent was not to enter as Diſſeiſor; and it was not found that P. had any Son and Heir at the Time of his Death, and if not then there was no Deſcent, and there is no Diſſeiſin found, that P. expulit L. out of the Land; and Judgment was given againſt the Plaintiff. 4 Le. 48. pl. 126. Trin. 30 Eliz. B. R. Piers v. Leverſuch.

Cro. E. 450. pl. 18. and Ibid. 585. pl. 15. Buckler v. Hardy. S C. adjudged but not on

17. A *Tenant for Life*, the *Remainder in Fee to B. A. makes a Leaſe for Years*, and afterwards *grants the Reverſion to C. Habendum* Tenementa prædict. *from Midſummer next* following *for the Life of the Grantor.* After *Midſummer the Leſſee for Years attorns*; *the Years expire*; *C. the Grantee enters and leaſes at Will to D. to whom A.* the Grantor *levies a Fine Come ceo. B. in the Remainder enters.* Reſolved that when C. enters

enters by Colour of this void Grant he is a Diſſeiſor; and a Diverſity was taken between a Grant made by Agreement of the Parties, which ſtands not with the Rules of Law, and which never can by any ſubſequent Act (as by Livery or Attornment) be made good, and a Grant good at the Commencement, but to have its Perfection by Ceremony ſubſequent, as in the Caſe of a Charter of Feoffment if the Feoffee enters before Livery he is no Diſſeiſor; for the Charter is good, and the Agreement of the Parties accords with the Law, and it may be made good by Livery ſubſequent. 2 Rep. 55. a. b. Mich. 39 & 40 Eliz. C. B. Buckler's Caſe.

this Point.— Mo. 423. pl. 591. S. C. adjudged but not on this Point. —— 2 And. 29. pl. 19. Buckley v. Hardy, S. C. adjudged, but not on S. P.

18. *Copyholder* or *Leſſee for Years* or *at Will levies a Fine* of his Lands ſo holden among other Lands, and yet pays his Rent, this Fine ſhall not bind; for it is no Diſſeiſin but at Election. 3 Rep. 77. b. Hill. 44 Eliz. in Canc. Farmer's Caſe.

2 And. 176. pl. 98. S. C. reſolv'd by all the Juſtices at Serjeants Inn —— S. C. (except two.) —— Jenk. 253. pl. 45. S. C. reſolv'd by all the Judges of England. —— S. C. cited per Cur. Jo. 317.

19. Tenant at Will made a Leaſe *from Year to Year*. Per Dyer and Manwood it is no Diſſeiſin, and denied the Book of 12 E. 4. 12. but Harper J. e contra. 4 Le. 35 pl. 95. 15 Eliz. C. B. Anon.

If *Leſſee at Will leaſes for Years* and the Leſſee enters, it is a Diſſeiſin at the Election of him who has the Franktenement and not otherwiſe. Per Jones J. Lat. 53. 1 Car. Gerrard v. Norris.

20. If *A. leaſe Land to B.* reſerving a Rent &c. *B. pays* his Rent *to C.* this is no Diſſeiſin to A. unleſs he will. 2 Sid. 75. Paſch. 1658. Crouch v. Wills.

Cro. C. 303. pl. 6. Paſch. 9 Car. B. R. per Cur. S. P. in Caſe of Blunden v. Baugh.

21. *Tenant in Tail of a Rent grants the ſame in Fee* and dies. The Iſſue has his Election; If he will *diſtrain* he is in Poſſeſſion; But if he brings *Formedon* he is out of Poſſeſſion. Co. Lit. 57. b. cited per Archer J. Cart. 58.

22. *Executor de ſon tort of a Term* is a Diſſeiſor only at the Election of the Lord or the Reverſioner. 2 Show. 458. Hill. 1 & 2 Jac. 2. B. R. Norwich (Mayor) v. Johnſon.

(I) *Who* ſhall be ſaid a *Diſſeiſor* or not.

A Man *cannot qualify his own Wrong.*

1. If a Diſſeiſor makes a Leaſe for Years or at Will, and the Diſſeiſee enters upon him, and after the Leſſee re-enters, claiming his firſt Eſtate, yet he is a Diſſeiſor, becauſe he cannot qualify his own Tort. D. 3. 4 Ma. 134. 11.

D. 134 b. pl. 11. Mich. 3 & 4 P. & M. Kirton v. Birling. S. C.

2. If a Man enters into my Land, claiming a Leaſe for Years, he is a Diſſeiſor. 9 H. 6. 21. 31. b.

3. So if a Man enters claiming as Guardian where he is not Guardian, he is a Diſſeiſor. 9 H. 6. 31. b. 28 Aſſ. 11. adjudged.

Br. Diſſeiſor, pl. 85 (84) cites S. C.— Br. Aſſiſe, pl. 280. (279) cites S. C.

Fitzh. Aſſ. pl. 130. cites S. C.

4. So if a Man enters into Land, claiming as Tenant by Statute-Merchant when he has no Right &c. he is a Diſſeiſor. 24 E. 3. 31. adjudged.

5. If Guardian in Chivalry aſſigns Dower to one, as the Wife of the Father of the Ward, where ſhe was not his Wife, ſhe is a Diſſeiſoreſs to the Heir, though ſhe enters as Tenant in Dower. 21 E. 3. 5.

6. If a Man leaſes for Years to another and his Heirs, and after the Leſſee dies, and his next Heir claiming the Land, enters into the Land; though this is but a Chattel, ſo that the Heir hath no Right thereto, yet becauſe he claims but the Term, he is no Diſſeiſor. 11 E. 3. 88. adjudged.

7. If a Copyholder leaſes for Years by Licence of the Lord, and after enters upon the Leſſee, and ouſts him, this is a Diſſeiſin to the Lord of the Freehold. M. 11 Ja. B. R. per Coke.

8. If the King Guardian continues the Poſſeſſion after the full Age of the Heir, he does not gain the Fee thereby, becauſe he hath Right to contiue it till Livery ſued. 7 H. 4. 43.

Fol. 663.

9. If the Guardian holds himſelf in after the full Age of the Heir without Cauſe, he is a Diſſeiſor. 7 H. 4. 43. but a Tenant at Sufferance, for which, vid. the Diviſions under Title * Eſtate, 1 Rol. Abr. 861. D.

* Tit. Eſtate. (D. c) pl. 3.

10. But if Leſſee for Years holds over his Term, he is no Diſſeiſor. 7 H. 4. 43.

11. If *Tenant for Years, or a Guardian makes a Leaſe for Life, the Remainder in Fee*, and Tenant for Life enters, he is a Diſſeiſor, becauſe he takes the firſt Livery; and ſo it is of him in the Remainder for Life or in Fee, if he enter. 2 Inſt. 413. Marg. cites 50 E. 3. 22.

12. A *Man and a Woman Executors ſued Execution of a Statute*, and the *Man granted his Eſtate to the Baron of the Feme, Co-executrix, and died.* The *Baron granted his Eſtate to another, who entered and was ſeiſed*; and alſo the *Baron and Feme ſealed an Indenture of Grant of their Eſtates to another, and delivered to him the Obligation of the Statute, but not Seiſin*, by which *entered claiming ſuch Eſtate only*, yet he is a Diſſeiſor, by reaſon that the Grant is void, and a Diſſeiſor by his Claim nor otherwiſe cannot qualify his Eſtate. Br. Diſſeiſin, pl. 78. cites 24 E. 3. 31. and 63.

13. *Mayor and Commonalty* cannot *diſſeiſe another unleſs to the Uſe of themſelves*; Per Cand. Contra it ſeems if one enters for them by Authority in Writing under their common Seal, where their Entry is not lawful. Br. Corporations, pl. 24. cites 8 H. 6. 1. 4.

14. If there be two Jointenants, and the Grantee of a Rent-charge diſtrains for the Rent, and one of them makes Reſcous, *they are both Diſſeiſors*; for a Diſtreſs for the Rent is a Demand in Law, and then the Nonpayment is a Denial and Diſſeiſin, but he that made the Reſcous is the only *Diſſeiſor with Force*. Co. Litt. 161. b.

15. If a Man *enters into Land* of his own Wrong, *and takes the Profits*, he cannot qualify his own Wrong by ſaying he holds it at the Will of the Owner. Co. Litt. 271. a.

(K) Who

(K) Who ſhall be ſaid a Diſſeiſor.

By Command.

1. **If a Man** commands J. S. to enter **into certain Land** in his Name, if he hath Right thereto, or in the Name of his Couſin, if he hath Right, **if J. S. enters accordingly, yet if the** Commander or his Couſin have no Right, **he ſhall not be a Diſſeiſor, but J. S. only; for his** Command was conditional. 34 Aſſ. 12. **adjudged.** Br. Diſſeiſin, pl. 57. cites S. C. for he made J. S. a Judge of his Right, and therefore it was his Folly to enter where the Commander had no Right; Quod Nota. ——— Br. Entry Congeable, pl. 72. cites S. C. ——— Fitzh. Aſſiſe, pl. 315. cites S. C. and J. S. who entered was awarded the Diſſeiſor.

2. So **if a Man ſays to J. S. that where his Anceſtor died ſeiſed of certain Land, he commands him** to enter **into it** in his Name if his Anceſtor died ſeiſed of a Fee, otherwiſe not; **if J. S. enters in his Name, yet if the** Anceſtor of the Commander did not die ſeiſed of a Fee, **J. S. only is the Diſſeiſor, and not he that commanded him, for his Command was conditional.** 34 Aſſ. 12. See ſupra, pl. 1. and the Notes there.

3. **If a Man** commands J. S. to diſſeiſe J. D. and he does it **accordingly, the** Commander **is a Diſſeiſor as well as J. S.** * 22 Aſſ. 99. * This is miſprinted, no ſuch Point being there.

4. [So] **If a Man** commands his Bailiff to make a Diſſeiſin, **and he does it accordingly, the Commander is a Diſſeiſor.** 27 Aſſ. 30. **adjudged.** Fitzh. Aſſiſe, pl. 254. cites S. C.

5. **If a Man** counſels another to make a Diſſeiſin, **and does it accordingly, the** Counſellor **is a Diſſeiſor.** 27 Aſſ. 30. **adjudged.** Fitzh. Aſſiſe, pl. 254. cites S. C. ——— Co. Litt. 180. b. S. P. and that Aſſiſe lies againſt him.

6. **If a Man** makes a Leaſe for Years of the Land of another out of the Land, **and the** Leſſee enters, **the** Leſſee **only is the Diſſeiſor, and not the Leſſor. P.** 10 Ja. B. **Contra** 23 H. 8. S. 27.

7. If Leſſee at Will makes a Leaſe for Years, **and the** Leſſee for Years enters, **the** Leſſee at Will **is the Diſſeiſor, and not the Leſſee for Years, for that otherwiſe the Leaſe for Years would be void. P.** 9 Car. B. R. **between** *Blanden and Baugh*, **in a Writ of Error upon a Judgment in Banco, reſolved per Curiam, præter Richardſon, and the Judgment given in Banco by Richardſon, then being Chief Juſtice there, and by the Court, præter Harvey, reverſed accordingly. Intratur, Hil.** 7 Car. B. R. Rot. 1106. **This was for the Manor of Blechingly, which belonged to the Earl of Nottingham.**

8. If Tenant at Will or Sufferance makes a Leaſe for Years, **the** Leſſee at Will and Tenant at Sufferance **are the Diſſeiſors, and not the Leſſee for Years.** 12 E. 4. 12. b. **by all the Juſtices.** Br. Diſſeiſin, pl. 68. (67.) cites S. C. ——— Fitzh. Diſſeiſin, pl. 4. cites S. C.

9. Aſſiſe againſt an Infant and others; The Diſſeiſin was found by *Command of the Infant to his own Uſe*, but he *was not preſent*, and the Infant was acquitted of the Diſſeiſin by Judgment, for he *cannot conſent*, and becauſe one came Vi & Armis to make the Diſſeiſin, all the others F. N. B. 179. (G) S. P. ——— But a Man of full Age

may be a Diſſeiſor if he commands another to enter into Land.

others were adjudged to Priſon; and ſo ſee of Treſpaſs. Br. Diſſeiſin, pl. 35. cites 12 Aſſ. 33. Ibid.

10. Lord and Tenant by *Rent-Service*. The *Lord diſtrained*. The *Tenant commanded N. to make Reſcous, who did ſo.* The Aſſiſe is well brought againſt the Tenant only; for he is Tenant, and is Diſſeiſed by the Command, and ſo Diſſeiſor and Tenant named &c. Br. Diſſeiſin, pl. 54. cites 29 Aſſ. 59

Litt Rep. 372 Arg. cites S. C and ſays, that a material Implication will not ſerve, as ſaying, *Do if you will*; and ſays it was agreed there that this is no Diſſeiſin to his Uſe.

11. If *a Man ſays that he will diſſeiſe J. N. to my Uſe*, and *I ſay that I am content*, he is ſole Diſſeiſor, and this is no Command but a Sufferance. Br. Diſſeiſin, pl. 15. cites 21 H. 7. 35.

12. If a Man *diſſeiſes a Stranger to the Uſe of W. N. by my Command* it is a Tort in me. Per Pollard. Br. Diſſeiſin, pl. 15. cites 21 H. 7. 35.

13. If *A. leaſes the Land of J. N.* to me for Years *rendring Rent*, and the *Leſſee enters and pays the Rent to the Leſſor*, the Leſſor is a Diſſeiſor. Br. Diſſeiſin, pl. 77. cites it as ſaid for Law T. 25 H. 8. F. *this countervails a Command to enter*, and he who commands is a Diſſeiſor, quod nota by his void Leaſe.

(K. 2) Who is Diſſeiſor by Failer of Record pleaded.

1. 13 E. 1. *cap.* 25. *IF the Defendants fails to make good the Exception which he pleads, he ſhall be adjudg'd a Diſſeiſor without taking the Aſſiſe, and ſhall give to the Plaintiff double Damages and ſhall ſuffer a Years Impriſonment.*

Br. Aſſiſe, pl. 186. cites S. C.

2. In Aſſiſe the Baron and Feme pleaded Record in Bar and fail'd at the Day, and the *Feme was received*, and *was no Diſſeiſor by the Failer of the Record*, notwithſtanding the Statute of Weſtminſter 2. cap. 25. Br. Diſſeiſin, pl. 36. cites 13 Aſſ. 1.

3. In *Aſſiſe* if the *Tenant vouches Record and fails at the Day, he is a Diſſeiſor without confeſſing the Aſſiſe by the Statute of Weſtminſter* 2. cap. 25. Br. Failer de Record, pl. 5. cites 15 Aſſ. 16.

4. *And* where a Man fails of his Record at the Day &c. he *is not excus'd to ſay that the Juſtices before whom the Record remains was in Wales, and cannot be found. But* by ſome he is excus'd to ſay *that the Record remains in C. B. which Court was always after clos'd ſo that he could not have the Record*; Quære. Br. Failer de Record, pl. 5. cites 15 Aſſ. 16

5. In Mortdanceſter the *Tenant vouch'd*, and the *Demandant granted the Voucher*, and the *Vouchee vouch'd Record and fail'd* at the Day, and yet the Aſſiſe was not awarded of the Damages as in Aſſiſe of Novel Diſſeiſin, but the Aſſiſe was at large upon the Points &c. For the Statute ſays, That by Failer in Aſſiſe habeantur pro Diſſeiſitoribus &c. and *no Diſſeiſor is in Aſſiſe of Mortdanceſtor*. Br. Failer de Record, pl. 10. cites 29 Aſſ. 11.

6. E

6. If an Infant *pleads Record in Aſſiſe and fails at the Day*, he ſhall not be Diſſeiſor by the Statute. Br. Coverture, pl. 76. cites 5 E. 3. Br. Diſſeiſin, pl. 98. cites S. C. and Fitzh. Aſſiſe. 443.

ſed concordat. 33 E. 3. ibi N. 67. quod nota.——Br. Failer de Record, pl. 13. cites S. C. and 3 E. 3. S. P. accordingly; For Corporal Puniſhment ſhall not be againſt an Infant.

7. An *Infant* ſhall not be a Diſſeiſor by Failer of Record, for *corporal Puniſhment* ſhall not be againſt an Infant. Br. Failer de Record, pl. 13. cites 36 E. 3. and 33 E. 3.

8. Attaint in Aſſiſe the *Baron and Feme pleaded Record* in Bank *and fail'd* at the Day, and the *Baron made Default*, and the *Feme was received*, and therefore the Baron was adjudg'd a Diſſeiſor by the Statute by the Failer of his Record; For Judgment cannot be given upon the Failer of the Record by reaſon of the Receipt.. Br. Diſſeiſin, pl. 72. cites 11 H. 4. 51.

(L) Diſſeiſin *by Officers.*

1. IF a Man recovers ſeveral Houſes in an Aſſiſe, and after the Tenant reverſes it in a Writ of Error, and a Writ of Execution iſſues to the Sheriff to put them in Poſſeſſion of the Houſes which he loſt by the Judgment, though the Tertenants are Strangers to the Recovery, and therefore ought to be ouſted without a Scire Facias againſt them, yet if he does Execution putting them out of Poſſeſſion by Force of this Writ, he ſhall not be any Diſſeiſor, becauſe he hath the direct Authority of the Court to do it. P. 15 Ja. B. R. per Curiam, reſolved between *Floyd and Bethel.*

2. The ſame Law is in all Caſes where the Execution is of a Judgment in which the Demand was of a Thing certain, if the Sheriff make Execution of this Thing, he is no Diſſeiſor. P. 15 Ja. B. R. between *Floyd and Bethel*, reſolved per Curiam. Fol. 664.

3. But where the Execution is in the Generalty without mentioning any Thing in particular, there the Sheriff ought to make Execution of the right Thing at his own Peril, otherwiſe he will be a Diſſeiſor, for he is bound to take Notice thereof, and he hath no Warrant from the Court to make Execution but of the right Thing. P. 15 Ja. B. R. between *Floyd and Bethel*, reſolved per Curiam. 6 R. 2. Aſſ. 71.

(M) In what Caſes a Diſſeiſin *of what Part ſhall be* a Diſſeiſin *of the Whole.*

1. IF a Man be diſſeiſed of Part of a Corody, this is not any Diſſeiſin of the Whole. 22 H. 6. 10. Br. Aſſiſe, pl. 76. cites S. C.——Br. Diſſeiſin, pl. 10. cites 15 E. 4. 5. S. P——If the Corody be to take four Loaves and four Flagons of Drink every Week he is diſſeiſed of the Loaves; this is no Diſſeiſin of the Drink, but if diſſeiſed of two Loaves only; this is a Diſſeiſin of all four. 8 Rep. 50. a. cites 22 H. 6. 9. b. and 12 Aſſ. 23.

Br. Aſſiſe, pl. 70. cites S. C. —— Br. Diſſeiſin, pl. 10. cites 15 E. 4. S. P.

2. If a Man be diſſeiſed of Part of the Profits of an Office, this is not any Diſſeiſin of the whole Office. 22 H. 6. 10.

3. If a Man holds of me 20s. Rent, and diſſeiſes me of 10s. thereof, this is a Diſſeiſin of the Whole. 22 H. 6. 10. b.

Br. Aſſiſe, pl. 76. cites S. C.

4. If a Man ſeiſed of a Manor which extends into ſeveral Counties, and one diſſeiſes me of an Acre in one County, this is not any Diſſeiſin of the Reſidue of the Manor. 22 H. 6. 10. b.

For Entry or Livery of Seiſin in one County in Name of Things in two Counties ſhall not ſerve but for the one County. Per Paſton. —— Br. Diſſeiſin, pl. 10. cites S. C.

Br. Aſſiſe, pl. 121. cites S. C.

5. If *five Coparceners* are, and the *one takes more Profits than he ought* to take, this is a Diſſeiſin to the others, though he relinquiſhes Part to the others; but if the others *take this little Part it ſhall abate the Writ.* Br. Diſſeiſin, pl. 18. cites 7 Aſſ. 10.

6. Diſſeiſin of one *Parcel of an Office*, or of the *Profits of an Office*, is no Diſſeiſin of the whole. Br. Diſſeiſin, pl. 10. cites 22 H. 10. per Paſton.

7. If one *diſſeiſes me of Part of a Houſe, and I am in Poſſeſſion of the reſt* of it, it is at my Election whether I will admit myſelf out of Poſſeſſion of the Houſe or not. Sty. 341. Mich. 1652. Cydall v. Spencer & al'.

(N) Where it is purged.

1. IF *the Iſſue* in Tail *enters* after the Death of his Anceſtor *upon the Diſcontinuee within Age, and aliens in Fee*, he ſhall not have Formedon, but *Dum fuit infra ætatem*, becauſe the *Diſſeiſin is not purged by the Diſcontinuance.* Br. Formedon, pl. 47. cites 7 E. 4. 19.

2. If a Man *leaſes for Life*, the *Remainder* over *to another for Life*, if he in *Remainder diſſeiſes Tenant for Life*, and after the *Tenant for Life dies*, he in Remainder is not now any Diſſeiſor; for by the Death of the Tenant of Life, he in Remainder is now ſeiſed by his Remainder, and the Fee reveſted to him in Reverſion; for there he in Remainder cannot enter after the Diſſeiſin, inaſmuch as there is a Meſne Remainder between them. Br. Diſſeiſin, pl. 74. cites 19 H. 6. 22.

3. If *a Man diſſeiſes my Father*, and *I enter upon the Deſſeiſor*, and after *my Father dies*, now *I ſhall retain* againſt the Diſſeiſor, and yet the Diſſeiſor may have Action of Treſpaſs againſt me for my firſt Entry; for *Aſſiſe lies againſt me in the Life of my Father*; Per Brian and his Companions. Brooke ſays Quære inde; for Diſſeiſor cannot make Title. And ſo ſee that the Deſcent of the Right after ſhall change his Matter. Br. Diſſeiſin, pl. 90. cites 21 E. 4. 78.

2 Rep. 55. a. 56. a. Buckler's Caſe, S. C. and the ſixth Point there it was ſaid accordingly.

4. If the *Diſſeiſee levies a Fine to a Stranger*, the Diſſeiſor ſhall retain the Lands for ever; becauſe the Diſſeiſee againſt his own Fine cannot claim; but by the Fine *the Right is extinct, of which the Diſſeiſor ſhall take Advantage.* Mo. 423. pl. 591. Paſch. 37 Eliz. adjudged both in C. B. and in B. R. Buckler v. Harvey.

—— Gouldsb. 162. pl. 96. Hill. 43 Eliz. S. P. put by Coke Attorney-General to the Court; but Popham and Gawdy thought that Diſſeiſor ſhould not take Advantage of it. —— Mar. 105. pl. 180 Reeve and Crawley Juſtices held that this Fine ſhall enure only by way of Eſtoppel, and Eſtoppels bind only Privies to them, and not Strangers, and therefore the Diſſeiſor here ſhall not take

Ken. A. in fol. 49. a. of L. Litt. 13th ed. of my notes on the ſub-ject nine publicat." of that edition.

take Benefit of it, and therefore did conceive 2 Rep. 56. a to be no Law. —— Diſſeiſee levied a Fine, and declared the Uſe of it by Deed to the Conuſee. Bridgman held that this ſhall not enure to the Diſſeiſor; but if no Uſe had been declared, then it ſhould enure to the Uſe of the Diſſeiſor, and extinguiſh the Right of the Diſſeiſee. Lev. 128. Hill. 15 & 16 Car. 2. at Lent Aſſizes at Southwark. Peterborough (Counteſs) v. Bludworth.

5. If a *Leaſe for Life* be made, the *Remainder for Life*, the *Remainder in Fee*, and he in *Remainder for Life diſſeiſes the Tenant for Life*, and then *Tenant for Life dies*, the Diſſeiſin is purged, and he in the Remainder for Life has but an Eſtate for Life; And ſo note a Diverſity, where the particular Eſtate for Life is precedent, and when ſubſequent. Co. Litt. 276. a.

By the Death of the Diſſeiſee that wrongful Fee is turned into a rightful Eſtate by Operation of Law. 8 Mod. 53. Arg.

6. Rights, and the *purging of wrongful Acts are always favoured in Law*, and therefore where a Diſſeiſin or Abatement is made, and the Diſſeiſee brings his Ejectment, and has a Verdict and Judgment for him, (but no Execution) yet an Entry being found as being in the Declaration of Ejectment, that *Entry will purge the Diſſeiſin, and the continuing in Poſſeſſion afterwards is only as a Treſpaſſor.* See Hill. 12 Ann. B. R. Goodtitle v. Riſden. The Caſe was as follows, viz.

MS. Rep. Hill. 12 Ann. C. B. Goodtitle v. Riſden & al'.

In Eject' Firmæ the Plaintiff declared, that Brown Forteſcue, 13 April Anno Reginæ nunc 9. did demiſe to the Plaintiff two Meſſuages, two Gardens &c. with Appurtenances in Clauton in Com' Devon' habend' a 25 Die ejuſd' Menſis Aprilis for ten Years then next following, and that James Forteſcue poſtea ſcilicet eodem 13 April' Anno ſupradict' did demiſe the ſame Tenements (as above) &c. and alſo that Brown Forteſcue poſtea ſcilicet eodem 13 Die Aprilis Anno nono ſupradict' did demiſe the ſaid Tenements (as above); that by Virtue thereof the Plaintiff entered, and was poſſeſs'd until the Defendants ejected him &c. On Not Guilty pleaded, and upon a Trial at Devon Aſſiſes, the Jury find a ſpecial Verdict, viz. they find that Leonard Pote was ſeiſed of, and in the Premiſſes with the Appurtenances in his Demeſne, as of Fee, and being ſo ſeiſed 3 Martii, 16 Jac. 1. by a certain Indenture made between him of the one Part, and Richard Gedge, and John Mayne, of the other Part, did infeoff the ſaid Richard and John, habend' to them and their Heirs, to the Uſe of Leonard for his Life, and after his Deceaſe, then to the Uſe of * M. the Wife of John Pote, Son and Heir apparent of the ſaid Leonard for the Term of her Life, and after the Deceaſe of Leonard and M. to the Uſe of the ſaid John Pote, and the Heirs Male of his Body lawfully begotten, or to be begotten, upon the Body of the ſaid M. and for Default of ſuch Iſſue, to the Uſe of the Heirs Males of the Body of the ſaid Leonard Pote, lawfully begotten upon the Body of Willmot his late Wife, deceaſed, and for Default of ſuch Iſſue to the Uſe of the right Heirs of the ſaid Leonard Pote. That M. died in the Life-time of Leonard, and Leonard died ſeiſed of ſuch Eſtate in the Premiſſes as aforeſaid, after whoſe Death the ſaid John Pote entered, and was ſeiſed in his Demeſne as of Fee Tail, and had Iſſue by M. Leonard his eldeſt Son, John his ſecond Son, and Thomas his third Son; that John Pote the Father died ſeiſed &c. and that the Premiſſes deſcended to the ſaid Leonard as the Son and Heir of the Body of the ſaid John Pote the Father, begotten on the Body of M. whereupon Leonard the Son entered, and was ſeiſed in Fee Tail, Remainder as aforeſaid; and being ſo ſeiſed the ſaid Leonard the Son, 22 Die Martii 1688. died thereof ſeiſed without Iſſue; that John the ſecond Son died in the Life-time of the ſaid Leonard alſo without Iſſue. They find that Leonard the Son in his Life-time married one Eliz. Pine, who ſurvived him, and immediately after his Death entered &c. into the Premiſſes, and during her Life continued the Poſſeſſion thereof; that one John Truebody in her

* The true Name was (Richawrd), which being an odd Chriſtian Name for a Woman is changed into (M.)

her Life-time, viz. Trin. 2 W. & M. in C. B. impleaded the ſaid Eliz. (after the Death of her ſaid Husband) & al' in a Plea of Treſpaſs and Ejectment (inter al') of the Premiſſes upon the Demiſe of the ſaid Thomas Pote, Narrando verſus eos inde (inter al') Modo & Forma ſequen' videlicet Devon' ſſ. Johannes Raw, Eliz. Pote, & al' attach' fuerunt ad reſpond' Johanni Truebody Gent' de placito quare Vi & Armis quinq' Meſuag' &c. quæ prædict' Tho. Pote dimiſiſſet ad terminum &c. intraverunt & ipſum Johannem Truebody a firma ſua prædict' ejecerunt &c. et unde idem Johannes Truebody &c. ad tunc querebatur quod cum prædict' Tho. Pote 1 Aprilis 2 W. & M. &c. dimiſiſſet eidem Johanni Truebody Tenementa prædict' &c. habend' eidem Johanni Truebody a 25 Die Martii tunc ult' præterit' uſque finem Termini quinq' Annorum ex tunc prox' ſequen' plenar' complend' & finiend' virtute cujus quidem dimiſſionis prædict' Truebody in Tenement' prædict' &c. intravit & fuit inde Poſſeſſionat' & ſic inde Poſſeſſionat' exiſten' prædict' Johannes Rawe & al' poſtea ſcilicet eodem 1 Die Aprilis Anno ſecundo ſupradict' apud Clauton &c. Vi & Armis &c. in Tenementa &c. cum Pertinentiis quæ præfat' Thomas Pote eidem Johanni Pote in Forma prædict' dimiſit ad Terminum qui nondum præteriit intraverunt & ipſum Johannem Truebody a firma ſua prædict' ejecerunt &c. Upon Not Guilty pleaded and Iſſue thereupon, In quo quidem placito talit' proceſs' fuit in eadem Cur. &c. quod poſtea ſcil' Term' Sancti Mich. Anno ſecundo ſupradict' prædict' Johannes Truebody per Cons' ejuſdem Cur. recuperavit verſus præfat' Johannem Raw Eliz. Pote & al' Terminum ſuum prædict' (inter al') de & in Tenement' prædict' cum Pertin' &c. ad tunc ventur' & ſuper inde Johannes Truebody petiit breve dictorum nuper Regis & Reginæ de Habere fac' eidem Johanni Truebody poſſeſſion' Termini ſui prædict' ad tunc ventur' de & in Tenement' prædict' &c. per ipſum ſic ut præfertur recuperat' prout per Record' & Proceſs' &c. They further find, that after the ſaid Judgment, and before any Entry by the ſaid Thomas Pote, or by the ſaid John Truebody, a Fine was levied a Die Sancti Mich. in Tr' Septiman' Anno Regni W. & M. ſecundo between John Forteſcue jun. Gen' Quer', and the ſaid Tho. Pote Deforc' of the ſaid Premiſſes &c. unde Placitum convention' fact' inter eos &c. ſcil' quod the ſaid Tho. Pote did acknowledge the ſaid Premiſſes to be the Right of the ſaid John, ut illa quæ idem Johannes habuit de Dono ipſius Thomæ &c. prout &c. They further find, that the ſaid Fine levied of the Premiſſes was, and by a certain Indenture dated 1 Die Maii, Anno tertio W. & M. and made between the ſaid Tho. Pote of the one Part, and the ſaid John Forteſcue of the other Part was, at the Time of the levying thereof, to have been had and levied to the Uſe of the ſaid Thomas Pote and his Heirs for ever; that the ſaid Thomas Pote afterwards, ſcil' 2 Die Junii, Anno 5 W. & M. entered upon the ſaid Premiſſes, and was thereof ſeiſed &c. and being ſo ſeiſed, he the ſame Day by an Indenture made between him of the one Part, and the ſaid Brown Forteſcue of the other Part, and then ſealed and delivered by the ſaid Thomas upon the ſaid Premiſſes &c. in Conſideration of 500 l. paid to him by the ſaid Brown Forteſcue, did demiſe to the ſaid Brown Forteſcue the ſame Premiſſes &c. habend' for the Term of 1000 Years, by Virtue whereof the ſaid Brown Forteſcue entered, and was poſſeſſed &c. They further find, that the ſaid Eliz. Pote poſtea ſcil' 26 Die Martii Anno Domini 1710 died, and that after her Death the ſaid Anthony Riſdon, and others, entered into the ſaid Premiſſes, and were thereof ſeiſed &c. and that afterwards the ſaid Brown Forteſcue, by Virtue of the ſaid Demiſe, entered into the Premiſſes &c. and was thereof ſeiſed &c. and being ſo poſſeſs'd, poſtea ſcil' Die & Anno in Narr' inde mentionat', did demiſe to the ſaid

id George Goodtitle the Premiſſes &c. That the ſaid George Goodtle by Virtue of the ſaid Demiſe entered &c. and was poſſeſs'd &c. pon whoſe Poſſeſſion the ſaid Anthony & al' re-entered & ipſum Georium a firma ſua prædict' &c. inde ejecerunt prout idem Georgius inrius verſus eos inde queritur ſed utrum &c.

This ſpecial Verdict was argued Paſch. 12 Ann. by Serjeant Prat for he Plaintiff, and Serjeant Hooper for the Defendant; and in Mich. Term following it was argued by Serjeant Pengelly for the Plaintiff, nd by Serjeant Cheſhire for the Defendant; and in Hill. Term following the Court of C. B. ſcil' Lord Trevor Ch. J. Blencowe, Tracy, nd Dormer, gave Judgment for the Plaintiff.

The Ch. J. delivered the Opinion of the Court as follows, viz. that pon this ſpecial Verdict three Queſtions had been made and argued t the Bar; 1ſt. Whether, as this ſpecial Verdict was found, Elizabeth Pote, who was the Wife of Leonard Pote, muſt be taken to have entered by Diſſeiſin or Abatement, and to have gained an Inheritance by Wrong? Whether this Entry muſt imply a Diſſeiſin or Entry by Abatement, or muſt be ſuppoſed to be a wrongful Entry to him who had the Right?

In the next Place, whether the Recovery in the Ejectment that was proſecuted by Thomas Pote againſt Elizabeth, (ſuppoſing there had been a Diſſeiſin) has not purged that Diſſeiſin, and re-veſted the Eſtate in Thomas? And

3dly, Admitting there was a Diſſeiſin to him, and that that Diſſeiſin was not purged, then whether the Fine levied by him, who was diſſeiſed, to John Forteſcue, who was a Stranger, and had nothing in the Eſtate did not work by way of Extinguiſhment, and for the Benefit of the Defendant, the Right of the Leſſor of the Plaintiff being extinguiſhed by the Fine?

Theſe were the Queſtions argued at the Bar; now if either of them be with the Plaintiff, he has a good Title; for if there were no Diſſeiſin, or if the Diſſeiſin was purged, or if there was no Extinguiſhment by the Fine, it is plain he had a good Title unleſs it had been deſtroyed by theſe wrongful Acts.

That as to the firſt Queſtion, whether it was a Diſſeiſin or not, and as to the third Queſtion, whether the Fine levied by a Diſſeiſee to a Stranger, to the Uſe of him and his Heirs, did work by way of Extinguiſhment or not, the Court, as to either of them, would not deliver any Opinion at all; But upon the ſecond Queſtion the Court were of an Opinion, that the Recovery in Ejectment had purged the Diſſeiſin. When an Ejectment is brought the Plaintiff declares upon an Entry; 1ſt. He declares of a Demiſe or Leaſe made to him by his Leſſor, and then of an Entry by the Plaintiff, and then that afterwards the Defendant entered upon him, and ejected him; now all this is confeſſed by the Rule of the Court, and this Confeſſion is in Nature of an Eſtoppel, that the Entry will purge the Diſſeiſin, therefore after a Recovery in Ejectment the Plaintiff, or his Leſſor, may bring an Action for the meſne Profits from the Time of that Entry. This is the conſtant Practice, the Defendant has confeſſed the Entry; As to himſelf he is concluded from denying it afterwards, he is accounted a Treſpaſſor, and the meſne Profits ſhall be recovered againſt him.

There is nothing plainer in the Law, than that Rights, and the purging of wrongful Acts, are always favoured; therefore where the Plaintiff has recovered his Eſtate, and an Entry is found by the Jury that Entry purges the Diſſeiſin, and the Continuer in Poſſeſſion afterwards is but as a Treſpaſſor, though there was a Diſſeiſin it is now purged; But whether there was a Diſſeiſor or not, or whether Fine levied by a

Diſſeiſee will extinguiſh the Right, it is not neceſſary in this Caſe for the Court to give any Opinion upon at all; ſo the Plaintiff muſt have his Judgment. Judgment pro Quer' per tot. Cur.

(O) What Actions &c. Diſſeiſee may have againſt Strangers.

1. IF the *Tenant* of the Land *with Warranty be diſſeiſed* by a Stranger, he ſhall not have this Writ during this Diſſeiſin, becauſe he is not Tenant of the Land during the Diſſeiſin, and the Writ ſuppoſes him Tenant. 11 H 3. Rot. 3. between **Simon of Abendun and Reginald de Beſſebury** agreed aud adjudged. 2 Roll Warrantia Chartæ (D) pl. 6.

2. *So* if a *Stranger takes unjuſtly redditum Terræ*, (that is, as it ſeems, takes the Profit of the Land, by which is intended a Diſſeiſin) from the Tenant, or of the Tenant, he ſhall not have this Writ; for he *may have his Aſſiſe* if he will. 11 H. 3. adjudged. 2 Roll Warrantia Chartæ (D) pl. 7.

(P) What Charge of Diſſeiſor ſhall bind Diſſeiſee.

1. YOungeſt Son diſſeiſes the Elder. In Aſſiſe or other Action it is found by falſe Oath againſt Plaintiff. Then the youngeſt grants a Rent-charge and dies without Iſſue. Before Attaint brought he muſt hold the Land charged; for he *comes in now as Heir to his Brother.* The Attaint is gone by his Death, and no Remitter contrary to the Recovery. D. 5. b. pl. 1. Trin. 24 H. 8.

2. Diſſeiſor leaſes for Life, and *grants Reverſion to Diſſeiſee.* Diſſeiſee *accepts the Rent* of Leſſee. Quære, if Diſſeiſee ſhall ouſt Leſſee? D. 30. b. pl. 207. Hill. 28 H. 8. in Canc. Compton v. Brent.

(Q) Power of Diſſeiſee or Diſſeiſor as to Strangers.

1. IF a Man is diſſeiſed, and the *Diſſeiſor makes Feoffment*, and the *Diſſeiſee re-enters*, he ſhall have Action of *Treſpaſs* as well againſt the Diſſeiſor as againſt the Feoffee, and recover all his Damages, ſo that by divers Writs every one ſhall be charged for his Time of the Damages. Br. Treſpaſs, pl. 31. cites 33 H. 6. 46.

2. If *Diſſeiſor takes the Beaſts* of a Stranger *Damage-feaſant* upon the Land, *and after Diſſeiſee re-enters*, yet Diſſeiſor may juſtify the keeping the Beaſts taken before the Re-entry till Agreement be made with him. Kelw. 40. pl. 3. Mich. 17 H. 7.

3. A Diſſeiſor *makes a Leaſe* for Life or Years, the Diſſeiſee ſhall not have Action of *Treſpaſs Vi & Armis* againſt him, becauſe he comes in by Title. For this *Fiction of Law* that the Franktenement hath always been in the Diſſeiſee, ſhall not have *Relation* to make him that comes in by Title to be a Treſpaſſor Vi & Armis. Arg. Godb. 318. cites 11 Rep. 51. [Mich. 12 Jac.]

4. If a Man enters on another, and makes a Leaſe for Life, he gains a Reverſion, and ſhall *maintain* an Action of *Waſte*. Arg. Godb. 318. pl. 417. Paſch. 21 Jac. in Scacc.

(R) Writ and Pleadings.

1. IF *five Coparceners* are, and the one *takes more of the Profits than he ought* to take, this is a Diſſeiſin to the others, though he relinquiſhes Part to the others, but if the others *take this little Part it ſhall abate the Writ*. Br. Diſſeiſin, pl. 18. cites 7 Aſſ. 10.

2. In Aſſiſe if *Diſſeiſor named* in the Writ comes *in proper Perſon he may plead in Abatement of the Writ*. Br. Diſſeiſin, pl. 20. cites 8 Aſſ. 2.

3. In Mortdanceſter of Rent, the *Pernor of the Rent* was not ſuffered to plead *Hors de ſon Fee*, and therefore it ſeems that this is only for the Tertenant. Br. Diſſeiſin, pl. 80. cites 12 Aſſ. 38.———But it ſeems 2 H. 6. 1. That *Stranger to the Avowry* ſhall plead this Plea well, but there he *had Intereſt* in the Land, contra of Pernor. Br. Diſſeiſin, pl. 80.

4. A *Diſſeiſor ſhall not plead Recovery in Abatement* of the Writ, *neither by Concluſion nor Miſnoſmer*, nor otherwiſe, without *ſhewing the Record immediately*; for he cannot loſe the Land by Failure of Record, as the Tenant may, therefore the Aſſiſe was awarded immediately; Quod Nota. Br. Aſſiſe, pl. 413. cites P. 20 E. 3.

5. The Diſſeiſor *ſhall not plead Record in Abatement of the Writ, nor by Concluſion*; Per Skipwith. But per Grene, Diſſeiſor ſhall plead *Miſnoſmer of the Plaintiff*, or *that the Feme Plaintiff is Covert Baron*. But Shard e contra of the Coverture nor *Record*, *unleſs he ſhews it immediately*; for if the Record be deny'd he cannot loſe the Land by Failer of the Record; Per Thorpe, Diſſeiſor may plead that he was *Autterfoits acquit of the Diſſeiſin*. Br. Diſſeiſin, pl. 93. cites 20 E. 3. Fitzh. 120.

6. Præcipe quod reddat againſt *Pernor of the Rent*, who *ſaid* that he *is Tenant of one Houſe out of which* &c. *and W. N. not named, is Tenant of the other Houſe out of which* &c. *Abſque hoc that he is Pernor of any Rent of this Houſe*, and a good Plea, and the Demandant was compelled to maintain his Writ; for if there is not all the Tenants nor Pernors named, this is not well. Br. Diſſeiſin, pl. 73. cites 21 E. 3. 24.

7. Entry, ſuppoſing *that the Tenant entered by W. and K. his Feme*, and the Tenant *ſaid that the Feme's Name was J.* Priſt; and the Demandant was compelled to maintain his Writ that her Name was K. For *known by the one Name, and the other is no Plea*. Br. Enter en le per. pl. 16. cites 21 E. 3. 47. 48.

8. In Aſſiſe Diſſeiſor ſhall not plead *Ancient Demeſne*, nor any but the Tertenant, and he who takes upon him the Tenancy, Quod Nota. Br. Diſſeiſin. pl. 83. cites 21 Aſſ. 2.

9. In

9. In Aſſiſe Diſſeiſor ſhall not plead *that the Plaintiff was ſeiſed the Day of the Writ purchaſed*; for this is for him to plead who takes upon him the Tenancy, Quod Nota, by Award. Br. Diſſeiſin, pl. 44. cites 26 Aſſ. 49.

10. *Aſſiſe againſt B. and A.* and *B. pleaded to the Aſſiſe as Tenant* of the Franktenement; and *A. pleaded that the Plaintiff was ſeiſed* of the Franktenement *the Day of the Writ purchaſed, and yet is*, where the Plaintiff *had elected B. for Tenant before*, and from hence it ſeems that the Diſſeiſor may plead this Plea to the Writ, Quod Nota. Br. Diſſeiſin, pl. 51. cites 28 Aſſ. 41.

11. In Aſſiſe it was ſaid by Aſcue J. That among the Aſſiſes Anno 28 is, that Bailiff nor Diſſeiſor cannot plead that there are *two Vills of the ſame Name in the ſame County, and none without Addition.* Br. Diſſeiſin, pl. 9.

12. In Aſſiſe the Bailiff of the Diſſeiſor pleaded, *That the Plaintiff never had any Thing, and if* &c. Nul tort. Fiſh. ſaid his Maſter had nothing in the Franktenement, therefore he ſhall not have the Plea, and the Opinion of the Court waa with him, and therefore it ſeems that the Diſſeiſor ſhall not have the Plea. Br. Diſſeiſin, pl. 49. cites 28 Aſſ. 24.

13. It was the Opinion of the Court, that the Diſſeiſor ſhall not plead *that there are two S.'s in the ſame County* ſcil. *Great S. and little S.* and none without Addition, Judgment of the Writ, *nor other Plea, but Miſnoſmer of his proper Name*, and ſo was the Opinion of the Court, and it ſeems that theſe Words (no other Plea) are *intended no other Plea of Miſnoſmer, but Miſnoſmer of his proper Name.* Br. Diſſeiſin, pl. 50. cites 28 Aſſ. 38.

14. In Aſſiſe the *Tenant pleaded in Bar by Statute made by himſelf to the Plaintiff, who had the Land after in Execution by Extent*, which *Plaintiff was after condemned at the Suit of C. in 40 l. and this Land delivered in Execution by Elegit*, as a Chattel, *which Eſtate C. the Defendant has.* The *Plaintiff ſaid that he had the Land in Execution by the Statute* ut ſupra, and was ſeiſed till by the Defendant diſſeiſed, *abſque hoc that C. had ever any Thing* in this Land, Priſt, and the other e contra; and ſo ſee that in Pleading by Tenant by Statute-Merchant *he ſaid that he was ſeiſed, and yet it is only a Chattel.* Br. Aſſiſe. pl. 348. cites 38 Aſſ. 4.

15. *Diſſeiſor made Feoffment to a Feme Sole*, who *took Baron*, and Writ of *Entry was brought againſt both, ſuppoſing that the Feme entered by the Diſſeiſor, and not that the Baron and Feme entered by the Diſſeiſor*, and the Writ awarded, Quod Nota, and it ſeems that the Writ had been good alſo if the Entry of both had been ſuppoſed by the Diſſeiſor of this Part, contra of the Part of the Demandant, as in 5 H. 7. Br. Enter eu le per. pl. 34. cites 39 E. 3. 25.

16. Aſſiſe *by Baron and Feme*, quod Diſſeiſivit eos, the *Defendant ſaid that he himſelf was ſeiſed in Fee, and leaſed to B. C. for Life, who alienes to the Feme and her firſt Baron*; the *Plaintiff made other Title*, upon which they were *at Iſſue out of the Point of Aſſiſe*, viz. That the Leſſee had Fee, and *found for the Plaintiff*, and *that the Feme was ſeiſed and diſſeiſed before the Eſpouſals, and that the Baron never had Seiſin*, Hache demanded Judgment of the Writ, which is, Quod *Diſſeiſivit eos, where the Baron was not ſeiſed*, & non allocatur, but Seiſin awarded to the Plaintiff, for an *Ouſter was confeſſed* by the Defendant in his Plea before, and therefore ought not to have inquired of the Seiſin and Diſſeiſin, and ſo the Verdict void. Br. Aſſiſe, pl. 369. cites 44 Aſſ. 6.

17. Entry in the Poſt of *Diſſeiſin to the Brother of the Demandant*, the Tenant *pleaded Feoffment of this ſame Brother to J. N. Que Eſtate he has, Judgment ſi Actio*, and held a good Bar; quod Mirum! for it ſeems Argumentative. Br. Enter en le per. pl. 10. cites 2 H. 4. 19.

18. Writ

18. Writ of Entry *ſur Diſſeiſin* made to J. N. the *Tenant pleaded Feoffment of this ſame J. N. made to another, Que Eſtate he has*, and held a good Bar; quod mirum! for it ſeems only Argumentative. Br. Bar, pl. 14. cites 2 H. 4. 19.

19. *Feme Covert is infeoffed, Writ* of Entry is brought, *ſuppoſing the Entry to be by Baron and Feme*, as Land cannot revert to the Feme Covert but to the Baron alſo; but otherwiſe it ſhall be where *the Feme enters and after takes Baron* ſo that he finds the Feme ſeiſed; for there the Writ of Entry ſhall ſuppoſe the Entry of the Feme only. Br. Enter en le per. pl. 12. cites 7 H. 4 17.

20. Pernor of the Profits ſhall not plead *Ancient Demeſne*, nor *Releaſe of Right*, *Fine*, *Recovery*, nor ſuch like by Que Eſtate, as it ſeems, unleſs in ſpecial Caſes; but he may plead *all Actions, or traverſe the* * *Diſſeiſin, or the Pernancy of the Profits* &c. Br. Diſſeiſin, pl. 91. cites 1 H. 5. Fitzh. 381.

* Orig. is (Difference)

21. In Writ of Entry ſur Diſſeiſin made to the Anceſtor, the Writ was, *Quæ clamat eſſe jus et Hæreditatem ſuam*, by which the Writ was abated. Thel. Dig. 105. Lib. 10. cap. 14. S. 1. cites Mich. 20 E. 2. Brief 851. but cites 10 H. 6. contra.

But Ibid. S. 8 ſays, that in Writ of Intruſion upon the Poſſeſſion of his Anceſtor, and in every Writ where a Man demands a Fee Simple upon the Poſſeſſion of his Anceſtor, he ought to have theſe Words, Quæ clamat eſſe jus et Hered' ſuam, cites the Regiſter 228, 229. but contra in Nat' Brev. 191. but in no Writ of his own Poſſeſſion, unleſs in Cui in Vita Mich. 10 H 6. 9.

22. In Treſpaſs Iſſue was tendered *that J. N. Defendant did not diſſeiſe the Plaintiff to the Uſe of W. P.* and the other e contra, and by Danby and Davers, it is Negative Pregnant; but if he ſays that *non Diſſeiſivit Modo & forma*, it is good to all Intents. Br. Negativa &c. pl. 5. cites 33 H. 6. 37.

23. In *Aſſiſe* they were *adjourn'd for Variance between the Writ and the Patent*, to Weſtminſter, and there to H. ſuch a Day, at which Day the Parties appeased, and the one *Defendant took the Tenancy* upon him, *and pleaded in Bar*, and the *other ſaid that the Plaintiff after the laſt Continuance had entered into Parcel* of the Land put in View and now in Plaint, and demanded *Judgment of the Writ*, and there it is agreed that the Diſſeiſor ſhall have this Plea to the Writ. Br. Diſſeiſin, pl. 1. cites 35. H. 6. 11. 12.

Br. Aſſiſe, pl. 14. cites S. C.

24. *And* it is ſaid that *he ſhall have every Plea which goes in Excuſe of Damages* as this Plea does, *and every Plea which goes in Bar and does not meddle with the Right of the Land*, as *Releaſe of all Actions perſonal*; Quod Nota, it is agreed that this is a good Bar in Aſſiſe, *but* he ſhall *not* plead Releaſe *of all the Right*, for this goes to the Right of the Land. Br. Diſſeiſin, pl. 1. cites 35 H. 6.

Br. Aſſiſe, pl. 14. cites S. C.

25. *But* per Priſot and Fincham, he may plead to the Writ, *that at another Time the Plaintiff brought Writ of a higher Nature vgainſt him*, and he may plead that *no Tenant of the Franktenemert named in the Writ*, aud *that the Plaintiff has nothing unleſs jointly with one J. N. not named* in the Writ who is in full Life; for *thoſe Pleas do not go in Extinguiſhment but in Excuſe of Damages*, and therefore by the Entry into Part the Aſſiſe is gone, and he cannot recover any Damages. And ſo ſee that *Entry into Part goes to all the Writ*; for the Damages are entire, Quod Nota, by which the Plaintiff ſaid, that he did not enter, and the others e contra. Br. Diſſeiſin, pl. 1. cites 35 H. 6. 11. 12. and ſays ſee 14 H. 6. fol. in Fine, and 28 Aſſ. 41.

Br. Aſſiſe, pl. 14 cites S. C.

26. In Præcipe quod reddat the Tenant *ſaid that J. S. was ſeiſed till by him diſſeiſed before the Writ purchaſed, which J. S. has entered upon him pending the Writ*; Judgment of the Writ and a good Plea. Br. Diſ-

ſeiſin, pl. 101. cites 5 E. 4. 5. 6. and ſuch a Plea was awarded good Anno 15 E. 4. and ſo ſee that for his Advantage *to abate the Writ* &c. the *Tenant may confeſs a Diſſeiſin to a Stranger.* Br. Diſſeiſin, pl. 101.

As in Dower the *Tenant ſaid that before the Writ purchaſed A. B. was ſeiſed in Fee till by this Tenant diſſeiſed, and that the* 10th *Day of October A. re-entered*, Judgment of the Writ, and a good Plea per tot. Cur. And it is *no Replication that A. entered by Covin*; for his Entry was lawful, and a Man cannot do Right by Covin. Br. Brief, pl. 192. (bis) cites 15 E. 4. 4.

27. A Man may *confeſs, that he himſelf did a Diſſeiſin* for his Benefit. Br. Diſſeiſin, pl. 11. cites 15 E. 4. 5.

28. In *Aſſiſe againſt Diſſeiſor and Tenant*, the *Diſſeiſor may plead to the Diſſeiſin, and in Bar, and in Excuſe* of the Tort, *but he cannot meddle with the Land*; for the Tenant only ſhall plead to the Right of the Tenancy. Br. Diſſeiſin, pl. 75. cites 13 H. 8. 14. Per Brudnel.

29. *And* in Aſſiſe *againſt Pernor and Tenant* the Tenant ſhall plead a Diſcharge of the Tenancy only; But the *Pernor may plead to the Tort, and ſhall intitle himſelf to the Rent* out of it if he can. Br. Diſſeiſin, pl. 75. cites 13 H. 8. 14. Per Brudnel.

(S) Pleadings. What Plea is a Confeſſion of a Diſſeiſin.

1. IN Aſſiſe, they are at Iſſue upon *Hors de ſon Fee*; the Seiſin and Diſſeiſin ſhall not be inquired; For it is confeſſed *implicative* by the Plea, quod nota bene. Br. Aſſiſe, pl. 429. cites 10 E. 3. 41.

2. In Aſſiſe, the *Tenant pleaded a Deed in Bar, and waved it*, there the Aſſiſe ſhall not inquire of the Diſſeiſin, but only of the Seiſin; For he is Diſſeiſor by his Plea; Per Parninge. Br. Aſſiſe, pl. 416. cites M. 13 E. 3.

3. *Releaſe pleaded by the Defendant* is a Confeſſion of the Diſſeiſin, ſo that the Seiſin and Diſſeiſin ſhall not be inquir'd. Br. Aſſiſe, pl. 417. cites 22 E. 3. 4.

(T) Entry in the Per &c. Pleadings.

1. ENTRY brought *by a Feme, in that the Tenant had not Entry unleſs by the ſame Feme*, and the Tenant *ſaid that ſhe and her Baron demiſed to him*, Judgment of the Writ and a good Plea, and ſhe put to her Cui in Vita; For it was in Writ of Entry ad terminum qui præteriit. It ſeems that ſhe may enter if there be no Deſcent after the Diſcoverture. Br. Entry en le Per, pl. 43. cites 6 E. 2. Itinere Cant.

2. If Writ of Entry be *brought in the Poſt which may be within the Degrees it ſhall abate.* So if it be brought in the Per, or in other Degree within the Degrees where it ſhould be in the Poſt, this ſhall abate. Br. Enter en le per, pl. 39. cites Vet. N. B. Tit. Brief de Non compos mentis, and Brief de Entry dum fuit infra ætatem, and Fitzh. Tit. Brief 286. 438. and 440. and 17 E. 3.

3. Entry ſur Diſſeiſin *againſt a Man and his Feme in the Quibus, the Feme not having Entry unleſs by R. who wrongfully &c. diſſeiſed his Father,*

ther, and *not ſuppoſing the Entry of the Baron*, and yet the Writ varded good, and if the *Baron aliens and retakes to him and his Feme*, et this ſhall not change the Degrees; For the Feme is remitted. Br. ntre en le Per, pl. 25. cites 39 E. 3. 25.

4. Entry ſur Diſſeiſin *of Rent*, the *Tenant made bar of Rent-Charge*, nd the *Demandant made Title to the Rent-Service*, and good per Cur. or it may be that he has both there, and brings the Action of the one, nd there the Tenant ſhall have new Anſwer, and this to the Writ if e will in this Caſe, and ſo he had there; For the Bar was not pleaded o this Rent-Service. Br. Entre en le Per, pl. 35. cites 12 E. 4. o. 11.

5. Writ of Entry *againſt the Baron and Feme*, the *Writ ſhall be that he Feme had not Entry unleſs by N.* &c. and *not that the Baron and Feme ad not Entry unleſs by N.* &c. Br. Enter en le Per, pl. 36. cites H. 7. 2.

6. Entry in the Poſt, *ſuppoſing that the Tenant had not Entry unleſs fter the Diſſeiſin which J. S. made to his Anceſtor* &c. And the Tenant aid, *That before that the Anceſtor any Thing had, T. was ſeiſed in Fee and eas'd to B. for Term of Life, and B. infeoffed N. by which the Leſſor en-er'd for Alienation to his Diſinheritance and died ſeiſed, and the Land deſcended to the Tenant as Heir* &c. and per tot. Cur. this is no Plea, becauſe he does not traverſe the Diſſeiſin alleg'd by J. S. nor he does not confeſs nor avoid it; And per Vaviſor *in Writ of Entry the Diſſeiſin ought to be confeſs'd and avoided or travers'd.* But *otherwiſe* it is *in Aſſiſe*; For there it is ſufficient to plead Feoffment of a Stranger, and give Colour to the Plaintiff; Contra in Writ of Entry ſur Diſſeiſin. Br. Enter en le Poſt, pl. 22. cites 15 H. 7. 16, 17.

7. In Writ of Entry *in the Poſt*, the Tenant *ſaid that he was ſeiſed till by the Plaintiff diſſeiſed, upon which he entered*, and a good Plea. And the ſame Law in Treſpaſs. Br. Enter en le Per, pl. 46. cites 16 H. 7. 4.

(U) Pleadings. Traverſe in what Caſes.

1. ENTRY in the Per by which the *Tenant had not Entry but by J. who diſſeiſed the Demandant*, the Tenant *ſaid that the Demandant infeoffed J.* and no Plea without ſaying *abſque hoc that J. diſſeiſed the Demandant*; For Plea contrary to the Suppoſal of the Writ is no Plea without traverſing the Point of the Writ. Br. Enter en le Per, pl. 15. cites 38 E. 3. 2.

2. If a Man is diſſeiſed he may have *Aſſiſe or Writ of Entry* in Nature of Aſſiſe at his Pleaſure. Br. Enter en le Poſt, pl. 14. cites 9 H. 5. 9.

3. In Entry ſur Diſſeiſin *it is no Plea that the Plaintiff infeoffed him unleſs he traverſes the Diſſeiſin.* Br. Traverſe per &c. pl. 299. cites 4 H. 6. 29.

4. In Treſpaſs the *Defendant pleaded his Franktenement at the Time* &c. per quod &c. the *Plaintiff ſaid that before that the Defendant any Thing had, P. was ſeiſed in Fee and infeoffed him, by which he was ſeiſed till the Defendant enter'd and did the Treſpaſs, and he freſhly re-enter'd*, and becauſe the Defendant acknowledg'd the Treſpaſs, Judgment &c. the *Defendant ſaid that J. N. was ſeiſed in Fee, and died ſeiſed and W. his Heir enter'd and died, and he as Heir to him, and ſhew'd how &c. enter'd*

and

and of ſuch Eſtate was ſeiſed at the Time of the Treſpaſs &c. and held no Plea; For he has not travers'd the Diſſeiſin in the Replication, nor confeſs'd and avoided it. Br. Traverſe per &c. pl. 61. cites 7 H. 6. 33.

5. In *Treſpaſs* the *Defendant ſaid that he was ſeiſed* &c. *till by A. diſſeiſed, who infeoffed the Plaintiff upon whom the Defendant enter'd*, of which Entry the Plaintiff has brought this Action, and the *Plaintiff ſaid that before the Defendant or the ſaid A. any Thing had, W. was ſeiſed*, and *ſo convey'd the Deſcent to the ſaid A. and that the Defendant abated after the Death of the Anceſtor of the ſaid A. upon whom A. enter'd and infeoffed the Plaintiff, and after the Defendant did the Treſpaſs*, of which he has brought his Action, and pray'd his Damages, and by the Opinion of the Court the *Title is not good without traverſing the Diſſeiſin alleg'd in the Bar.* Br. Traverſe per &c. pl. 13. cites 9 H. 6. 32.

6. *For* it is ſaid there and the ſame Year, fol. 19. and 30. that *where Diſſeiſin is alleg'd by Suppoſal*, as *in Writ or Declaration*, as in Aſſiſe or Writ of Entry ſur Diſſeiſin, there it is ſufficient to plead Matter of Bar as above, without traverſing the Diſſeiſin; *But* where it is alleg'd *in Bar, Title, or other Pleading*, there it ought to be confeſs'd and avoided or travers'd, quod nota, and in the Caſe above the Plaintiff has not done the one nor the other. Br. Ibid.

7. Treſpaſs *againſt R. who pleaded* that *his Franktenement* &c. the *Plaintiff ſaid that before R. any Thing had, W. was ſeiſed and infeoffed the Plaintiff, who was ſeiſed till by N. diſſeiſed, who infeoffed the ſaid R. upon whom the Plaintiff freſhly re-enter'd, and the Treſpaſs meſne between the Diſſeiſin and the re-entry*, to which the *Defendant ſaid, that E. was ſeiſed in Fee, and infeoffed the ſaid R.* and no Plea without traverſing the Diſſeiſin to the Plaintiff. Br. Traverſe per &c. pl. 292. cites 21 H. 6. 5. 6.

8. Where the Diſſeiſin is *alleg'd by Way Conveyance to the Title or Poſſeſſion of the Plaintiff*, it is not traverſable, and eſpecially where the *Plaintiff and Defendant convey from one and the ſame Perſon.* Arg. D. 365. b. 366. a. pl. 34. Mich. 21 & 22 Eliz. in Ld. Crumwell's Caſe, cites 21 and 30 H. 6. 2. and 5 E. 4. and 4 & 5 H. 7.

9. In Aſſiſe, the Tenant may ſay *that his Father was ſeiſed, and died ſeiſed*, without traverſing the Diſſeiſin ſuppoſed in the Writ or Plaint. Br. Traverſe per &c. pl. 279. cites 22 E. 4. 39.

10. Formedon *againſt Pernour of the Profits of the Day of the Title accrued*; Per Littleton the Statute does not give Action but where the Defendant is Tenant of the Franktenement the Day of the Action accrued, and where the Defendant takes the Profits the Day of the Writ purchaſed, and ſo the Defendant may traverſe any of the Points; Contra in Aſſiſe or Action founded upon Diſſeiſin, there he ſhall traverſe the Diſſeiſin or the Prender of the Profits. Br. Traverſe per &c. pl. 216. cites 4 E. 4. 38.

For more of Diſſeiſin in General, See **Aſſiſe, Diſcent, Entry** and other proper Titles.

Diſtreſs.

(A) *Damage-Feaſant.* What Things may be taken Damage-Feaſant.

1. A Grayhound **may be taken Damage-Feaſant** running after Coneys in a Warren. 2 E. 2. **Fitzh. Diſtreſs,** 20.

2. So **a Man may take a** Ferret **that another hath brought into his Warren and taken Coneys with.** 2 E. 2. **Fitzh. Avowry** 182.

3. **If a Man brings** Nets and Gins **through my Warren I cannot take them out of his Hands.** 7 E. 3. **Avowry.** 199.

4. **If a Man rides upon my Corn I cannot take his Horſe Damage-Feaſant.** 7 E. 3. **Avowry.** 199. Sid 440. in a Nota at the End of pl. 9 Hill. 21 Car. 2. B. R. the Chief Juſtice ſaid, that a Horſe on which a Man is riding may be diſtrained Damage-Feaſant, and it ſeems he ſhall be led to the Pound with the Rider on his Back.

5. Shocks of Corn **may be taken Damage-Feaſant.** 21 H. 7. 39. b. **by all the Juſtices.** Br. Diſtreſs, pl. 30 cites S. C.—— Fitzh. Avowry, pl. 263. cites S. C. and Trin. 14 H. 7.——S. P. accordingly, per Cur. Obiter. Lat. 8. Hill. 1 Car. B. R. in Caſe of Stilman v. Chance.

6. Treſpaſs for taking a Grayhound with a Collar, the Defendant pleaded that the *Dog* was *courſing a Hare in his Land*, and thereupon he took him and led him away; upon Demurrer this was adjudged an ill Plea. Cro. J. 463. pl. 10. Hill. 15 Jac. B. R. Athill v. Corbett.

7. Treſpaſs for cutting the Plaintiffs Nets and Oars; the Defendant juſtified, for that he was ſeiſed in Fee of a ſeveral Fiſhery, and that the Plaintiff with others *endeavoured* to row on the Water, and *with their Nets to catch his Fiſh*; and thereupon to preſerve his Fiſhing, he cut the Nets, and Oars &c. adjudged no good Plea, for he might have taken the Nets and Oars, and detained them as Damage-Feaſant. Cro. Car. 228. pl. 5. Mich. 7 Car. B. R. Reynell v. Champernoon.

8. If *ten Head* of Cattle *are doing Damage* one cannot *take one* of them and keep it till he be ſatisfied for the whole Damage, but may bring Treſpaſs for the Reſt. Per Holt Ch. J. 12 Mod. 660. Hill. 13 W. 3. in Caſe of Vaſpor v. Edwards.

(B) The *Goods of whom* may be taken Damage-Feaſant.

1. **IF the** Lord agiſts the Cattle of a Stranger in the Common **of the Tenants where he himſelf hath Right to feed the Common, though he hath the Freehold, yet a Tenant may take the Cattle Damage-Feaſant.** 30 E. 3. 27. Fol. 665.

2. In Avowry it was held that where J. is amerced in a Leet for receiving of W. by a Year and a Day, who was not put in Decennary, the Lord cannot diſtrain J. but by his proper Beaſts, and not by the Beaſts of another in his Cuſtody, by reaſon that *the Offence aroſe upon the Perſon*, contra where it ariſes by the Soil, as for Rent-Service or Damage-Feaſant; note the Diverſity, for it is good as it ſeems, but the Plaintiff paſſed over Gratis. Br. Diſtreſs, pl. 3. cites 41 E. 3. 26.

3. Note, It was ſaid that if *the King grants a Rent out of his Manor*, the Manor is not charged, but the Perſon by Petition, the Reaſon ſeems to be inaſmuch as a Man cannot diſtrain upon the King, nor have Aſſiſe or other Action againſt him. Br. Charge, pl. 37. cites 13 E. 4. 5. 6.

4. *Leſſor cuts Wood*, and puts it into his Cart, and *leaves it on the Land for a Month*, and then will carry it away; Leſſee may diſturb him, for he may diſtrain this Damage-Feaſant for the Wrong to him; Per Doderidge; (N. B In the Caſe in Judgment the Leſſee had covenanted not to diſturb the Leſſor in felling or carrying away &c.) Palm. 504 Hill. 3 Car. B. R. Hayward v. Fulcher.

5. The *Cattle of a Stranger* cannot be diſtrained unleſs they were *Levant and Couchant*, but it muſt come on the other Side to ſhew that they were not ſo; Per Keeling. Mod. 63. in pl. 6. Trin. 22 Car. 2. B. R.

(C) *Who, in reſpect of his Eſtate*, may take Cattle Damage-Feaſant.

1. A Commoner **may juſtify the taking of the Cattle of a Stranger upon the Land Damage-Feaſant.** 30 E. 3. 27.

2. **If there be a** Shack Common **in a Town where** every one **knows his Part, but it lies in Common, yet** no Commoner may **avow the taking of Cattle Damage-Feaſant** in any Part of the **Common** but in that which is his own Part. **Mich. 8 Jac. B.** *Boderidge's Caſe*, **per Curiam.**

Br. Avowry, pl. 29. cites S. C. —— The Landholders had Common for all Beaſts levant and couchant upon their Eſtates; the Plaintiffs were both intitled to this Common, and the Plaintiff putting in more Cattle than were levant and couchant upon his Eſtate, the Defendant diſtrained them; and the Queſtion was, Whether one Commoner might diſtrain another in this Caſe? It was agreed in this Caſe, that one Commoner might have an Action upon the Caſe againſt another that put in more than were levant and couchant, and that the Lord might in ſuch Caſe diſtrain; and that where a Commoner was intitled to a Common for a certain Number of Cattle, as for ten or any other certain Number, there if he ſurcharged, another Commoner might diſtrain. It was likewiſe agreed, that if a Stranger, who has no Right of Common, put in Cattle, any Commoner might diſtrain; but this was ſaid to be a Caſe not yet reſolved, Whether one Commoner could diſtrain another for a Surcharge in the Caſe of Levancy and Couchancy; And ſo the Court took Time to conſider till the next Term. Freem. Rep. 273. pl. 300. Paſch. 1698. C. B. Dixon v. James.

3. **If a Man hath** Common for ten Cattle, **and he puts in more, the** Surpluſage above the ten may be taken **Damage-Feaſant.** 46 E. 3. 12. b.

If a Man hath a Freehold in a Market-Place, and Corn is brought thither on the Market Day, and ſet down, he cannot juſtify the taking it there Damage-Feaſant. Cro. Eliz. 75. pl. 34. Mich. 29 & 30 Eliz. B. R. The Mayor of Launceſton's Caſe.

(D) Diſtreſs

(D) Diſtreſs Damage-Feaſant. *In what Caſes* it may be.

1. If a Man takes my Cattle and puts them into the Land of another Man, the Tenant of the Land may take the Cattle Damage-Feaſant, though I. who was the Owner was not privy to the Cattle being Damage-Feaſant, and he may keep them againſt me till Satisfaction of the Damages. Trin. 15 Jac. B. R. between *Robinſon and Waller*, Per totam Curiam.

2. If a *Man comes to diſtrain* Damage-Feaſant, *and ſees the Beaſts there, but the Owner drives them out*, he cannot diſtrain them Damage-Feaſant, but is put to his Action of Treſpaſs; For in ſuch Caſe though otherwiſe in the Caſe of Rent Arrear the Beaſts ought to be Damage-Feaſant at the Time of the Diſtreſs; Per the Reporter in a Nota. 9 Rep. 22. a. cites 16 E. 4. 10. b. and 2 E. 2. Avowry 180.

Co. Litt. 161. a. S. P. —— Pl. C. 38. a. S. P. —— But Ibid. Marg. cites that in a Writ of Reſcous brought by one named Rich, Hill. 6 R. 2. and abridged by Fitzh. tit. Reſcous, pl. 11. it is held that for Damage-Feaſant the Party who had the View may purſue and take the Beaſts in other Land &c.

Diſtreſs Damage-Feaſant *in the ſtricteſt Diſtreſs* that is; for the Thing diſtrained *muſt be taken in the very Act*; For if they are once off, though on *freſh Purſuits*, you cannot take them; Per Holt Ch. J. 12 Mod. 661. Hill. 13 W. 3. in Caſe of Vaſper v. Edwards.

3. Treſpaſs againſt A. who *juſtified for Diſtreſs for his Lord*; the *Plaintiff ſaid that he had a Cloſe adjoining in which Beaſts were put, and they eſcaped and went into the other's Lands where Treſpaſs &c. and the Plaintiff freſhly purſued them, and before that he could take them out the Defendant took them*, and yet the Diſtreſs is well taken, per Cur. notwithſtanding the freſh Suit, and that they were not levant and couchant; for they *were there without Authority*. Br. Treſpaſs, pl. 281. cites 7 H. 7. 1.

4. S. brought an *Ox-hide to Leadenhall in London to ſell it*, and W. diſtrains it Damage-Feaſant, and juſtifies as Servant to the Mayor to whom that Place appertained for the Incorporation; adjudged that the Diſtreſs is not lawful, for it was brought there to be ſold pro bono publico; for *Goods brought to a Market* and expoſed to Sale ſhall not be diſtrained. Noy 19. Mich. 15 Jac. cites the Caſe of Sawyer v. Wilkinſon.

5. A. ſuffer'd his *Cattle* to *eſcape into B. his Neighbour's Ground, the Fences being out of Repair, which B. ought to make*, and the Cattle being there levant and couchant, without any freſh Purſuit made *were diſtrained for Rent due from B.* and per Cur. the Diſtreſs is not lawful; for though the Fault was in B. for not repairing the Fences, yet it was A.'s Fault to ſuffer them to be levant and couchant there without making any freſh Purſuit after them; and Rent is due of common Right, and the Land is the Debtor, where the Landlord muſt reſort for his Rent, and is not to enquire whoſe Cattle they are, or how they came there. 2 Roll Rep. 184. Mich. 17 Jac. B. R. Gill v. Gawen.

6. The *Cattle of a Stranger* cannot be diſtrained, unleſs they were *levant and couchant*; but it muſt come on the other Side to ſhew that they were not ſo; Per Kelynge. Mod. 63. pl. 6. Trin. 22 Car. B. R. Jordan v. Martin.

S. C. cited by Powell J. 2 Lutw. Appendix 1580. in Caſe of a Diſtreſs for Rent ——— 2 Keb. 669 pl. 34. S. C. and per Curiam præter Twiſden, it muſt be averr'd Levant and Couchant, but it not being poſitively averred that the Plaintiff was a Stranger, the Court will never intend it ſo.

7. If

7. If *Turves* are *lying on a Common Damage-Feaſant* a Commoner may diſtrain them, but he cannot juſtify the burning them. 2 Jo. 193. Paſch. 34 Car. 2. B. R. Bromhall v. Norton.

(D. 2) For Rent. By whom. In reſpect of his Eſtate.

1. IN Aſſiſe it was ſaid for Law, that where *Rent-Charge deſcends to a Daughter*, and after *the Land deſcends to the ſame Daughter and to her two Siſters*, nothing is extinct but the third Part of the Rent, and yet the Daughter, who has the Rent, *cannot diſtrain* for the other two Parts of the Rent *till Partition* be made; For ſhe is ſeiſed of the Land per my et per tout with the other two Siſters till Partition be made. Br. Diſtreſs, pl. 37. cites 34. Aſſ. 15.

2. In Scire Facias upon a Fine, it was agreed, where *upon a Fine it it reſerv'd*, That for not performing of Maſſes by the Prior of B. (the Conuſor) *That the Juſtices of C. B. or Barons of the Exchequer might diſtrain*, and in this Caſe the *Conuſee and his Heirs might diſtrain*. Br. Diſtreſs, pl. 20.

Br. Grants, pl 21. cites 46 E. 3. 18.

3. Where it is *reſerv'd*, *That* for Non-Feaſance *the Bailiff of the King ſhall diſtrain*, yet the *Bailiff of the Party may diſtrain*. Br. Diſtreſs, pl. 20.

Br. Execution, pl. 143. cites S. C. and Fitzh. tit. Avowry. 237.

4. *Rent reſerv'd upon a Leaſe for Term of Life may* be put in Execution by Elegit, and the Plaintiff who recovers may diſtrain for the Rent, and yet he has not the Reverſion. Br. Diſtreſs, pl. 71. cites 13 H. 4.

5. Where a Man *leaſes for* 20 *Years*, and the *Leſſee leaſes over for* 10 *Years* rendring Rent, there if he grants the Rent to another Man he cannot diſtrain; becauſe he has not the Reverſion of the Term; Contra if he had granted to him the Reverſion and the Rent; Note the Diverſity. Br. Diſtreſs, pl. 45. cites 2 E. 4. 11.

6. It was ſaid, that if *the King grants a Rent out of his Manor* the Manor is not charged, but the Perſon by Petition; The Reaſon ſeems to be inaſmuch as a Man cannot diſtrain upon the King, nor have Aſſiſe nor other Action againſt the King. Br. Charge, pl. 37. cites 13 E. 4. 5. 6.

2 Mod. 138 Cook. v. Herle S. C.

7. *Ceſtuy que Uſe of a Rent-Charge* for Life *executed by the Statute*, may diſtrain as incident to the Eſtate, the Power of Diſtreſs is tranſferred to him by the Statute. Mod. 223. pl. 12. Mich. 28 Car. 2. C. B Boſcawen and Herle v. Cook.

8. If a *Leaſe for Years* be made reſerving Rent, *and then Leſſor acknowledges a Statute* which is extended. The Conuſee after the extent ſhall have a Debt or Diſtrain and avow for the Rent. Per Ventris J. 2 Vent. 328. cites Bro. tit. Statute Merchant 44. [cites Fitzh. Avowry. 137. 13 E. 4.] and Noy 74. *But* he that *enters by a Power to hold for an Arrear* of Rent ſhall not. Per Ventris J. 2 Vent. 328. Trin. 1 W. & M.

9. In Replevin the Defendant avowed, for that W. R. was ſeiſed of the Place where &c. in Fee, and being ſo ſeiſed he *granted a Rent-Charge out thereof to W. W. for Life*, that *W. W. is dead*, and that he (the Defendant) was his Executor, and diſtrained in the Place where, for ſo much Rent in Arrear, and due to his Teſtator in his Life; but did not aver, that the Place where &c. was then in the Seiſin of the Grantor of this Rent, or any other Perſon who claimed by, from or under

nder him ; And upon a Demurrer to this Avowry Holt Ch. J. held, hat the Executor might diſtrain either on the Grantor or any other erſon, who comes in by or through him, and if the Plaintiff is not iable to the Diſtreſs, it is more natural for him to ſhew it in his Re-lication for his own Defence. Beſides, the Statute which impowers Men to diſtrain, is a Remedial Law, and therefore ought to be ex-ounded according to Equity, and extended accordingly, and the Words therein being (Executors of Tenants for Life) may ex vi Ter-mini include all Tenants for Life. 2 Salk. 136. pl. 2. Mich. & Hill. 8 W. 3. C. B. Howell v. Bell.

(D. 3) Who may diſtrain for Rent, in Reſpect of the Eſtate or the Perſon in Poſſeſſion. Of the King &c.

1. THE *one Tenant in common* may hold of the other, and the *other may diſtrain* and make Avowry, quod nota. *Contra* it ſeems *between Coparceners* and Jointenants *before Partition*, for Privity. Br. Diſtreſs, pl. 64. cites 31 E. 1. and Fitzh. Avowry. 241.

2. Where a Man *has a Seigniory*, and *this Land is ſeiſed into the Hands of the King by falſe Office*, yet the *Lord cannot diſtrain upon the Poſſeſſion of the King, though the Office be Falſe*, this Office *being in Force*, quod nota ; For it appears, tit. Treſpaſs, that a Man may traverſe for his Seignory. Br. Diſtreſs, pl. 76. cites 44 E. 3. 13.

3. A Man cannot diſtrain during the Poſſeſſion of the *King*, be he *intitled by Office* or not, and if he be intitled by Office or Record, and grants the Land over, then he cannot diſtrain upon the Grantee. Contra where the King enters *without Office or Record*, and grants it over, there he may diſtrain the *Patentee*, but not upon the Poſſeſſion of the King. Br. Diſtreſs, pl. 46. cites 4 E. 4. 22.

4. If the *King is intitled to the Ward of* the Heir of the Tenant, and the *Land is charg'd with Rent-Charge*, and the *King commits it over durante minore Ætate*, a Man cannot diſtrain upon the Poſſeſſion of the King, nor upon the Poſſeſſion of the Committee. Per Keble, quod non negatur. Br. Diſtreſs, pl. 38. cites 1 H. 7. 17,

5. If the *King is intitled by Office to the Land out of which I have a Rent-Charge iſſuing*, there I cannot diſtrain upon the Poſſeſſion of the King ; But if the King *grants the Land by Patent*, there I may diſtrain ; For I am not out of Poſſeſſion of the Rent by the Office. But he who pretends Title to the Land is out of Poſſeſſion thereof by the Office, nota Diverſity. Br. Diſtreſs, pl. 27. cites 21 H. 7. 1.

6. The Land ſubject to a Rent-Charge is privileg'd, and diſcharg'd from Diſtreſs while it is in the Hands of the King, yet *when* it is *transferr'd from his Poſſeſſion*, then *the Diſtreſs there is revived* ; For Rent is not extinct by the Poſſeſſion of the King of the Land out of which it iſſues, but the Diſtreſs is ſuſpended for the Time ; but when the King has intirely diſmiſſed himſelf of all the Intereſt in the Land, then the Land is ſubject to ſuch Charges and Incumbrances as it was before ; and this ſeemed by the better Opinion. Sav. 125. pl. 194. Mich. 32 & 33 Eliz. Boſden's Caſe.

(E) Distreſs In what Caſes a Distreſs may be of *common Right* by a common Perſon. *For what* Thing.

Litt. S. 213. S. P. and Co. Litt 142. a. ſays that Littleton's Meaning is, that the Lord may diſtrain for his Rent of Common Right, that is, by the Common Law, without any particular Reſervation or Proviſion of the Party.

1. FOR Rent-Services a Diſtreſs may be taken of Common Right. 45 E. 3. 15 b. 1 H. 4. 1. b. 3 H. 6.

Br. Diſtreſs, pl. 15. cites S. C. —— Fitzh. Diſtreſs, pl. 11. cites S. C.

2. If my Tenant holds Land to do Suit to my Hundred, I may diſtrain for this Suit if it be arrear. 8 H. 4. 15.

The Lord may diſtrain, but cannot have Action of Debt, but his Executors or Adminiſtrators may have Action of Debt, but cannot diſtrain. Co. Litt. 8. a. b. —— Ibid. 162. b. S. P.

4. The Lord may diſtrain for Relief, but if he dies his Executors cannot, but ſhall have an Action of Debt for it. D. 3. 4 Ba. 140. [pl.] 37. Co. 4. *Ognell* 49. b.

Br. Hariot, pl. 6. cites S. C. but not for Hariot-Cuſtom. —— Fitzh. Avowry, pl. 177. cites S. C. —— S. P. admitted, Cro. E. 32. pl. 8. Trin. 26 Eliz. B. R. in Caſe of Peter v. Knoll. —— Cro. C. 260. pl. 4. Trin. 8 Car. B. R. Major and Brandwood, S. P. —— Jones 300. pl. 2. S. C. & S. P.

5. For an Heriot-Service due after the Death of every Tenant, the Lord may diſtrain. 27 Aſſ. 24. admitted.

3. For Aid to marry his Daughter, or make his Son a Knight, a Diſtreſs may be taken of Common Right. 39 E. 3. 34. though it was objected he ought to have a Writ to the Sheriff to levy it.

6. It was held, that for *Suit-Service* a Man may diſtrain, but *not for Amercement for ſuch Rent*, but for *Amercement for Suit-Real*; As at the Leet a Man may diſtrain; Note the Diverſity, and it was for 2d. Br. Diſtreſs, pl. 15. cites 8 H. 4. 16.

7. For *Rent reſerved upon Equality of Partition* the Parcener may diſtrain of Common Right. Br. Diſtreſs, pl. 92. cites 11 H. 4. 3.

Ibid. 126. a. pl. 87. S. P.

8. If one *holds of another by Homage, Fealty, and 10 s. Rent*, who takes Wife and dies, his *Wife* ſhall have the third Part of the Rent as a Rent-Seck, and yet *in Favorem Dotis* ſhe *ſhall diſtrain for it.* Kelw. 104. a. pl. 11. Caſus incerti temporis.

And *yet he ſhall diſtrain for it*; for ſeeing the Fealty is extinct, the Law reſerves the Diſtreſs to the Rent; for, as it has been ſaid in the like Caſe, ſeeing the Fealty is extinct, the Diſtreſs by Act in Law may be preſerved, Quia quando Lex aliquid alicui concedit, concedere videtur & id ſine quo res ipſa eſſe non poteſt. Co. Litt. 153. a. —— S. P. for the Rent was Rent-Service before, and the Nature of the Rent is not changed by the Act of the Meſne. Kelw. 104. a. pl. 11. —— And therefore if a Man make a *Leaſe for Life, reſerving a Rent*, and binds himſelf in a Statute, and has the Rent *extended and delivered* to him, he ſhall diſtrain for the Rent, becauſe he comes to it by Courſe of Law Co. Litt. 153. a. —— But if a *Rent-Service is made a Rent-Seck* by the Grant of the Lord, the Grantee ſhall not diſtrain for it, for that the Diſtreſs remains with the Fealty. Co. Litt. 153. a.

9. If the *Tenant holds of the Meſne by 5 s.* and the *Meſne holds but by 12 d.* ſo as he has more in Advantage by 4 s. than he pays to his Lord, *he ſhall have the ſaid 4 s. as a Rent-Seck* yearly *of the Lord which purchaſed the Tenancy.* Litt. S. 232.

10. It

10. It is a Maxim in Law, that no Diſtreſs can be taken for any *Services* that are *not put into Certainty*, *nor can be reduced* to any Certainty. For id certum eſt quod certum reddi poteſt, for opertet quod certa res deducatur in Judicium, and upon the Avowry Damages cannot be recovered for that which neither has, nor can be reduced to a Certainty; and yet in ſome Caſes there may be a *Certainty in Uncertainty*; As a Man may hold of his Lord to ſhear all the Sheep depaſturing within the Lord's Manor, and this is certain enough, albeit the Lord has ſometimes a greater, and ſometimes a leſſer Number there, and yet this Uncertainty being referred to the Manor which is certain, the Lord may diſtrain for this Uncertainty; Et ſic de ſimilibus. Co. Litt. 96. a.

12. The Lord by Eſcheat ſhall diſtrain for the *Rent after the Death of the Tenant*, though the Reſervation be to the Leſſor and his Heirs, and both Aſſignees in Deed and in Law ſhall have the Rent, becauſe the Rent being reſerved of Inheritance to him and his Heirs is incident to the Reverſion, and goes with the ſame. Co. Litt. 215. b.

13. If a *Gift in Tail*, *Leaſe for Life of Leſſee*, *or of another*, *or for Years* be made rendring Rent, ſuch Rent is Rent-Service, and the Leſſor may diſtrain for it of Common Right. Litt. S. 214.

And if a Man makes a *Leaſe at Will*, rendering a Rent, though the Leſſee ſhall not do Fealty, yet the Leſſor ſhall diſtrain for the Rent of Common Right, Co. Litt. 142. b

14. If *upon a Partition between Coparceners a Rent is granted* out of Part of the Lands deſcended for Equality of Partition, the Grantee of Common Right may diſtrain for this. Co. Litt. 169. b.

3 Rep. 22. b. in Walker's Caſe, S. P.

15. So if a Rent be *aſſigned* out of the Lands *to a Woman for her Dower*. Co. Litt. 169. b.

Note no title as to ~~take~~ diſtreſs by expreſs reſervation, as to which, ſee Dr. & Stud. Dial. 2. c. 9 — As for diſtreſs by cuſtom ſee poſt (Y)

(E. 2) Taken. How. And where.

1. WHERE *the Lord comes to diſtrain and ſees the Beaſts*, and the *Tenant perceiving it chaſes the Diſtreſs* &c. the Lord may purſue them, and diſtrain well enough; Quod Nota; and this is where the Lord ſees the Beaſts as above, and not otherwiſe; for *if they are chaſed out before that he ſees them*, *he cannot purſue and diſtrain*; nota inde. Br. Reſcous, pl. 13. cites 21 H. 7. 40.

S. P. by all the Juſtices and Serjeants, but he cannot have Reſcue, becauſe he had not Poſſeſſion. Br. Diſtreſs, pl. 30. (bis) cites S. C.

2. One cannot *fling open Gates*, or break down an *Incloſure* to take a Diſtreſs. Co. Litt. 161. a.

3. *Horſes yoked to a Plow* may be ſevered *for Damage-Feaſant*; but per Manwood J. there is a Difference in the Books when the Diſtreſs is for *Rent-Service* they cannot be ſevered, for they are an intire Diſtreſs, and he claims no Intereſt in the Land, but only a Rent or Service with which the Land is charged; but in a Diſtreſs for Damage-Feaſant the Party claims the Land itſelf, aud he may have ſeveral Actions for Treſpaſs for every Horſe; for every one of them does Treſpaſs. Cro. E. 7. pl. 6. Trin. 24 Eliz. B. R. Tunbridge's Caſe.

4. By 2 *W. & M.* 5. It is thought convenient that a Conſtable ſhould be preſent, though the Act does not require it. Sir B. Shower's Obſervations on Stat 2 W. & M. cap. 5.

5. If a Landlord comes into a Houſe, and *ſeiſes* upon *ſome Goods* as a Diſtreſs *in the Name of all* the Goods of the Houſe, that will be a good Seizure

Seiſure of all; but he muſt *remove them* in convenient Time by common Law, and now *ſince the Stat. of 2 W. & M. immediately, except it be Hay or Corn*; Per Holt Ch. J. 6 Mod. 215. Trin. 3 Ann. B. R. in Caſe of Dod v. Monger.

6. Upon a Queſtion about taking a Diſtreſs, it was held, that a *Padlock* put *on a Barn's Door could not be opened by Force* to take the Corn by Way of Diſtreſs; Per Ld. Ch. Juſtice Hardwick. Summer Aſſiſes at Exeter, 1735.

(E. 3) Sold. In what Caſes it may be.

1. THE *Lord of a Manor* having a *Leet may ſell Diſtreſs taken for Offence preſented in Leet* as the King may, becauſe it is the Court of the King, though it be in the Hands of a common Perſon, and he ſhall cauſe a ſtrange Man to be ſworn as the King may; for this is for the Advantage of the King. Br. Diſtreſs, pl. 39. cites 3 H. 7. 4. Per Fairfax J.

2. *For Debt of the King* Diſtreſs ſhall be ſold within 40 Days. Br. Diſtreſs, pl. 71.

3. *And* per Fairfax, *Lord of a Leet* of the King may do the like; for this Pre-eminence goes with the Leet. Br. Diſtreſs, pl. 71. cites 3 H. 7. 4.

Roll Rep. 76, 77. Mich. 12 Jac. S. P. —— The Lord may ſell a Diſtreſs taken for a Fine. Noy 17. Hill. 3 Jac.

4. A Diſtreſs taken for an *Amerciament in a Court Leet* may be impounded or ſold at the Pleaſure of the Lord. 8 Rep. 41. a. Trin. 30 Eliz. C. B. in Grieſley's Caſe.

5. Diſtreſs taken by a Bailiff of a *Court Baron* for not *doing Suit* and Service there, being warned, cannot be *ſold*. Bulſt. 52. Mich. 8 Jac. Hewet v. Norborough.

Yelv. 194. Gomerſall v. Medgate. —— Cro. J. 255. Gomerſall v. Wayts.

6. A Diſtreſs for an *Amerciament in a Court Baron of the King's Manor* cannot be ſold, but a Diſtreſs infinite ſhall go. Bulſt. 53. Mich. 8 Jac. Hewett v. Norborough.

7. A Farm leaſed *lay in two Hundreds*, and the *Conſtable of one Hundred only, in the Preſence of the Conſtable of the other* Hundred, *ſwore the Appraiſers and cauſed the Goods* diſtrained in both Hundreds *to be ſold*; And per Cur. this is good; For the Diſtreſs is entire being made at one Time, and the Land contiguous; and then where ſuch Lands are in two Counties, and the Goods are diſtrained for one *Intire Rent* out of thoſe Lands, this *is one Diſtreſs*, and by the 1 & 2 Ph. & M. 12. ought to be put into one Pound; and whereas it was urged, that the *Appraiſement* muſt be made by the Officers of the Pariſh or Hundred where the Diſtreſs is taken, it was ſaid that the *Continuing and Driving them to the Pound is a taking*. 12 Mod. 76. Walker v. Rumbold. cites Lat. 60. [Paſch. 1 Car.]

The Perſon *diſtraining* muſt give Notice, but it need not be immedi-

8. 2 *W. & M. Seſſ.* 1. *cap.* 5. *S.* 2. *Diſtreſſes for Rent may be ſold in five Days after the taking and Notice given if not replevied; The Diſtrainor with the Sheriff, Under-Sheriff, or Conſtable of the Hundred, Pariſh, or Place, (who are required to aſſiſt therein) ſhall cauſe the Diſtreſs to be* appraiſed

aiſed *by two Appraiſors to be ſworn, and then may ſell for the* * *beſt rice towards ſatisfying the Rent Arrear, Charge of Diſtreſs, Appraiſement, d Sale, leaving the Overplus (if any be) for the Owner's Uſe, in the ands of the Sheriff or Conſtable.*

ately, but at any Time after the *Diſtreſs*; but then the five Days are to

computed from the Notice, not from the *Diſtreſs*. If the Party *replevy*, all this is to no Purpoſe; erefore before you venture to make any Sale, ſearch the Sheriff's Office within the five Days The Rent may be tendered after the five Days if no Appraiſement, and a Tender after Appraiſe- ent prevents the Sale, for all is but to have the Rent, and no Property is in the Diſtrainer, but only the Vendee by Sale.

Any Perſons may be Appraiſors that are of Age and capable of being Witneſſes; *but* they *muſt be worn* by the Sheriff or Conſtable for that Purpoſe. The *Appraiſement* ſhould be *in Writing*.

Suppoſe the Appraiſement is higher than they can be ſold for, may they ſell them notwith- anding?

I think they may; for the Words are *for the beſt Price can be gotten for the ſame*; and it is not aid, for what they were appraiſed at or above that Rate. But are they bound to carry them to Market or wait for a good Chapman? For the Words of the Act are (*beſt Price that can be gotten*) and o Time is limited for the Sale, and Charges are allowed for it. I do think it moſt adviſeable, if it an be, to get the Value ſettled by the Appraiſers, and to ſell immediately to the firſt Chapman; f not, to wait ſome ſmall, reaſonable and convenient Time, as a Week or the like. If you cannot et that Price, to ſell to the higheſt Bidder. And the next convenient Way ſeems to be by giving Notice at the next Market or Pariſh Church, of the Day and Place, when and where the Goods ſhall e expoſed to Sale; yet I conceive, that after the Expiration of the five Days, and no Replevy, and an Appraiſement, the Party may carry any portable marketable Goods and Commodities to the next Market, as Corn or the like, and there ſell them, and he ſhall have his Charges allowed for ſuch Carriage, if he could not have a Chapman at Home; I think it always adviſeable for the Buyers to have a Bill of Sale of all ſuch Goods ſo diſtrained, appraiſed and ſold, and the Sheriff or Conſtable Witneſſes thereto. As to the Charges, I think the Expence in Removal of the Goods, Charges of Food for living Creatures, and moderate neceſſary Expences for Tenants and Officers, will be allow- d within the Meaning of this Clauſe.

For the *Overplus* (if any) to be *left in the Sheriff or Conſtable's Hands*, it is adviſeable for the *Landlord to have a Receipt* or other Writing teſtifying the ſame.

For the *Corn or Grain*, the Law is the ſame as to Sale, only there it is not to be removed, if to the Damage of the Owner, otherwiſe it may. Sir Barth. Shower's Obſervations on this Statute, ſaid to be printed from a MS. of his in the Hands of the Author of The compleat Engliſh Copyholder. fol. 160. &c.

* A Diſtreſs ſold at an appraiſed Price, ſhall be intended to have been ſold at the beſt Price, ſince the Appraiſers were ſworn. Ld. Raym. Rep. 55. Trin 7 W. 3. Walter v. Rumbal.

9. *Lands* lying *in two Hundreds and two Counties contiguous, were demiſed by one Leaſe* rendering Rent; The Leſſor for Rent-Arrear *diſtrained in both Hundreds*, and the Diſtreſs not being replevied in five Days, the Conſtable of the Hundred in which the Diſtreſs was taken, Notice having been given to the Owner, adminiſtered the Oath upon *Sale of the Goods in the other Hundred*; and this was held good, it being an intire Diſtreſs and not ſeverable, and the Hundreds contiguous, ſo that the Driving was lawful, and a Continuance of the firſt Taking. 1 Salk. 247. pl. 1. Trin. 7 W. 3. B. R. Walter v. Rumbal.

12 Mod. 76. Walker v. Rumbald, S. C. adjudg'd. —— Comb. 336. S. C. —— 4 Mod. 390. S. C. adjudged. —— 12 Mod. 53. S. C. adjudged. —— Ld. Raym. 53. S. C. held accordingly.

10. Diſtreſs *in a Leet* of Common Right may be ſold becauſe it is a *Court of Record*, otherwiſe of Diſtreſſes in Courts that are not of Record; Per Holt. 12 Mod. 330. Mich. 11 W. 3.

11. As to *Commiſſioners of Sewers* that is a ſpecial Power given them, and of Conſequence of that they may ſell; And Callis takes great Pains to prove them a Court of Record, and though ſome Acts that order Things to be levied by Diſtreſs have alſo the Words (and Sale) yet no neceſſary Inference can be made from that, for Statutes very often expreſs Matters more plainly than they need for greater Caution; Per Holt. 12 Mod. 330. Mich. 11 W. 3.

12. Upon a Diſtringas in a Court-Leet *Pro Certo Letæ* the Officer cannot ſell the Diſtreſs of Common Right without a Cuſtom; Per Cur. 1 Salk. 379. Mich. 1 Ann. B. R. in Caſe of The King v. Speed.

13. 11 *Geo.* 2. *cap.* 19. *S.* 1. *Goods or Chattles conveyed away from the Premiſſes to prevent the diſtraining them for Rent arrear, may be ſeized any where within* 30 *Days after, and ſold, or otherwiſe diſpoſed of, as if ſeized upon the Premiſſes for ſuch Arrears.*

Provided they are not ſold bona fide, and for a valuable Conſideration, before ſuch Seizure, to any Perſon not privy to the Fraud.

See the Statutes and ſeveral Pleas at (H).

(E. 4) Impounded. Where.

1. 52 *H.* 3. *cap.* 4. NONE *ſhall cauſe any Diſtreſs to be driven out of the County, and if any Neighbour do ſo to his Neighbour of his own Authority, and without Judgment, he ſhall be puniſhed by Redemption. Nevertheleſs, if the Lord do ſo againſt his Tenant, he ſhall be but grievouſly puniſhed by Amercement.*

2. Treſpaſs for *diſtraining in one County and carrying into another*; the Defendant was condemned upon Inſufficiency of his Plea, and was condemned in Damages 10 l. taxed by the Court, and that the Defendant ſhould be ranſomed, and Capias awarded againſt him. Br. Treſpaſs, pl. 255. cites 30 Aſſ. 38.

Br. Action ſur le Statute, pl. 41. cites S. C and notwithſtanding the Statute of Weſtminſter 1. cap. 16.

3. If a Man *holds Land in Eſſex of a Manor in the County of Hereford*, the Lord may diſtrain for his Services upon the Land, and bring the Diſtreſs into the other County to the Manor, notwithſtanding the Statute of *Marlebridge*, *cap.* 3. Quod nullus duci faciat diſtrictiones &c. Br. Diſtreſs, pl. 32. cites 1 H. 6. 3.

4. Treſpaſs for diſtraining in the County of Wilts, and carrying into the County of Southampton contrary to the Statute of Marlebridge, cap. 4. The Defendant ſaid, that the Place where is a Carve of Land which the Defendant holds of him in the County of Warwick, by which he diſtrained for the Rent arrear, and was going towards the County where the Manor is, and the Place where the Writ is brought was in the County of B. which is the Way to his Manor of B. in the County of Warwick &c. And per Huſſey he cannot juſtify, becauſe the Statute is in the Negative. But per Jenney and Fairfax Juſtices he may juſtify; becauſe the Statute ſpeaks, Quod ſi vicin' ſupra vicin' hoc fecerit puniatur per Redemptionem, & ſi Dominus ſuper tenen' ſuum hoc fecerit tunc puniatur per gravem miſericordiam, and therefore per Fairfax the Statute is *intended of Diſtreſs for Damage feaſant or Rent-charge*, and *not between Lord and Tenant*. But quære inde; for the Statute is *in the Negative* as Huſſey rehearſed; for the Parties demurred in Law, and no Replevin can be made in this Caſe; for a Replevin ſhall be where the taking was. Br. Diſtreſs, pl. 53. cites 22 E. 4. 11.

5. It was agreed, that if a Man puts the Diſtreſs in his *ſeveral Paſture*, *this is ſufficient Pound-Overt*; and by others, præter Fairfax, if he puts them in the ſeveral Paſture *of another*, this is a good Pound-Overt. Quære, for per Fairfax it ſhall be where the Plaintiff may give them Food without Damage to others, and after Iſſue was taken if they died in Default of the Plaintiff, or in Default of the Defendant. Br. Diſtreſs, pl. 41. cites 5 H. 7. 9.

6. If Lord or Leſſor diſtrains, he cannot make a Pound *in the ſame Land* for this Diſtreſs; Per all the Juſtices. But per Juſticiarios, if he diſtrains *for Damage feaſant* in his proper Land, he may impound them

hem there; Quod Nota. And per Keble, when a Man diſtrains his Tenant at Will for Rent, and makes a Pound in the ſame Land, this making of a Pound there is a Diſcharge of the Leſſee, Quod non negatur. Br. Diſtreſs, pl. 30. (bis) cites 21 H. 7. 39.

7. 1 & 2 *P. & M. cap.* 12. *S.* 1. *Diſtreſſes ſhall not be driven out of the Hundred &c. unleſs to a Pound-Overt in the ſame Shire, and within three Miles of the Place where taken, and ſhall not be impounded in ſeveral Places, whereby the Owner ſhall be conſtrained to ſue ſeveral Replevins, in Pain that every Perſon offending ſhall forfeit to the Party aggrieved* 5 *l. and treble Damages; and* 5 *l. for taking more than* 4 *d. for impounding one Diſtreſs.*

The Plaintiff declared of a Diſtreſs taken in a Hundred in ſuch a County, and that he drove it ſix Miles out of the County; and becauſe a Hundred may be in divers Counties, and the Statute is, That the driving ought not to be more than three Miles out of the Hundred; and that it might be that the Driving was ſix Miles from the Place where the Diſtreſs was taken in another County, and yet not three Miles from the Hundred where the taking was, for that Cauſe it was not adjudged againſt the Party; and that was after Verdict in arreſt of Judgment. Godb. 11. pl. 15. Mich. 24 Eliz. C. B. Anon

Diſtreſs was taken in the Hundred of Offlay in Staffordſhire, and the City of Litchfield was ſometime within this Hundred, and by Letters Patents of 1 Mariæ, the City was made a County of itſelf, and he which took the Diſtreſs impounded them within a Pound in the County of the City of Litchfield; now whether he has incurred the Penalty of the Statute, or not, was the Queſtion? And becauſe the Court had not a Statute-Book there to ſee the Preamble, therefore they would give no Reſolution. Anderſon ſaid the Meaning of the Statute was, becauſe the Bailiff of the Hundred might make Dellverance; Alſo I think it is within the Compaſs of the Statute, becauſe the City was a County ſevered before this Statute made. Goldsb. 100. pl. 5. Mich. 30 & 31 Eliz. Beardſley v. Pilkington.

It was ſaid by the Serjeants at Bar, that the Party may drive the Diſtreſs as far as he will within the ſame Hundred, but not above three Miles out of the Hundred. Gouldsb. 101. pl. 5. Mich 30 & 31 Eliz. Beardſley v. Pilkington.

If a Diſtreſs be of three Cattle, and they are drove about three Miles from the Place where taken; and each Beaſt has a diſtinct Owner, the Diſtrainer ſhall forfeit three times 5 l. Per Holt Ch J. 1 Salk. 32. in pl. 2. Paſch. 5 W. & M. in B.R. obiter.

8. P. brought an Action of Debt againſt N. upon the Statute of 1 & 2 P. & M. cap. 12. for taking of a Diſtreſs in one County, and driving it into another; and the Caſe was, that *three Men diſtrained a Flock of Sheep, and them impounded in ſeveral Places*, and if every of them ſhall forfeit 100 s. ſeverally, or but all together 100 s. The Court was divided, for the Words of the Statute is, that every Perſon ſo offending ſhall forfeit to the Party grieved for every ſuch Offence 100 s. and treble Damages; but Walmſley thought that every one ſhould forfeit 100 s. and he put a Difference between Perſon and Party, for many Perſons may make but one Party. Gouldsb. 145. pl. 62. Hill. 43 Eliz. Partridge v. Naylor.

Noy 52. S. C. and the Court gave 5 l. againſt every Offender; but after upon Error brought is was held to be erroneous, but the Court gave a Day for Precedents.

——Cro. E 480. pl. 12. S. C. adjudged accordingly in C. B and Judgment reverſed in B. R. —— Mo. 453 pl. 620. S. C. and Judgment reverſed. —— D. 177. b. Marg pl. 33. cites S. C. accordingly. —— But by Fenner, if the Plaintiff had brought his Action againſt them ſeverally, every one ſhould have paid 5 l. Noy 62. in Caſe of Patridge v. Emſon, and ſeems to be S. C. But the Reporter ſays Quære.

9. At Common Law a Man might have driven the Diſtreſs into what County he would, which was miſchievous for two Cauſes; 1ſt. Becauſe the Tenant was bound to give the Beaſts (being impounded in an open Pound) Suſtenance, and being carried into another County, by common Intendment he could have no Knowledge where they were. Another Cauſe was, he could not know where to have a Replevin, but the Party was, before this Statute, driven to his Action upon his Caſe; and albeit this Statute be in the Negative, yet if the *Tenancy is in one County, and the Manor in another* County, the Lord may drive the Diſtreſs which he takes in the Tenancy to his Manor in the other County, for that the Tenant is out of both the ſaid Miſchiefs; for the Tenant by doing

doing of Suit and Service to the Manor, by common Intendment may know what is done there, and therefore may give his Beaſts Suſtenance; and to know where to have his Replevy, the Bailiff of the Manor uſually drives the Cattle diſtrained to the Pound of the Manor. And this * Act extends as well to Goods as to Beaſts. 2 Inſt. 106.

* Stat. of Marlb. 52. H. 3. cap. 4.

10. *By Preſcription*, if a Manor is one County, and is held of a Manor in another County, the Lord may drive a Diſtreſs out of the County where it is taken; Arg. Palm. 544. Trin. 4 Car.

S. P. cited per Walmſley J. 2 Brownl. 260. —— Pl. C. 9 b. cites it as held accordingly 30 E. 3. in the Abbeſs of Wilton's Caſe. —— Ibid. in the Marg. is a Nota, viz. Vide the Caſe in Termino H. 30 E. 3. fol. 5. in Treſpaſs upon the Statute abridged by Fitzh. in Tit. Diſtreſs, 16. but nota that it is adjudged contrary to what is vouched here.

Diſtreſs was *in* the County of *Wiltſhire in a Place which is within the Honour of Wallingford*, which Caſtle and Court is *within the County of Berks*, and drove them to the Caſtle, and there Deliverance was made, and at the Suit of the Defendant the Plaint was removed by Accedas ad Curiam directed to the Sheriff of Oxford into Bank, and there counted of the taking in Wiltſhire, and this was held well by the Court. D. 168. b. 169. a. pl. 20. Trin. 1 Eliz. Anon.

11. If *Lands in Middleſex and Hampſhire* are *demiſed by one Demiſe, reſerving one intire Rent*, the *Diſtreſs taken in Middleſex cannot be chaſed into Hampſhire*, becauſe the Counties are not adjoining; Per Holt Ch. J. Ld. Raym. Rep. 55. Trin. 7 W. 3. in Caſe of Walter v. Rumbal.

4 Mod. 395. S. C. per Cur though the Diſtreſs was *taken in two Hundreds*, they being *contiguous, it is but one intire Diſtreſs*, eſpecially being taken at one and the ſame Time, and for one intire Rent, and it ought to be put into one Pound. —— Ld. Raym. Rep. 55. S. C. held accordingly, and that the chaſing of the Diſtreſs over is a Continuance of the taking the Diſtreſs, and the Party, ſince it was for one intire Cauſe, cannot ſever the Diſtreſs, but muſt chaſe them all together, and impound them in one Pound, by the Stat. 1 & 2 P. & M. cap. 12. —— 12 Mod. 77. S. C. & S. P. held accordingly.

12. Where *Land lies in ſeveral Counties*, and *one Diſtreſs is taken for an intire Rent of ſome Cattle in one County, and ſome in the other*, the *Landlord may* drive them all together, and *impound them in either County*, (notwithſtanding the Statute of Marlbridge, that a Diſtreſs ſhall not be driven out of the County) and the Officer of either County is within the Meaning of the late Act of Parliament of 2 W. & M. Reſolved. Comb. 336. Trin. 7 W. 3. B. R. Walter v. Rumbal.

(F) For an *Amercement*.

[*In what Caſes.*]

S. C. cited 11 Rep. 45. a. — Diſtreſs is *incident* to an Amercement in a Law-Day, by all the Juſtices in C. B. Quod nota bene. Br. Diſtreſs, pl. 44. cites 9 H. 7. 22.

1. FOR Amercements in a Court-Leet for Offences done out of Court a Diſtreſs is incident of Common Right. Co. 8. *Grieſly* 41. Doctor and Student 74. M. 12 Ja. B. per Curiam.

8 Rep. 41. a. b. in Grieſley's Caſe, S. P. a fortiori, Quod licitum eſt pro minore, licitum eſt pro majore.

2. So for Amercements in a Court-Leet for Offences done in Court a Diſtreſs lies of Common Right. 10 H. 6. 7. 7 E. 2. and 8 E. 2. Avowry 211. 212. upon Default of Appearance.

3. So

3. So for Fines in a Court a Diſtreſs is incident of Common ght. 39 E. 3. 35. admitted.

4. But the Lord cannot diſtrain for an Amercement in a Court ron without a Preſcription. Doctor and Student 47. Co. 11. odfey 45. Kelloway 20 H. 7. 66. Brownl. 36. S. P.

5. If the Lord of a Fair hath uſed to have certain Toll for every ale of Cattle, and upon a Sale the Toll is not paid, the Lord ay ſeiſe any of the Cattle ſo ſold, and retain them till Satisfac- n. Mich. 13 Jac. B. between Agard and Liſle.

6. And in ſuch Fair, if a Man buys one Beaſt of one Man and other of another Man, and ſo many of ſeveral Men, and refuſes pay Toll for any of them, the Lord may ſeiſe any of the Cattle bought by him for all his Toll. M. 13 Jac. B. per Hobert.

7. Replevin. Where the *Lord of a Leet diſtrains for Amercement af- r'd in a Leet* for Non-appearance at the Leet, the *Tenant is bound to e Notice for what Matter he diſtrains*; per Finch, but Wich contra, d that it is ſufficient for the Tenant to ſay, that in Caſe the Defen- nt would have notified to him what was amerc'd, that he would ve paid it. And per Finch, if the *Tenant offers the Amercement*, d the *Lord refuſes it*, and after the *Lord diſtrains*, and the *Tenant ers it again*, and the *Lord carries away the Diſtreſs* he does tort, and t once it was offer'd; For he *ought to offer it at the Time of the Taking* c. and then the Lord ſhall not have Return. And per Wich, if the enant comes after the Lord has diſtrain'd, and offers the Rent and e Lord refuſes, he ſhall not have Return. And ſo ſee that *the Diſ- ſs is only a Pledge for the Duty, which* Duty *when it is offer'd the rd ought to deliver the Pledge*, and after Iſſue was taken upon the otice gratis. Br. Diſtreſs, pl. 8. cites 45 E. 3. 9. Br. Retorn de Avers, pl. 11. cites S. C.

8. In *Treſpaſs* the *Defendant juſtified for* Diſtreſs for Amercement, *in hich A. the Owner was amerced*, and the *Iſſue* was taken *if the Property the Time of the Taking was in the Plaintiff or in A. who was amerc'd.* . Iſſues joines, pl. 46. cites 47 E. 3. 13. Br. Treſpaſs, pl. 59. cites S. C. and ſays, Quære of this Pleading at this Day.

9. It was held that a Man *cannot diſtrain for Amercement for Rent- rvice*, but for *Amercement for Suit real* as at the Leet, a Man may diſ- ain; Note the Diverſity, and it was for 2 d. Br. Diſtreſs, pl. 15. tes 8 H. 4. 16. Br. Amerce- ment, pl. 15. cites S C.— For Suit Real no Diſtreſs can be taken but for Amerciaments for Default of Suit. 2 Inſt. 120.

10 For Amercement in a Leet *no Beaſts* ſhall be diſtrain'd *but the oper Beaſts of the Offender*. Br. Diſtreſs, pl. 89. cites 12 H. 7. 15.

11. *But* if *a Man holds of a Leet to be Cryer tempore Curiæ* &c. there *he ay diſtrain any Beaſts* which are *upon the Land, held* per Fineux, quod ota, and by the beſt Opinion of the Court; et concord' of the Diſ- eſs in Leet. 47 E. 3. 13. Br. Diſtreſs, pl. 89. cites 12 H. 7. 15.

12. It was agreed that a Man *may preſcribe for Amercement in a Leet*, diſtrain and ſell the Diſtreſs, becauſe it is Curia Regis, and the arty derives his Intereſt from the King, quod nota. Br. Diſtreſs, pl. 1. cites 21 H. 7. 40. Br. Diſtreſs, pl. 91. cites S. C. that Lord may diſtrain *for breaking of*

Eye Law in a Leet by Cuſtom Br. Diſtreſs, pl. 91. cites 21 H. 7 40.——See 6 Rep 25. a. uddock's Caſe ——Cro E. 648. Raſing v. Ruddock. S. C.——11 Rep. 44. Godfrey's Caſe.

13. A Man may diſtrain and avow &c. *for Rent due from a Copyholder* a Lord of a Manor; For this is a Duty to the Lord at the Com- on Law; and therefore an Avowry may well be for it. Cro. Eliz. 24. pl. 51. Mich. 38 & 39 Eliz. B. R. Laughter v. Humfries.

Sav. 93, 94. pl. 173. S. C. adjudg'd.

15. So he may for an *Amercement of an Inhabitant* impoſed *in a Court-Leet* for *refuſing to take upon him the Office of a Conſtable.* 8 Rep. 38. and 41. Trin. 30 Eliz. C. B. Greiſley's Caſe.

16. A common Perſon Lord of a Manor cannot diſtrain for Amerciaments in a *Court Baron*, as for Surcharge of Common &c. *without Preſcription.* But the Queen by her Prerogative may. Cro. E. 748. pl. 1. Paſch 42 Eliz. B. R. Rowlſton v. Alman.

17. *Diſtreſs* taken *for not doing Suit* at the Leet *may be ſold*, and taken in any Land within the Leet of the Beaſts of him that made Default. Jenk. 219. pl. 67.

7 *H.* 8. nor 21 *H.* 3. 19. gives any *Coſts or Damages* in this Caſe. Cro. E. 258. but adjornatur. Haſelip v. Chaplin. ——— S. P. adjudged. Cro. E. * 300. Porter v. Grey. ——— Upon producing divers Precedents of Damages and Coſts given ſince the Statute, the Court inclined to allow them. Cro. E. 330. Haſelop v. Chaplin.

18. Upon an Avowry for an Amerciament in a Court *no Damages* are to be recovered, though found for the Avowant. Jenk. 272. pl. 89.

* S. C. cited Cro. J. 28.

19. A *reputed Manor* will maintain an Avowry for an Amercement in a Court-Leet, though indeed he had no Manor in Truth. Brownl. 170. Reynolds v. Oakley.

20. A *Diſtreſs* is incident of Right to a Court-*Leet*, but in a Court Baron Preſcription muſt be laid to diſtrain. Brownl. 36.

* Action of Debt was brought by a Lord againſt his Copyhold Tenant for a Pain aſſeſſed by the Homage *for an Incroachment on the Waſte.* The Court ſeem'd to incline againſt the Action. See Carth. 183. Cudmore v. Honywood.

21. Upon a Preſentment of a *Nuſance* in a Court-Leet and a Pain aſſeſſed to remove it by ſuch a Time it was reſolved by All that the Lord may *diſtrain* or have Action of * *Debt* for ſuch Pain or Amerciament. Cro. J. 382. pl. 10. Mich. 13 Jac. B. R. Pratt v. Stearn.

Raym. 204. Pierſon v. Riddley. S. C. Twiſden J. ſaid that when a Duty is raiſed by Cuſtom, a Diſtreſs for that Duty muſt be maintained by the like Cuſtom. Sed adjornatur.

22. A *Cuſtom was laid for ſuch a Townſhip to ſend one to be ſworn Conſtable at ſuch a Leet*, which not being done a Fine was ſet, and Diſtreſs taken for it. Exception was taken, becauſe *no Cuſtom was alleged to warrant the Diſtreſs*; For though of Common Right a Diſtreſs may be taken for a Fine in a Court-Leet, that is, where it is impoſed for ſuch Things as are of Common Right incident to its Juriſdiction, as for Contempts or the like; yet where Cuſtom only enables them to ſet a Fine, it cannot be diſtrained, for without Cuſtom alſo, and cites 11 Co. **Godfrey's Caſe.** And to this Opinion did the Court incline; Sed Adjornatur. Vent. 105. Mich. 22 Car. 2. B. R. Pierſon v. Ridge.

——2 Keb. 701. 739. 745. S. C. adjornatur.

S. P. or he muſt *ſet out ſome Eſtreate* of the Court. 1 Salk. 108.

23. If the Bailiff *diſtrains* for an Amercement for a Nuſance upon Preſentment in a Leet, he muſt *juſtify by Warrant of the Steward.* Show. 61. Mich. 1 W. & M. Matthews v. Cary.

S. C. —— A Diſtreſs *per Mandatum* of the Lord of the Manor is not good; For a Bailiff cannot diſtrain by that Means, nor otherwiſe than by Virtue of a *Precept* directed to him *by the Steward of the Court.* Carth. 75. Mich 1 W. & M. in B. R. Mathews v Carew. —— Show 61. S. C. & S. P. accordingly. ——— But in an Avowry he need not ſhew any Authority or Precept, but then he muſt aver the Offence to have been committed. Carth. 74 S. C. ——— Show 61, 62. S. C & S. P. accordingly. ——— 3 Mod. 137. S. C. reſolv'd that he ought to ſet forth the Warrant of the Steward, without which he cannot juſtify to diſtrain for an Amercement. But in a Replevin where the Defendant made Cognizance in the Right of the Lord, it might be well enough. —— S. P. per Popham accordingly; But per Gawdy contra. —— Cro. E. 698. in Caſe of Steverton v. Scroggs. —— S. P. per Popham, but the other Juſtices conceived otherwiſe, but afterwards Judgment was according to the Opinion of Popham. Cro. E. 748. pl. 1. Paſch. 42 Eliz. B. R. Rowleſton v. Alman.

24. In

24. In *Replevin* the Defendant made *Conuſance as Bailiff* to R. F. and ſaid that the Place where is within S. and that S. is within the Manor of &c. and *ſhews a Cuſtom for the Jury to elect* one of the Reſiants to ſerve the Office of *Conſtable* for a Year, and ſaid that they elected ſuch a One to be Conſtable for the Year inſuing, and to take his Oath under a Penalty of 40s. and at the next Court it was preſented that he did not take the Oath, and for this 40s. a Diſtreſs was taken &c. And the Plaintiff demurred to this Avowry, that here is a Duty laid to be by Cuſtom, and it is not like to a Fine or Amercement, and therefore the Party ought likewiſe *to enable himſelf by Cuſtom to diſtrain* for it, otherwiſe no Diſtreſs is incident of Common Right; For the Defect of a Cuſtom to diſtrain, and for want of alledging of Notice, the Court held the Avowry to be ill; for this is a Duty by the Cuſtom, and therefore the Remedy in ſuch a Special Matter ought to be by Cuſtom likewiſe. Skin. 635. pl. 4. Hill. 7 W. 3. B. R. Fletcher v. Ingram.

1 Salk. 175. pl. 1. S. C. adjudg'd for the Plaintiff. ——If abſent the Party ought to be ſummoned, and a Time and Place appointed under a Penalty when and where he ſhall come, and before whom to take the Oath. 5 Mod. 127. S. C and the Pleadings.——Comb. 350. S. C. adjudg'd, Niſi &c ——12 Mod. 87. S. C. the alleging that Notitiam habuit is too general. Judgment for the Plaintiff. ——Ld. Raym. Rep 69. 71. S. C. & S. P. and for that Reaſon, and becauſe the Defendant did not allege a Cuſtom for taking the Diſtreſs, it was adjudg'd for the Plaintiff.

(F. 2) Pleadings in Replevins, and Avowries for Amerciaments.

1. CUSTOM cannot be that a Man abiding within the Leet ſhall be *excus'd* of the Leet, *by their coming before the Conſtable and Port-reeve.* Br. Cuſtoms, pl. 11. cites 2 H. 4. 16.

Br. Leet, pl. 10. cites 2 H. 4. 15. ——Br. Preſcription, pl. 13. cites S. C.

2. The Lord intitled himſelf to a Leet and a certain Sum Pro Certo Letæ by Means of his Hundred; it is a *good Plea* by him *that he is ſeiſed of the Hundred without ſhewing the Deed*; Per Periam and Rhodes J. But if the Hundred itſelf had been in Queſtion, then he ought to ſhew a Deed; but here the Defendant intitling himſelf to a Leet, and a Leet-Fee by reaſon of the Hundred, it is ſufficient for him to ſay that he is ſeiſed of the Hundred &c. although it be by Diſſeiſin; For if he has Poſſeſſion, be it Jure vel Injuria he ſhall have all Things incident thereunto; For the Poſſeſſion of the Hundred draws to him the Leet, and the Leet the Leet-Fee. 2 Le. 74. pl. 98. Trin. 28 Eliz C. B. Lawſon v. Hare.

3 Le. 178. pl. 231. S. C. in totidem Verbis.

3. In Avowry on a Diſtreſs for an Amercement in a Leet on a Vill as *for not making Tumbrel and Stocks*, it *muſt be alledged that the Pain is not paid* to the Lord, or *elſe it might be paid by another of the Vill before.* Mo. 573, 574. pl. 789. Trin. 40 Eliz. Scroggs v. Stevenſon.

Cro. E. 698. pl. 11. Steverton v. Scroggs. S. C.

4 In Replevin, the Defendant *avowed, for that he had a Leet for all the Inhabitants and Reſiants within his Manor, and that the Plaintiff being an Inhabitant, was ſummoned to appear* at the Leet *on a certain Day, and for making Default he was amerced, for which he diſtrained*; The Plaintiff *replied, that the Place where he dwelt was Parcel of a Monaſtery, and Land held in Frankalmoigne diſcharg'd of all Secular Services*; *then* he *pleads the Statute* 31 *H.* 8. *and the King's Grant to his Anceſtors adeo plene, libere & integre, as the Abbot held it* before the Diſſolution, and conveyed the Land to himſelf by Deſcent &c. The

Avowant

Avowant demurred; and adjudged for the Plaintiff; for the Abbot was discharged ratione ordinis sui as all Churchmen, Women and Noblemen &c. were; and this Immunity Churchmen had at Common Law before the Statute of Marlbridge, in respect of their Persons, and therefore it shall not go to the Patentee of the King; but all other Persons above 12 Years old must do Suit, and it is called Suit Real, alias Regal, for though the Lord has the Benefit of the Court, yet it is the King's Court, and the Service there done is Service to the King. 2 Roll. Rep. 56. Mich. 16 Jac. B. R. Dacre v. Nixon.

5. In *Trespass* the Defendant pleads a Special Justification for an Amercement upon a *Presentment* by the Jury *for a Nusance* at the Court Leet of the Archbishop of Canterbury; adjudged for the Plaintiff, for the Defendant ought to *shew the Bounds and Limits* of the Leet, *and over what Persons* the Leet has Jurisdiction, as to say de Residentibus, and Inhabitantibus infra Manerium de Lambeth &c. for the Leet may extend into one Manor or within four or five Manors; or there may be several Leets within one Manor, and therefore he ought to plead the Bounds of his Leet certainly. Skin. 392, 393. pl. 29. Mich. 5 W. & M. in B. R. George v. Lawley.

4 Mod. 377. S. C. adjudg'd for the Plaintiff. —S. P. held accordingly, and also because he did not plead an

6. The Avowry of the Bailiff of a Manor *for taking the Beasts as a Distress for Breach of a Bye-Law by the Plaintiff was held ill, because he did not plead a Precept of the Steward* for taking the Distress, or levying the Pain; For he can no more do it ex officio than a Sheriff could execute a Judgment of B. R. without a Writ. Skinn. 587. Mich. 7 W. 3. B. R. Lamb v. Mills.

Extract of the Court, which the Bailiff ought to have for his Warrant. Mo. 573, 574 pl. 789 Trin. 40 Eliz. Scroggs v. Stevenson.——All the Justices held, that the Bailiff cannot without Special Authority from the Steward distrain for an Amercement in a Leet. Mo. 607. pl. 839. Stevenson v. Scroggs. S. C.

Skinn. 635. pl. 4. S. C. & S. P. accordingly. Comb. 350. S. C. & S. P by Holt Ch J. and Judgment accordingly. ——5 Mod. 127. 130. S. C ——Ld. Raym. Rep. 69. 71. S. C. & S. P. accordingly, by the Opinion of the whole Court.

7. There can be *no Distress for a Penalty* by Custom in a Leet, as to forfeit 40 s by the Custom if one refuses to be sworn Constable if elected, *without alleging a Custom for it.* 1 Salk. 175. Hill. 8 W. 3. B. R. Fletcher v. Ingram.

(G) *For what* Thing *against common Right* a Distress may be taken.

S. C. cited by Hale Ch. J. Freem. Rep. 103. in the Case of Brumfield v. Tea, that though they did not allege a Custom to distrain, yet it was held good enough

1. IF there be a Custom in the Town of Tewksbury that the Bailiffs and principal Burgesses of the Town have used Time &c. to rate and tax every Inhabitant within the Town for the Reparation of any Bridge within the Town; if a Tax be made according to the Custom, a Distress may be taken for this Rate of the Goods of any Inhabitant so tax'd, though upon the making of the Tax it is not ordain'd that a Distress shall be taken for it, inasmuch as here no Person can have an Action of Debt for this Tax, inasmuch as the Corporation is not to have it, and then if a Distress should not be for it, there should be no Remedy for it. Pasch. 11 Car. B. R. *Smethesden and Ashton*, resolv'd per totam Curiam, after a Verdict for the Avowant, in which the Distress was made by Warrant

Warrant under the Seal of the Bailiffs, Burgeſſes and Commonalty which was the Name of the Corporation, and yet reſolv'd good, becauſe the Bailiffs could not have made a Warrant by other Seal. becauſe the Party had no other Remedy.

2. If a Rent-Charge be granted, and that if it be Arrear that the Grantee ſhall have a penal Sum; if the Penalty be forfeited the Grantee may diſtrain for it. 11 H. 4. 85. Quære of this.

3. The *Uſage* of the Town of Dale was, *That when the Church was ruinous* the *Inhabitants aſſembled* themſelves *and taxed every one to a certain Sum, and if any taxed &c. did not pay they uſed to diſtrain ſuch Perſon*; This by the Cuſtom is allowable, and the Diſtreſs taken lawful; notwithſtanding there is a Statute which ſays, that nulli liceat ex quacunque Cauſa facere Diſtrictiones extra ſeodum ſuum niſi a Domino Rege & Miniſtris ſuis Auctoritatem habent; For the Statute does not take away ſuch Cuſtom. Arg. And. 71. in pl. 144. cites 44 E. 3.

4. If by Cuſtom Time out of Mind there has been paid at a Leet certain Money, called *Certum Letæ*, the Lord without a ſpecial Cuſtom enabling him, cannot diſtrain for it, becauſe being againſt common Right, and for the private Benefit of the Lord, as he muſt preſcribe in the Principal, ſo he muſt preſcribe in the Diſtreſs. 11 Rep. 44. b. Mich. 12 Jac. Godfrey's Caſe. 1 Roll Rep. 33. 35. 75, 76, 77 S. C. adjudged.

5. A *Rent-Charge* was granted *for Years with a Nomine Pœnæ, and Clauſe of Diſtreſs* it not paid at the Day, and the Rent is behind, and the Years incur, he cannot diſtrain for the Nomine Pœnæ, for that depends upon the Rent, and the Diſtreſs is gone as to both of them; Per Cur. Win. 7. Paſch. 19 Jac. Tutter v. Fryer.

6. If there be a *Cuſtom* within a Manor, *that every free Tenant of the Manor, upon every Alienation* of their Tenancy, *ſhall pay ſo much by Way of Relief as their yearly Rents amount to*, this is not properly a Relief, but a Fine for the Alienation due by Cuſtom, and therefore cannot be diſtrained for unleſs by Cuſtom; otherwiſe if due by Tenure; And it being alleged that the Tenant held by 5 s. Rent, & per Relevium quando acciderit ſecundum conſuetudinem Manerii, it was held by three Judges againſt Doderidge, that it ſhould be *intended a Relief due by Tenure*; for though it was firſt averred, that ſuch Relief was due by Cuſtom of the Manor, yet it is after expreſly alleged, that the Tenant held by Relief quando acciderit; Agreed per totam Curiam. Jo. 132. Trin. 2 Car. Hungerford v. Havyland. Lat. 37, 95. 130. S. C.— 3 Bulſt 323. S. C.

7. Certum Letæ cannot be *diſtrained for* unleſs there is a Cuſtom to warrant it. Jo. 133. Trin. 2 Car. B. R. per Cur. cites 11 Rep. 44. b. Mich. 12 Jac. Bulloyne and Godfrey's Caſe. Roll Rep. 35. S. C. Coke Ch. J. ſaid that CertumLetæ is againſt Common Right, therefore he doubted if it might be diſtrained for without a Preſcription; and the Court ſeemed to incline to the ſame Intent. —— Ibid. 76. 77. S. P. accordingly.

8. Grantee of a Rent-Charge *levies a Fine* to the Uſe of himſelf and Wife in Tail, yet he may diſtrain for Rent Arrear before the Time levied. 2 Jo. 2. Witherhead v. Harriſon.

(H) *What Thing* may be diſtrained.

1. A Diſtreſs for Rent or &c. ought to be of a Thing of which there is a valuable Property in ſome Perſon, and for Dogs, Deer, Coneys, and ſuch like which are Feræ Naturæ, they cannot be diſtrain'd. Co. Litt. 47.

2. Furnaces or Cauldrons fixed to the Freehold, or the Doors or Windows of an Houſe or ſuch like cannot be diſtrained. Co. Litt. 47. b.

3. A Man cannot cut the Corn growing and take it as a Diſtreſs. 18 E. 3. 4.

Freem. Rep. 202. pl. 204. Mich. 1675. S. P. Obiter. —— 2 Mod 61. S. P. obiter in S. C.

4. Such Things of which no Replevin lies becauſe they cannot again be known from other Things cannot be diſtrain'd for Services, as Money out of a Bag. 22 E. 4. 50. b.

2 Inſt. 82. S. P. ——

5. Or Sheafs out of a Cart. Contra, 22 E. 4. 50. b.

Freem Rep. 202. pl. 204. S. P. per tot. Cur. Mich, 1675. Wilſon v. Ducket. —— 2 Mod. 61. S. C. adjudged.

* Fitzh. Avowry, pl. 263. cites S. C. and Trin. 14 H. 7 —— Br. Diſtreſs, pl. 30. cites S. C. —— Jo 197. Mich. 4 Car. B. R. S. P. admitted in the Caſe of Cowper v. Pollard —— 2 Mod. 61. Mich. 27 Car. 2. C. B. Wilſon v. Ducket, S. P. per tot. Cur. —— Freem. Rep, 202. pl. 204 S. C. and S. P. per Cur.

6. Or Shocks of Corn. 11 H. 7. 14. * 21 H. 7. 39. b. Curia.

Fol. 667.

2 Mod. 61. S. P. in Caſe of Wilſon v. Ducket.

7. Another Reaſon is given that Shocks cannot be diſtrained, for that by the Carriage there would be Damage by ſhedding. 22 E. 4. 150. 2 H. 4. 15. Co. Litt. 47.

8. Grain or Barley cannot be diſtrain'd. 18 E. 3. 4. 20 H. 7. 8. b.

9. Nor after it is ground. 18 E. 3. 4.

10. But ſuch Things of which a Replevin lies, and which can be known again, may be diſtrained. 22 E. 4. 50. b.

2 Inſt. 82. S. P. ——

11. As a Cart of Grain. 22 E. 4. 50. b.

Jo. 197. Mich. 4 Car. B. R. the S. P. per Cur. in Caſe of Cooper v. Pollard. —— 2 Mod. 61. S. P. per Cur Mich. 1675. in Caſe of Wilſon v. Ducket. —— Freem. Rep. 202. pl. 204. S. C. & S. P. per Cur.

* Br. Diſtreſs, pl. 11. cites S. C. ——

12. Curia, Co. Litt. 47. a Cart of Corn. * 2 H. 4. 15.

Fitzh. Diſtreſs, pl. 9. —— See pl. 37.

13. Or a Horſe laden with a Load of Sheafs. 21 E. 4. 50. b.

14. Or Money in a ſealed Bag. 22 E. 4. 50. b.

15. A Man cannot diſtrain Corn in the Ear, or Hay for Services. 3 E. 2, Avowry, 189.

16. A Man may diſtrain other Goods beſides Cattle. 18 E. 3. 4

17. A

17. A Man cannot diſtrain Hay in a Barn for Services, becauſe this cannot be known again to have Deliverance in a Replevin. Mich. 4 Car. B. R. between *Cooper and Pollard* adjudged upon a Demurrer; which Intratur Trin. 4 Car. Rot. 457. Jo. 197. S. C. adjudged. —— And ſo of Hay in Cocks, but if it be in a Cart it may. Adjudged by four Juſtices. Ibid.

18. If a Man leaſes rendring Rent, when the Tithes are ſevered from the nine Parts, he cannot diſtrain the Tithes for the Rent. 11 H. 4. 40. quære. But Brooke Diſtreſs 81. it is ſaid he ſhall not, becauſe it is the Thing leaſed.

19. No Man can be diſtrained by the Utenſils of his Trade. Co. Litt. 47. Though this is generally true, yet it muſt be intended where there are Goods or other Beaſts enough to be diſtrained; Arg. 5 Mod 361. —— If a Miller has two *Mill-ſtones*, the one in the Mill, and the other near it, the ſpare Stone may be diſtrained. Mo. 214, 215. Arg. cites 18 H. 8.

20. As the Axe of a Carpenter cannot be diſtrained for Rent. Co. Litt. 47.

21. Nor the Books of a Scholar. Co. Litt. 47.

22. If a Horſe be laden with a Burden of Sheafs, the Horſe only, or the Sheafs only, may be diſtrained for Services, (R. admitting the Sheafs only may be diſtrained.) 22 E. 4. 50. b.

23. The Materials for making Cloth in a Weaver's Shop cannot be diſtrained. Co. Litt. 47.

24. Equitatura hoc eſt Equus Palfridus or an Horſe that a Man keeps for Journeys cannot be diſtrained. Regiſtrum Originale, 100 b. but it does not appear for what the Diſtreſs was. If a Man rides upon a Horſe, this ſhall not be diſtrained, but if he has another Horſe upon which he ſometimes rides alſo, the ſpare Horſe may be diſtrained. Arg. Mo. 214. —— S. P. per Cur obiter Cro. E. 550. —— A Saddle Horſe is not diſtrainable if there are other Goods ſufficient or covenable. 2 Inſt. 133.

25. An Horſe upon which another rides cannot be diſtrained. Co. Litt 47.

26. An Horſe in a Smith's Shop cannot be diſtrained for the Rent iſſuing out of the Shop; becauſe this is for the Maintenance of Trade or of the Common-wealth. Co. Litt. 47. For he is there by Authority of Law. 3 Bulſt. 270. S. P. Arg. — S. P. by Holt Ch. J. but he ſaid that there is no ſuch Reſtriction where it is for a perſonal Duty. Ld. Raym. Rep. 386. Mich. 10 W. 3.

27. So an Horſe cannot be diſtrained in an Inn. Co. Litt. 47. Br. Diſtreſs, pl. 97. (99) cites 10 H. 7. 21. S. P. —— Ibid. pl. 42 cites 7 H. 10. [1] S. P. —— Br. Treſpaſs, pl. 281 cites 2 H. 7. 1. S. P. —— 3 Bulſt. 270. Arg S. P.

28. So Sacks of Corn or Meal cannot be diſtrained in a Mill. Co. Litt. 47. Br. Treſpaſs, pl. 281. cites 7 H. 7. 1. S. P. —— Ibid. pl. 42. cites S. C. [but miſprinted for 7 H. 7. S. 10.] S. P.

29. So Sacks of Corn or Meal cannot be diſtrained in a Market. Co. Litt. 47.

30. So Cloth or Garments cannot be diſtrained in a Taylor's Shop. Co. Litt. 47. * 10 H. 7. 21. * Br. Diſtreſs pl. 97 (99) cites S. C. — Ibid. pl. 42. cites 7 H. 7. 10. [1] S. P. — — Br. Treſpaſs, pl. 281. cites 7 H. 7. 1. S. P.

31. Averia

They are not privileged

31. Averia Carucæ **cannot be diſtrained. Co. Litt.** 47.

where there is no other Diſtreſs. Arg. 1 Salk. 249. cites 2 Inſt. 133. ——— By the Common Law the Plough or any Thing belonging to it was not diſtrainable ſo long as any other Diſtreſs might be taken. 2 Inſt. 133. ——— Co. Litt 47 a. b. S. P. ——— 5 Mod. 361. Arg. S. P.

Things which are in Cuſtodia Legis

32. Things diſtrained Damage-Feaſant **cannot be diſtrained for Rent; becauſe they are** in Cuſtody of Law. **Co. Litt.** 47.

cannot be taken; As a Diſtreſs in a Pound overt cannot be taken out of the Pound upon another Diſtreſs. Godb. 316 Arg. cites D. 67. Stringfellow's Caſe.

In Treſpaſs on the Statute for diſtraining per Averia Carucæ ſuæ contra Formam Statuti

33. 51 *H.* 3. *Stat.* 4 *Neither Draught-Cattle nor Sheep ſhall be diſtrained (except for Damage-Feaſant) ſo long as other Goods may be found to ſatisfy the Debt; Diſtreſſes ſhall be reaſonable; The Sheriff ſhall anſwer all Debts received; and where the Sheriff charged himſelf, the Debtor ſhall be acquitted.*

he ought to ſurmiſe in his Count that he had other Beaſts; for if there are no other Beaſts he may diſtrain the Beaſts of the Plow. Br. Action ſur le Eſtatute, pl. 45. cites 4 H. 7. 8.

In Treſpaſs on the Statute the Plaintiff declared of taking Contra Formam Statuti Generally without alleging that he had otherwiſe reaſonable Diſtreſs, for which Cauſe Exception was taken, Sed non allocatur; for this muſt come on the Part of the Defendant, viz. That no other reaſonable Diſtreſs could be found, and this is iſſuable; and Judgment with Coſts was given for the Plaintiff. D. 312 a. pl 86. Trin. 12 Eliz.

Ibid cites Mich. 18 E. 2. where it was held that this Action lies for the Tenant againſt the Lord, though the Tenant had come to Agreement with the Lord for the Rent for which the Diſtreſs de Averiis Carucæ was taken; and cites Paſch. 17 H. 6. Rot. 93.

34. A Man may diſtrain *Sheep* if he cannot find other Diſtreſs, tho' he might have found other Diſtreſs before. Br. Diſtreſs, pl. 63. cites 29 E. 3. 16 and Fitzh. tit. Treſpaſs 250.

35. A Man *ſeiſed of four Acres* of Land *has Iſſue a Son and a Daughter by one Venter, and two Daughters by another Venter, and granted* 100 *s. out of his Land to his Son in Fee*; the *Son dies without Iſſue in the Life of his Father*; the *Father dies*, the *Land deſcends to the three Daughters*; the *eldeſt Daughter* cannot diſtrain for the two Parts of the Rent till Partition be made. Br. Extinguiſhment, pl. 31. cites 34 Aſſ. 15.

S. C. cited Cro. E. 550

36. A Man cannot diſtrain the *Horſe upon which a Man rides*, quod nota bene. Br. Diſtreſs, pl. 60. cites 6 R. 2. and Fitzh. tit. Reſcous 11.

37. Note, That a *Waggon full of Corn* may be diſtrained, contra of *Grain in Truſſes*; per Hank and Thirn, quod nemo negavit. And note, that a General Receiver has no Authority to re-deliver Diſtreſs without Command of his Maſter. Br. Diſtreſs, pl. 11. cites 2 H. 4. 15.

Br. Diſtreſs, pl. 80. cites S. C.

38. In Debt upon *a Leaſe of Tithes levied by Diſtreſs* is no Plea, per Skrene, becauſe there is no Land in which he can diſtrain, and he cannot diſtrain by the Tithes ſevered; for this is the Thing leaſed, contra Till. Br. Dette, pl. 234. cites 11 H. 4. 40.

39. A Man may diſtrain *the Beaſts of his Tertenant* for Rent-Service, or for Rent reſerved upon a Leaſe &c. *immediately* when they are put into the Land, *but not* the Beaſts *of a Stranger before they are levant and couchant*. Br. Diſtreſs, pl. 65. cites Lib. Fundamentum Legum.

40. *A Garment at a Taylor's, or a Horſe baiting in an Inn or Hoſtery*, ſhall not be diſtrained; for they are there by Authority. And the ſame Law elſewhere of *Sacks of Grain at a Mill to grind*, or *Cloth at a Dyers*. And per Bryan, the ſame Law of a *Horſe with a Farrier to be ſhod*; But if he *takes off the Saddle and lays it upon the Ground*, the Lord may diſtrain the Saddle, and yet not the Horſe. Br. Diſtreſs, pl. 56. cites 22 E. 4. 49.

41. Treſpaſs

41. Treſpaſs of taking of *two Waggons of Corn*; The Defendant juſtified as Diſtreſs for Rent arrear upon the Seigniory, and ſhewed certainly, there *he ought as well to juſtify the taking the Waggons as the Corn*, and otherwiſe it is ill; For per Suliard clearly, a Man cannot diſtrain Sheafs, nor Grain in Shocks, for the Damage of ſhedding in Carriage, and a Man cannot diſtrain *Money unleſs it were in a Bag ſealed*, for one Penny cannot be known from another, and then Replevin cannot be thereof made. Per Catesby, our Books are ſo of Sheafs unleſs they were in Waggons; but I think that a Man * may diſtrain by Sheafs; and Brian to the ſame Intent; for Writ of Reſcous lies thereof; tamen *Quære*. Br. Diſtreſs, pl. 58. cites 22 E. 4. 50. Br. Diſtreſs, pl. 88. cites S. C. —— * S. P. per Brian and Catesby, but Suliard contra, no more than Money. Br Diſtreſs, pl. 88. cites S. C.

42. *As* where a Man *leaſes his Sheep*, or *bails his Goods in Pledge*, there they ſhall not be taken and put in Execution, nor taken for Outlawry, nor for Diſtreſs, nor ſuch like, *till the Leaſe be determined, or the Money paid* for the Pledge. Br. Diſtreſs, pl. 74. cites 22 E. 4. 11.

43. A Man cannot diſtrain *Grain in Shock* for Rent arrear, becauſe he cannot have Replevin nor Return thereof, for it is not certain to have thereof Conuſance; but otherwiſe it is for Damage feaſant; Per all the Juſtices. Br. Diſtreſs, pl. 100. cites 11 H. 7. 14.

44. A *Furnace fixed to the Land*, and *not to the Walls*, nor *Fatts fixed in the Land*, *Pale*, *Eſtanks*, *Windows*, *Doors*, *Gates*, *Evidence of Land*, *Poſt fixed in the Land*, *Table Dormant* &c. ſhall not be diſtrained, for they are not Chattles which go to the Executors, but the Heir ſhall have them, per. Cur. Quære if *Glaſs*; for it is ſaid per Pollard, and not denied but that the Executor ſhall have it, and not the Heir. Br. Diſtreſs, pl. 29. cites 21 H. 7. 26. Br. Chattels, pl. 7. cites S. C.

45. In Treſpaſs of taking a *Mill-Stone*; The Defendant juſtified for diſtraining it for Suit &c. The *Plaintiff ſaid, that it was fixed to a great Piece of Timber, cum clavibus & aſſeribus*. Per Brudnell this is no Plea, but he *ſhall ſay that he had a Horſe-Mill in the Houſe, and annexed to the Houſe where* &c. and *that the Mill-Stone was Parcel of the Mill*; by which he ſaid ſo; by which the *Defendant ſaid, that it was ſevered, and was in Picking*; and yet it was held that it ſhall not be diſtrained; For yet it is Parcel of the Mill; For a Mill is for the Commonwealth; but if another Mill-Stone, which is none of them which are for grinding, be in the Houſe, this may be diſtrained. Quære of the *Anvil of a Smith*, it ſeems that this ſhall not be diſtrained, if it be that upon which the Smith uſed to work, notwithſtanding that it be taken out of the Stock. Br. Diſtreſs, pl. 23. cites 14 H. 8. 25.

46. *So of Doors and Windows*. Br. Diſtreſs, pl. 23. cites 14 H. 8. 25.

47. It is a moot Caſe, if *a Man diſtrains for a juſt Cauſe, and impounds the Beaſts*, and after the *Lord of the Soil comes and diſtrains them for Rent again*, if his Diſtreſs be lawful, and it ſeems that it is not, inaſmuch as they were diſtrained before, and were *in Cuſtodia Legis*. Br. Diſtreſs, pl. 74. cites 4 E. 6.

48. *Stuff ſent to a Taylor*, *Fuller*, *Sheerman*, *Weaver*, *Miller* &c. ſhall not be diſtrained; for thoſe Artificers are for the Commonweal. And the ſame Law elſewhere of *a Horſe in a common Inn*. But ſuch Artificers may retain the Stuff for their Wages for their Labour. And the Hoſtler of the Inn may retain the Horſe for his Victuals, viz. for the Horſe-Meat not paid. And *Victuals* nor *Corn in Sheafs* cannot be diſtrained; Contra *of Corn in a Waggon*. Br. Diſtreſs, pl. 70. cites Lib. Raſtel.

49. If a *Knight of the Order of the Garter has ſeveral Garters*, all but one may be diſtrained; Arg. Mo. 214. Mich. 27 & 28 Eliz.

50. An Horſe which carries Corn to Market, and is put into a Friend's Houſe for the Time, he is not diſtrainable; Per Beamond and Owen, which Walmſley denied. And where an *Horſe carries Corn to a Mill, and is tied at the Mill-Door during the Grinding* of the Corn, he ſhall not be diſtrained; which Walmeſley agreed; becauſe it is a common Place, and for the Publick-weal; but he ſaid that they be not alike. Cro. E. 550. pl. 25. Hill. 39 Eliz. C. B. in Caſe of Read v. Burley.

51. A covenable Diſtreſs is not of *Armour*, or *Veſſel*, or *Apparel*, or *Jewels*, ſo long as there are other ſufficient or covenable, nor of *Sheep*, *Saddle-Horſes*, *Beaſts of the Plough*, *Poultry or Fiſh*. 2 Inſt. 133. cites Mirror, cap. 2 S. 16.

52. *Goods under an Attachment* cannot be diſtrained. Vent. 221. Trin. 24 Car. 2. B. R. Monk's Caſe.

Upon this Act, if Corn be diſtrained in the Field the Party may carry it away, or elſe by its lying on the Ground it may ſpoil,

53. 2 *W. & M. Stat.* 1. *cap.* 5. *S.* 3. *It ſhall be lawful to diſtrain for Rent arrear, as aforeſaid, any Sheaves or Cocks of Corn, or Corn loſe in the Straw, or Hay in any Barn, or upon any Hovel, Stack or Rick, or otherwiſe; and to lock up and detain the ſame where it ſhall be found, till it be replevied; and in Default thereof, within the Time aforeſaid, to ſell the ſame after Appraiſement as aforeſaid; ſo as it be not removed to the Damage of the Owner, but kept where it ſhall be found till it be replevied or ſold.*

and every taking and removing of the Corn out of the Place where it was, is a taking and carrying away in Law; Per Holt and Powell. For per Holt, the Act of Parliament is only that it be not removed to the Damage of the Owner, and as long as it is not at the Damage of the Owner it may be carried out of the Field; But by Holt, if Corn be diſtrained in a Rick, I doubt whether it can be carried away. Mich. 8 Ann. B. R. Le Grice v. Manning.

54. 11 *Geo.* 2. *cap.* 19. *S.* 8. *Enables Landlords, their Stewards, Bailiffs, Receivers, or other Perſons impowered, to diſtrain any* Cattle or Stock *of their Tenants* feeding or depaſturing upon any Common *appendant or appurtenant, or any Ways belonging to all or any Part of the Premiſſes demiſed or holden; and alſo to take and ſeize all Sorts of Corn and Graſs, Hops, Roots, Fruits, Pulſe, or other Product whatſoever, which ſhall be growing on any Part of the Eſtates ſo demiſed or holden, as a Diſtreſs for the Arrears of Rent; and the ſame to cut, gather, make, cure, carry, and lay up, when ripe, in the Barns or other proper Place on the Premiſſes ſo demiſed or holden; and in Caſe there ſhall be no Barn or proper Place on the Premiſſes ſo demiſed or holden, then in any other Barn or proper Place which ſuch Leſſor or Landlord, Leſſors or Landlords ſhall hire, or otherwiſe procure for that Purpoſe, and as near as may be to the Premiſſes, and in convenient Time to appraiſe, ſell, or otherwiſe diſpoſe of the ſame, towards Satisfaction of the Rent for which ſuch Diſtreſs ſhall have been taken, and of the Charges of ſuch Diſtreſs, Appraiſement, and Sale, in the ſame Manner as other Goods and Chattel, may be ſeiſed, diſtrained, and diſpoſed of, and the Appraiſement thereof to be taken when cut, gathered, cured, and made, and not before.*

S. 9. *Tenants to have Notice of the Place where the Diſtreſs is lodged. And Diſtreſs of Corn &c. to ceaſe if Rent be paid before it be cut.*

(H. 2) The Goods of whom may be diſtrained.

1. LESSEE is ouſted by a Stranger, the Goods of *the Diſſeiſor* may be diſtrained for the Rent. Cro. J. 300. pl. 5. Paſch. 10 Jac. B. R. Humphry v. Damion.

2 A. *driving Cattle to London to ſell*, by Agreement with the Maſter of an Inn puts them into a Ground at ſo much a Score for a Night; The *Landlord* ſeeing them asked whoſe they were, but *conſented* to their ſtaying there, and afterwards the ſame Evening diſtrained them for Rent due to him by the Maſter of the Inn; and adjudged for the Landlord in the Caſe of Fowkes v. Joice. 3 Lev. 260. Trin. 1 W. & M. in C. B.

2 Vent 50. S. C —— 2 Vern. R. 129. S. C. Relief decreed upon the Fraud, and the Landlord to anſwer the Value of the Sheep, and to pay Coſts both in Equity and at Law; Per Commiſſioners, and they ſeemed to think that the Grounds lying to the Inn and uſed therewith, ought to have the ſame Privilege as the Inn, and Paſſengers Cattle not to be diſtrainable there. —— On the Landlord's coming and ſeeing the Sheep he pretended to be angry, upon which the Owner offered to take out the Sheep, at which Time they were not diſtrainable for the Rent, having not bee *levant and couchant* upou the Lands; ſo that the Court looked on the Conſent as a Fraud to get them to be left all Night, by which they became liable to the Diſtreſs; and the Plaintiff had his Coſts both at Law and in Equity. Ch. Prec. 7. S. C.

3. A *Rent-Charge* was Arrear for 20 Years, and *Cattle eſcaped out of the next Ground* and were diſtrained. Ld. Nottingham relieved againſt it; cited 2 Vern. 131. Hill. 1690. as the Caſe of Brodon v. Pierce.

S. C. cited Ch. Prec. 8.

4. Where a *Stranger's Beaſts eſcape* into the Land they may be diſtrained for Rent, though they have *not* been *levant or couchant*, provided that they are *Treſpaſſors*. *But* if the Tenant of the Land is in Default in *not repairing his Fences* whereby the Beaſts came into the Land, the Leſſor cannot diſtrain ſuch Beaſts, though they have been levant and couchant, unleſs he have given *Notice to the Owner*, and he ſuffer them to remain there afterwards. But *the Lord of the Fee*, or *Grantee of a Rent-Charge*, in this Caſe may diſtrain ſuch Beaſts after they have been levant and couchant, without giving Notice. 2 Lutw. 1573. 1577. Hill. 7 W. 3. Kimp v. Cruwes.

5. The Goods of an *Ambaſſador* are *privileged by* 7 *Ann.* 12. and 10 Mod. 4. Trin. 8 Ann. B. R. Arg. and cites Grotius to the ſame Purpoſe.

(I) The *Goods of whom* may be diſtrained.

[*And in what Place.*]

Fol. 668.

1. IF the Cattle of a Stranger eſcape into the Lands holden, and the Owner knows it and ſuffers them to continue there after for a Day or more, the Lord may diſtrain them for his Services. 27 E. 3. 80.

But if in this Caſe the Cattle eſcape and the Owner freſhly follows to take them, it is otheriſe. 2 Inſt. 296 —— S. P. admitted per Cur. Palm. 43 Mich. 17 Jac. B. R. Lacy's Caſe, and held that there was no Difference between Leſſor and Leſſee, and the Caſe of Lord and Tenant. —— S. C. cited by Powell J. 2 Lutw. 1580. Hill. 7 W. 3.

And ſo he may though they are not levant and Couchant. See (O) pl. 1.

2. [So] **if the Cattle of a Stranger eſcape into the Lands held,** though the Owner does not know them to be there, yet if **they are** levant and couchant **there, the Lord may diſtrain them for his Services. Contra** 27 E. 3. 80.

In Caſe of an ancient Seignory the Lord may diſtrain Cattle Services, which came in by Eſcape, though they were not levant and couchant, although it be in Default of the Fences, which the Tenant of the Land ought to maintain, becauſe the Lord has nothing to do with the Repairing of the Fences. But in Caſe of Rent reſerved upon a Leaſe for Years the Leſſor cannot diſtrain ſuch Cattle until they be levant and couchant; for if the Leſſor had had the Land in his own Hands he ought to have repaired the Fences; and when he puts in a Leſſee he ought by Covenant &c. to oblige him to repair. And therefore in that Caſe if the Law would allow the Leſſor to diſtrain the Cattle of a Stranger which come in by Eſcape, before that they be levant and couchant, it would be in Effect to allow a Man to take Advantage of his own Wrong; therefore the Opinion of Coke cannot be maintained ſo generally, no Book warranting it unleſs 10 H 7. 21. b. Therefore it muſt be intended if the Cattle come in by Default of the Owner of the Cattle, then they may be diſtrained before they be levant and couchant 7 H. 7. 1. 15 H. 7. 17. but if in Default of the Tenant of the Land, there they cannot be diſtrained until they have been levant and couchant; that is to ſay, for Rent upon Leaſes for Years. 15 H. 7. 17. And in ſuch Caſe the Leſſor ſhall not take the Cattle before that he has given Notice to the Owner that they are upon the Land liable to his Diſtreſs. And if the Diſtrainor chaſe Chattle in a Place liable to his Diſtreſs, and gives Notice to the Owner of the Cattle, and he does not come to take them away, they are now become diſtrainable. But in Caſe of Diſtreſs by the ancient Seignory aforeſaid the Owner may prevent the Diſtreſs by making freſh Purſuit, cites 15 H. 7. 2 Roll Rep. 124. Gill v. Gawen; per Powell J. But by Treby Ch. J. where the Cattle eſcape accidentally, there they are not diſtrainable, until they have been levant and couchant; but if they eſcape by Default of their Owner, they are diſtrainable the firſt Minute. Ld. Raym. 168, 169. Hill. 8 & 9 W. 3. C. B. Kemp v. Crewes.

3. **The Cattle of a Stranger that eſcapes into the Land may be diſtrained** for Services.

4. But **the Cattle of a Stranger that comes into the Land by Eſcape cannot be diſtrained** for a Rent-Charge. 18 E. 2. Avowry 219.

5. But **the Cattle of a Stranger may be diſtrained** for Rents and Services, **though they eſcape into the Land of the Tenant** if they do a Treſpaſs to the Tenant. 22 E. 4. 49. b. **Contra** 27. E. 3. 80.

6. But **the Cattle of a Stranger cannot be diſtrained by the Lord if they eſcape into the Land of the Tenant** if they do no Treſpaſs to the Tenant. 22 E. 4. 49. b.

7. As if **the** Tenant ought to incloſe againſt the Highway by Preſcription, **and in driving my Cattle by the Way** by Default of the Incloſure **they eſcape into the Land of the Tenant, the Lord cannot diſtrain them.** 20 E. 4. 49 b.

8. So **if he ought** to incloſe **by Preſcription** againſt my Land, **and my Cattle eſcape &c.** 22 E. 4. 49 b.

9. **In theſe Caſes after the Eſcape if my Cattle** continue in the **Land** levant and couchant for four, **or ſix, or more** Days, **or for half a Year, yet if I have** no Notice **thereof the Lord cannot diſtrain them.** 22 E. 4. 49. b.

10. But **otherwiſe it is if I have** Notice **and ſuffer them to continue there after.** 22 E. 4. 49. b. 50.

Fitzh. Diſtreſs, pl. 8. cites S. C. —

11. **My Goods cannot be diſtrain'd** in a Market or Fair **for the Prejudice to the Publick.** 7 H. 7. 2.

Goods *brought to Market* and expoſed to Sale ſhall not be diſtrain'd, becauſe it is Pro Bono Publico. Noy. 19. 15 Jac. Traſſel v. Morris

Br. Diſtreſs, pl. 42. cites 7 H. 7. 10. S. P. † Br. Treſpaſs, pl. 281. cites 7 H. 7. 1. S. C. ——

12. **So my Gown** in a Taylors Shop **cannot be diſtrain'd by the Lord of the Shop for Services,** nor **my** Horſe in an Inn. 10 H. 7. 21. b. † 7 H. 7. 2. Nor **my** Horſe in the Shop of a Smith who is to ſhoe him; **For the Laws give me a Liberty to put him there.** 22 E. 4. 39. b.

Br. Diſtreſs, pl. 42. cites 7 H. 7. 10. [1] S. P. —— Fitzh. Diſtreſs, pl. 8. cites S. C.

13. But

13. And in theſe Caſes the Lord cannot diſtrain theſe Goods, ough they continue there as long as I pleaſe; For they may retain em till Satisfaction. 22 E. 4. 39. b.

14. If I put my Horſe to a Smith's to be ſhod, although he be ere three or four Days before he is ſhod, yet the Lord cannot diſ- ain him. 22 E. 4. 50.

15. But if I come with my Horſe to be ſhod, and there put the addle under the Right Side of the Horſe, the Lord may diſtrain e Saddle. 22 E. 4. 50.

16. If a Man rides to any Place, and there he is took Sick, upon hich he remains there two or three Days, yet his Horſe cannot be iſtrain'd for Rent. 15 E. 2. Avowry 216.

17. [So] if a Man put his Horſe into a Common Herbage per 8 ours & * in beverie ſon Chival & luy remove yet this Horſe cannot diſtrain'd for Rent there. 15 E. 2 Avowry 216. adjudg'd.

* Quære the Meaning of the French Words, unleſs it be (and waters his Horſe, and puts him in again.)

18. If the Diſtreſs is to be taken for any Cauſe touching the Soil, e Cattle of a Stranger may be diſtrain'd, being upon the Land r Rent &c. 41 E. 3. 26. b.

Fol. 669.

Br. Diſtreſs, pl. 3. cites S. C. & S. P. as where it is for Damage-Feaſant, or for Rent-Service.

19. If an Heriot Service due after the Death of a Tenant be eſ- oign'd, the Lord may diſtrain the Cattle of any Stranger manuring pon the Land. 27 Aſſ. 24. adjudg'd.

Br. Hariots, pl. 6 cites S. C.—— Fitzh. Avowry, l. 177. cites S C.——Ow. 146. Anderſon ſaid, that he agreed the Caſe of Dyer, that the Cat- le of a Stanger cannot be taken for a Heriot.

20. The ſame Law if a Diſtreſs be to be taken for a Cauſe touch- ng the Perſon, as for an Amercement in Frank-pledge the Cattle of Stranger may be diſtrain'd being upon the Land. 41 E. 3. 26. . Vide Contra, 47 E. 3. 23.

21. The Cattle of a Stranger cannot be ſold for Debt of the King. 41 E. 3. 26. b.

22. But they may be diſtrain'd if they are depaſtured in the Place where &c. 11 H. 4. 2.

Fitzh. Avowry, 52. cites S. C.

23. Cattle which are in certain Land by way of Agiſtment may be diſtrain'd for Rent. 18 E. 2. Avowry 219. admitted by the Iſſue.

24. If a Town be aſſeſs'd to 40 s. for the Expences of the Knights of the Shire in Parliament this may be levied upon the Goods of one Man in the Town only. 11 H. 4. 2.

Fitzh. Avowry, pl. 52. cites S. C.——Br. Diſtreſs, pl. 94. (95) cites S. C.——Br. Avowry, pl. 42. cites S. C.

25. If there are ſeveral Jointenants and one grants a Rent-Charge out of the Land, the Grantee may diſtrain the Cattle of the Grantor. 11 H. 6. 23. b. 28. 33.

Br. Diſtreſs, pl. 68. cites S C.—— Br. Charge, pl. 39. cites S. C.

26. But he cannot diſtrain the Cattle of the other Jointenants. 11 H. 6. 23. b. 28, 33.

Br. Diſtreſs, pl. 68. (69.) cites S. C. —— Br. Charge, pl. 39. cites S. C.

Br. Diſtreſs, pl 68 (69.) cites S. C.

27. But he may diſtrain the Cattle of a Stranger that come upon the Land. 11 H. 6. Brook Diſtreſs, 69. Quære.

and that there is a Quære; but Brooke ſays it ſeems that they may be diſtrained. —— Br. Charge, pl. 39. cites S. C. and Quære, and ſame Opinion by Brooke.

Cro J. 611. pl. 6. Hill. 18. Jac. B R. Snelgar v Henſton, S. C. adjudged, that one Tenant in Common

28. If there be two Jointenants, and one leaſes his Part to the other for Years, rendring Rent, and they occupy it accordingly, now the Leſſor may diſtrain his Cattle; for now he ſhall occupy the whole without the Diſturbance of the Leſſor, and he cannot ouſt him. 11 H. 6. 34. M. 18 Ja. B. R. between *Sir Henry Snelgrave and Daiſton* adjudged upon a Demurrer where the Leaſe was made to a Stranger, who leaſed it to the other Jointenant.

may diſtrain upon the other, where he comes in under the Leſſee —— 2 Roll Rep. 212 Hudſon v Snelgar, S. C. Two were Tenants in Common in Fee, and one made a Leaſe for 40 Years, rendering Rent, and the Leſſee aſſigned his Term to the other Tenant in Common; and the Court held clearly that for Rent arrear the Leſſor may diſtrain the Beaſts of his Companion; and cited 11 H. 6. 28. accordingly.

Br. Diſtreſs, pl. 68 (69.) cites S C and cites 11 H 6. 33. where it is in a Manner

29. If there be ſeveral Jointenants, and one grants a Rent-charge, and after leaſes his Part to the other Jointenants at Will, and they occupy the whole, yet their Cattle cannot be diſtrained for the Rent; becauſe the Leaſe at Will is void, inaſmuch as a Jointenant ought to occupy per my et per tout by the Law. 11 H. 6. 28. 34

agreed, that where five Jointenants are, and two charge the Land with Rent, and leaſe their Part to one of the other three, and the Grantee diſtrains him, that this is good; for by the taking of the Leaſe of the Part of the Grantors, he ſhall be in the ſame Plight as the Grantors themſelves ſhould be; and è contra if he had occupied his firſt Part only.

30. But admitting the Leaſe at Will to them to be good, then their Cattle may be diſtrained for the Rent; becauſe they come to the third Part under the Charge, and they ſhall be in the ſame Plight that the Grantor himſelf was. 11 H. 6. 28. a. b.

31. If a leaſes at Will and after grants a Rent, (admitting this does not determine the Will, quod quære) the Grantee cannot diſtrain the Cattle of the Tenant at Will, becauſe he was in before the Charge, and therefore the Tenant of the Freehold cannot charge him before the Will determined. 11 H. 6. 28. b.

32. If a Man be ſeiſed of a Rent-charge by Preſcription iſſuing out of the Manor of D. yet it ſeems he cannot diſtrain the Cattle of the Copyholders of the Manor, if they have not been uſed to be diſtrained, becauſe they are in by Preſcription alſo, and ſo as high as the Owner of the Rent. M. 12 Ja. B. between *Cannon and Turner*, dubitatur.

* Fo 670.

33. But in the ſaid Caſe it is clear if the Owner of the Rent has it by Grant, or otherwiſe, and not by Preſcription; yet the Cattle of the Copyholders * cannot be diſtrained for it. M. 12 Ja. B. between *Cannon and Turner* adjudged.

34. If a Rent be granted out of two Parts of certain Land, and after a Leaſe is made of the two Parts to A. and the other third Part alſo comes to A by another Leaſe of him that has the third Part, the Cattle of the Leſſee may be taken for this Rent. Hobart's Reports 110 between *Newman and Moor*, where but one 3d Part came to the Leſſee of the two Parts.

35. If a Man *puts his Beaſts to J. N. to Paſture* for 4 d. the Week, and after *gives Notice that he will not Paſture them any longer*, and the Owner will not retake them, J. N. may diſtrain them for Damage feaſant. Br. Diſtreſs, pl. 93. cites 43 E. 3. 21.

36. In

36. In Writ of *Meſne*, if the *Defendant confeſſes the Acquittal*, the Defendant ſhall be diſtrained if he does not acquit him; Per Belknap. Br. Diſtreſs, pl. 20. Br. Fines, pl 45. cites 38 E. 3. 33. S. C.

37. Where a Man *agiſt Beaſts* in his Land *for a certain Sum*, he cannot diſtrain the Beaſts for the Agiſtment arrear; But if the Owner chaſes them away before Payment of the Agiſtment, the other may have Action of Treſpaſs; Quære inde; For it ſeems that Debt lies. Br. Diſtreſs, pl. 67. cites the Regiſter.

38. *So* it ſeems of *Leaſe of Tithes*, the *Leſſor cannot diſtrain the Sheafs of the Tithes*. Br. Diſtreſs, pl. 67. cites the Regiſter.

39. For *Fees of Knights of the County for the Parliament*, a Man may diſtrain the Beaſts of the Vill, or of any of the Vill. Br. Diſtreſs, pl. 94. (bis) cites 11 H. 4. 2.

40. A Man *put his Beaſts into his own Cloſe*, and they *eſcaped into the Cloſe of another adjoining*, *and* the *Owner freſhly retook them*, this is good Matter to ouſt the Lord of the Diſtreſs of them, but the other ſhall have Treſpaſs thereof; Quod Nota; per Cur. Br. Diſtreſs, pl. 21. cites 21 H. 6. 37.

41. Whether the *Sheriff* may *diſtrain the Beaſts of a Stranger upon the Land of one that has loſt Iſſues* in Curia Regis for Non-appearance was the Queſtion on a Demurrer; Brook ſays it ſeems to him that he may; becauſe the Land is thereof charged. Br. Diſtreſs, pl. 40. cites 5 H. 7. 1.

42. In Replevin the Defendant *avowed for Rent-Charge*; *The Plaintiff ſaid that the Land where* &c. *was open to the Highway for Default of Incloſure, and he drove his Beaſts in the Way, and they eſcaped and he freſhly purſued them, nnd the Defendant took and diſtrained them*; and by all the Juſtices, if *a Man de ſon tort puts his Beaſts into certain Lands*, the Lord may diſtrain them though they were *[not] levant and couchant upon the Land. Quære of the Diverſity between this Caſe and the Caſe of Eſcape. And the Defendant ſaid by Replication, that the Beaſts were in the Land by two Nights after the Eſcape; and per Catesby, he *ought to traverſe the Eſcape*; But Brian e contra, and that upon freſh Purſuit the Party cannot diſtrain, contra where he ſuffers the Beaſts to remain after the Eſcape, by which (by him) the Defendant *ought to traverſe the freſh Suit or the Eſcape*, quod Choke conceſſit. Br. Diſtreſs, pl. 24. cites 15 H. 7. 17.

* The Editions of Brook omit the Word (not) but it is in the Year-Book.

43. By Manwood J. there is a *Difference when the Cattle come upon the Lands of another in the Default of the Owner of the Cattle*, as by Eſcape or Stray, *and where in the Default of another*; For in the firſt Caſe the Lord may diſtrain them before they be levant and couchant; but in the latter Caſe not; alſo a *Rent reſerved upon a Leaſe for Years, is a new Rent, and not like unto an ancient Rent due upon an ancient Tenure betwixt the Lord and the Tenant*; For, for a Rent reſerved upon a Leaſe for Years, or for a Rent-Charge a Man cannot diſtrain the Cattle before they be levant and couchant upon the Lands although they come upon the Land by Eſcape, Eſtray &c. Dyer ſaid the Lord cannot diſtrain the Cattle which eſcape into the Land of his Tenant, for want of Incloſure of his Tenant, before they be levant and couchant, and yet the Seignory is favoured for the Antiquity of it. 2 Le. 7. 8. pl. 8. 7 Eliz. C. B. Anon.

44. If a *Clothier* having *put his Wool to ſpin comes with an Horſe to carry it back*, but becauſe there is no Beam or Weights at the Spinner's Houſe to weigh it, *the Clothier and Spinner with the Leave of a Neighbour who had a Beam and Weights* in his Houſe, *bring the Horſe thither*, *and enter the Houſe to weigh the Yarn*; the Lord of the Houſe whilſt they are

Noy 68 S C. accordingly, for they were brought there for another Intent,

and were in the Poſſeſſion of the very Owner.

are there cannot diſtrain the Horſe for Services; Adjudged. Cro. E. 549. 596. Hill. 39 Eliz. Read v. Burley.

—— S. C. cited 3 Lev. 161. by Lutwich J.

45. There is a *Difference between a Diſtreſs for Services, and* a Diſtreſs *for Amercements for not doing the Services*; For the firſt is by Common Right maintainable, the ſecond againſt Common Right by Preſcription. And then for ſuch Amercements you muſt diſtrain the Tenants own Beaſts, and not the Beaſts of a Stranger found upon the Land; As for Services you may, and the reaſon of that, as I conceive, is, for that it is for a *Perſonal Crime*; Per Walmſley J. Noy 20. in Caſe of Pell v. Towers.

46. *Two Hundreds*, viz. L. and M. were *adjoining to two ſeveral Manors*, viz. D. and E. and A. was ſeiſed of D. and B. was ſeiſed of E. In a Replevin A. avowed, and *preſcribed that all the Tenants of the other Manor have uſed to make Suit to the Leet within his Hundred, and that the Lord of the other Manor uſed to appear at the ſaid Leet, or to pay 4s. pro Anno futuro, and if not paid, then he preſcribed to diſtrain any Inhabitant within the Hundred for the ſame*; and for 4s. not paid he avowed the Diſtreſs within the Manor of the Plaintiff, who was one of the Inhabitants. Williams J. cited 47 E. 3. that the Cattle of the Lord of the Manor might be diſtrained in any Land within the Hundred for Suit and Services. But it was afterwards agreed by all the Juſtices, that the Cattle of a Stranger could not be diſtrained. Owen 146. Paſch. 40 Eliz. C. B. Gooſey v. Potts.

Noy 20. S. C but S. P. does not appear.

47. If for an Amercement for Default of Suit the Lord *preſcribes to diſtrain the Goods of his Free-Tenant*, he *cannot take a Diſtreſs of the Beaſts of his Under-Tenant*, who is not within the Preſcription; Adjudged. Cro. E. 791, 792. Mich. 40 Eliz. Pill v. Towers.

48. If *I let Land* for Years, *reſerving Rent, and I command one to put his Cattle into the Land, I cannot diſtrain them*; For my Commandment is a Wrong, and an Action on the Caſe will lie againſt the Commander. Brownl. 31. Hill. 6 Jac. Anon.

49. If one ſeiſed in Fee *makes a Leaſe for Life, and* after *grants to me a Rent-charge*, if the *Grantor's Cattle come upon the Ground*, I may diſtrain them, although I cannot diſtrain the Tenant in Poſſeſſion, but the Grantor cannot avoid it. Brownl. 32. Paſch. 10 Jac. Anon.

Brownl. 170. S. C. and ſays the Court held in this Caſe, becauſe the Beaſts were always in the Plaintiff's Poſſeſſion, and in his View, the Defendant could not diſtrain the Cattle of a Stranger; but if he had permitted the Beaſts to have remained there by any Space of Time, though they had not been levant and couchant, the Leſſor might have diſtrained the Beaſts of a Stranger. —— S. C. cited Mod. 63. pl. 6. —— S. C. cited 2 Lutw. 1580.

50. The Defendant *avowed for Rent reſerved* upon a Leaſe for Life. The Plaintiff pleaded in Bar, and conveyed to himſelf Title to 10 Acres adjoining, and that he put in his *Beaſts*, and they *eſcaped into the Place* &c. *and he freſhly followed to drive them out, but before he could recover them, the Defendant diſtrained them.* The Caſe had been ſomewhat better, if the Tenant ought to maintain the Fence. But no Judgment or Opinion. Hob. 265. pl. 347. 17 Jac. Reynolds v. Okely.

2 Vent. 50. S. C. ſays it was argued, that nothing appeared in the Pleading of a common Inn, and ſo the Matter did not come in Queſtion; neither was it ſet forth that the Cattle

51. *Cattle driving to London to be ſold* for Proviſions for the City, and being *lodged in a Cloſe by the Way*, may be diſtrained for Rent, though they are put into the Cloſe *by Conſent of the Landlord*; Adjudged per tot. Cur. 3 Lev. 260. Trin. 1 W. & M. in C. B. Fowkes v. Joice.

ttle were driving to Market, but only to London, ad Proficuum inde faciend'; and beſides, in the r to the Avowry the Licence is the only Matter relied upon, which does not conclude the Leſſor m taking the Diſtreſs And of that Opinion was the Court. And the Court held, that Cattle lving to a Marker, and put into Paſture by the Way, were not privileged from being diſtrained; it is by the Statute of Marlebridge, that Beaſts cannot be diſtrained in the Highway; and not by e Common Law. —— 2 Vern. 129. pl. 128 Hill. 1690. S. C. Relief decreed upon the Fraud, and e Landlord to anſwer the Value of the Sheep, and to pay Coſts both in Equity and at Law; Per mmiſſioners, and they ſeemed to think, that the Grounds lying to the Inn, and uſed therewith, ght to have the ſame Privilege as the Inn, and Paſſengers Cattle not be diſtrainable there.

52. A. is *ſeiſed of a third Part of a Cloſe in Common*, and B. of the ther two Parts in Common with A. — A. *lets his third Part*, reſerving Rent. B. puts in his Cattle, or a Stranger by his Licence. Such attle are not diſtrainable for the Rent. 2 Vent. 227, 283. Hill. 2 & 3 V. & M. in C. B. Kemp v. Cory.

53. In all Caſes *where the Land is the Debtor*, the *Cattle of a Stranger* re as well liable as thoſe of the Owner of the Land; As Cattle of a tranger *levant and couchant* are diſtrainable for Arrears of a Rent-Ser-ice. So if a Neighbour's Cattle eſcape into Land, out of which a ent-charge iſſues, and are levant and couchant, (there are good Au-orities, *though* they are *not levant and couchant)* they are diſtrainable or the Rent-charge, and the Owner ſhall not have them again unleſs e pays the Arrears; Per Holt Ch. J. in delivering the Opinion of the ourt. Ld. Raym. Rep, 308. Hill. 9 W. 3. in Caſe of Britton v. ole.

54. Goods in the Cuſtody of a Carrier are *privileged* from Diſtreſs for e Carrier's Rent. 1 Salk. 249. pl. 5. Hill. 8 Ann. Gisburn v. Hurſt.

(I. 2) Grant of Rent out one Manor or Place, with Clauſe of Diſtreſs in another Manor or Place.

1. WHERE a Rent-Charge is *granted out of an Ox-gange of Land in D. and* that *if the Grantor alien* the Oxgange of Land, hat the *Grantee may diſtrain in the Manor of B.* and the Grantor aliens he Oxgange of Land, yet in Aſſiſe the *Tenant of the Oxgange of Land hall be named, and the Oxgange ſhall be put in View*, for this remains harged. Br. Charge, pl. 17. cites 1 Aſſ. 10.

2. *Rent is granted out of Land in D. and for Default of Payment to di-rain C.* there *both* ſhall be charged, and *ſhall be put in View* in Aſſiſe; *ut if* the Lands were *in diverſe Counties*, then the firſt Land only ſhall e charged, for otherwiſe he cannot have Aſſiſe in this Caſe; For he annot have Aſſiſe in two Counties unleſs the Land be *in Confinio Com'*; Quod Nota. Br. Aſſiſe, pl. 427. cites 10 E. 3. 18. and Fitzh Aſſiſe 57.

(K) In what *Place* a Diſtreſs may be taken de Jure.

By the King.

* Br. Diſtreſs, pl. 6. cites S. C. —— Fitzh. Grant, pl. 47. cites S. C.

1. THE King may diſtrain for Rent-Services in all the Lands of the Tenant, as well thoſe that are held of others as of the King * 44 E. 3. 45. Curia. † 9 H. 6. 9. 44 Aſſ. 22. by all the Juſtices.

† Fitzh. Grant, pl. 6. cites S. C. —— Where it is ſaid that the King may diſtrain out of his Fee, that is, in the other Lands of his Tenant, it muſt be underſtood in ſuch other Lands as his Tenant has in his own actual Poſſeſſion, and manured with his own Beaſts, and not in the Poſſeſſion of his Leſſee for Life, Years, or at Will, for their Beaſts are not ſubject to ſuch Diſtreſs. 2 Inſt. 132.

* Br. Diſtreſs, pl. 6 cites S. C. —— Fitzh. Grant, pl. 47. citei S. C.

2. So the King may diſtrain for a Fee-Farm in all the Lands of the Farmer. * 44 E. 3. 45. 8 H. 6. 1. b.

3. If a Town be aſſeſſed to a certain Sum, a Diſtreſs may be taken in any Part ſubject to the Diſtreſs for the whole Duty. 11 H. 4. 35. b.

4. If a Corporation be amerced in B. R. this may be levied upon the Vill or Land of the Vill, or upon the Goods which they have in their natural Capacity. 8 H. 6. 1. a. b.

Brownl. 17. S. C. but not S. P.

5. If a Man holds of the King by Rent &c. and the Arrears incur, and the Tenant leaſes it to another, the King may diſtrain in the Lands of the Under-Tenant for theſe Arreages in any Place out of the Land held. M. 17 Ja. B. between *Catford and Osmond*, per Hobart.

6. In Treſpaſs for Goods taken for *Diſtreſs in the High Street*, the Statute was rehearſed in the Commencement of the Writ, and the Concluſion was *Contra Legem & Conſuetudinem Angliæ* &c. And adjudged good enough and purſuant; For it is made Law and Cuſtom by the Statute. Thel. Dig. 102. lib. 10. cap. 11. S. 8. cites Mich. 19 E. 2. Brief 842.

7. The King may diſtrain for Rent or Fee-Farm *as well in Land which is not held in him as in other*, by all the Juſtices; For the King may grant Rent, Fee-Farm &c. to hold of him in which a Man cannot diſtrain. Br. Diſtreſs, pl. 87. cites 44 Aſſ. 32.

8. The King may diſtrain in all other Lands of his Tenant for his *Rent-Charge*, and may diſtrain for his *Services* in all the other Lands of the Tenant. Contra of his *Grantee*. Br. Diſtreſs, pl. 48. cites 13 E. 4. 6.

9. *And* if the *King had had a Rent Time out of Mind*, and *had not uſed to levy it by Diſtreſs* by the ſame Time, his *Patentee cannot diſtrain*. Br. Diſtreſs, pl. 48. cites 13 E. 4. 6.

Br. Barre, pl. 49. cites S. C.

10. The King may diſtrain for his Debt, and may make levy of the Debt which the Debtor owes to him, by levy *of the Tenants of the Debtor*, and take the Rent of them, which ſhall be a good Bar for them againſt the Debtor who is their Lord; Quod Nota. Br. Diſtreſs, pl. 28. cites 21 H. 7. 12.

11. The

11. The King cannot diſtrain *for the Debt of the Baron* upon the *Dower of the Feme, nor in her Inheritance, nor in the joint Purchaſe which ſhe has* with her Baron; *But if* the Baron was *indebted to the King before the Coverture*, there the King may diſtrain in the Dower of the Feme; Note the Diverſity. Br. Diſtreſs, pl. 71. cites F. N. B.

12. *C. was indebted to the King, and* was *ſeiſed of a third Part of certain Lands in N.* and *R. was ſeiſed of the other two Parts as Tenant in Common*, and the *Beaſts of N. and R. paſtured promiſcuouſly* on the Land. Upon Proceſs to levy the King's Debt the *Sheriff took R's Cattle*, and ſold them; but held that ſuch taking was not good, though otherwiſe it would be if the Cattle had been levant and couchant on the Land of the King's Debtor; And if my Cattle are levant and couchant on the Land of the King's Debtor, the King may diſtrain them Damage-feaſant, but not for the Debt; Per the Ch. Baron, and two of the Barons, but Snig ſeemed to doubt. Lane 96, 97. Hill. 8 Jac. in Scacc. Clare's Caſe.

13. Although the King may diſtrain in any of the Lands of the Tenant, yet it muſt be admitted, that if the *Tenant aliens any Part of his Lands, or* if he deviſes, nay if he *leaſes to a Tenant at a Rent, although but at Will*, the *King cannot diſtrain upon thoſe Lands, being no Part of the Lands originally charged with the Rent*; and ſo it is upon a Recovery by Elegit, and therefore even the Crown is precarious in this Matter; The Tenant may at any Time determine that Right of diſtraining by aliening, by deviſing or ſetting his Land. *It is only liable whilſt it is in his own Hands*, Arg. 2 Vern. 714, 715. Hill. 1715. in Caſe of Attorney-General v. Coventry (Mayor &c)

(L) For an *Amercement*.

[*In what Place the Diſtreſs may be taken.*]

1. **FOR an Amercement** in the Sheriffs Tourn **for ſtopping a Way, the Sheriff may take a Diſtreſs** through the whole County. * 2 H. 4. 24. b. 8 R. 2. Avowry 194.

* Br. Diſtreſs, pl. 13. cites S. C.—Br. Leet, pl. 28. and pl. 41. cites S. C.——Br. Amerciaments, pl. 13. cites S. C.——Br. Court-Baron, pl. 13. cites S. C.——Fitzh. Diſtreſs, pl. 10. cites S. C.

2. So **where an Amercement is** within a Hundred **the Lord of the Hundred may diſtrain** through the whole Hundred, **as well out of the Land as upon the Land; For the Amercement does not extend to the Land [only] nor Iſſue out of it.** * 2 H. 4. 24. b. † 11 H. 4. 89. b. **For the Juriſdiction of the Hundred is intire through the whole Hundred.** 13 H. 4. 9. b. 8 R. 2. Avowry 194.

* Br. Diſtreſs, pl. 13. cites S. C.—Br. Leet, pl. 28. and pl. 41. cites S. C.—Br. Amerciaments, pl. 13 cites S. C.——Br. Court Baron, pl. 13. cites S. C.——Fitzh. Diſtreſs, pl. 10. cites S. C.

† Br. Diſtreſs, pl. 18. cites S. C.——Fitzh. Avowry, pl. 57. cites S. C.

3. **The Lord may take a diſtreſs for an Amercement** in a Leet in his own Land which is within the Hundred, **if he can find the Cattle of him that is amerc'd; For the** Amercement charges only the Perſon and not the Land. 47 E. 3. 13. Fitzh. Diſtreſs, pl. 15. S. C.

4. **So a Diſtreſs may be taken for it in the High Street.** 47 E. 3. 13. Fitzh. Diſtreſs, pl. 15. cites S. C.

5. But

Br. Distreſs, pl. 10. cites S. C.—— Fitzh. Distreſs, pl. 15 cites S. C.— Br Leet, pl. 8 cites 47 E 3. 12. S. P.

5. But if a Man be amerc'd in a Leet a Distreſs cannot be taken for it of the Goods of the Party amerc'd in the Lands which is in the Hands of the King, though it be within the Limits of the Hundred; For during this Time it is out of the Jurisdiction of the Leet. 47 E. 3. 13.

—— Br. Reſeiſer &c. pl. 5. cites 47 E. 3. 5. S. P. admitted.

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(M) By a *Common Perſon. In the Houſe.* [*Or what other Place.*]

In ſuch Caſe the Lord may enter

1. A Distreſs for Rent may be taken in a Houſe, if the Doors be open, elſe not. 46 E. 3. 26. b.

into the Houſe and diſtrain for Rent or Service; Per Cur. 5 Rep. 92. a. cites 38 H. 6. 26 a. and 33 E. 3. Avowry 256. and he may diſtrain in the Houſe though Lands alſo are held of him in which he may diſtrain, cites 29 Aſſiſe, pl. 49.

See pl. 7. Infra.

2. [And] among the Petitions of Parliament of the 18 E. 1. fo. 7. it is ſaid that he ſhall diſtrain for Rent per Oſtia et Feneſtras prout a Distreſs for Rent may be taken in a Houſe. 29 Aſſ. 49. Moris eſt.

3. A Man cannot diſtrain for a Rent-Service but in the Land out of which it iſſues. 8 H. 4. 18. b. 9 H. 6. 9.

4. As he cannot diſtrain in other Land though it be within his Fee. 8 H. 4. 14. b.

5. A Distreſs out of his Fee for Services is not lawful. 17 E. 3. 43.

6. A Distreſs in a Way within his Fee was lawful at Common Law. 17 E. 3. 43.

See pl 2.

7. A Man may diſtrain for the Rent of an Houſe per Oſtia et Feneſtras; among the Petitions of Parliament of 18 E. 1. folio 7. it is ſaid that he may diſtrain per Oſtia et Feneſtras prout moris eſt; it ſeems as if this was intended that he might go to the Houſe, and take a Distreſs, or take it out of the Windows.

8. If a Man leaſes an Advowſon for Life, rendring Rent, he cannot diſtrain for this in the Glebe. 11 H. 6. 5.

9. If a Man leaſes a Manor to which an Advowſon is appendant rendring Rent, he cannot diſtrain for the Rent in the Glebe, becauſe the Leſſor hath nothing to do therewith. 11 H. 6. 5.

10. If a Rent-Service iſſues out of Land which is in ſeveral Counties a Distreſs for the Whole may be taken in one County. 18 E. 3. 32. b.

11. If a Rent-Charge iſſues out of Land lying in ſeveral Counties, a Distreſs for the Whole may be taken in one County. 18 E. 3. 32. b.

12. So if a Rent Charge iſſues out of the Land which is in the Hands of ſeveral Men, a Distreſs may be taken for the Whole Rent upon the Poſſeſſion of one; For all the Rent iſſues out of every Part. 39 Aſſ. 4. adjudg'd.

This is intended of Suit Service in reſpect

13. 52 *H.* 3 *cap.* 2. *None ſhall diſtrain any to come to his Court, which is not of his Fee, or upon whom he has no Juriſdiction, by reaſon of his Hundred or Bailiwick, nor ſhall take Diſtreſſes without his Fee or in*

Place

lace where he has no Juriſdiction. And he that offends ſhall be puniſhed in like Manner, according to the Treſpaſs. of a Seignory, and not of Suit Real

reſpect of Reſiance. 2dly, Or that he has Juriſdiction by Hundred, Wapentake or Bailiwick. 3dly, That he ſhall not take Diſtreſſes out of his Fee or Place where he has a Bailiwick or Juriſdiction. 2 Inſt. 104.

23. Stat. Marlb cap. 2. is a Declaration of the Common Law, ſaving for the Penalty hereby inflicted; and therefore if A. diſtrain B. and in a Replevy A. avow as Lord for Rent or Service, B. pleads hors de ſon Fee, and it is found for B. A. ſhall not in this Replevy be puniſhed by Ranſom &c. according to this Act, but he muſt have an Action upon the Statute Et ſic de ſimilibus. 2 Inſt. 104, 105.

14. 52 *H.* 3. *cap.* 15. * *It ſhall be lawful to no Man,* This *Miſchief before this Statute was*, That whereas the King by his Prerogative might diſtrain for his Rents in any other Lands of his Tenant, being in his own actual Poſſeſſion, though they were out of his Fee, and Seigniory divers Lords took upon them alſo to diſtrain out of their Fee, which was wrong and Oppreſſion; And whereas all the King's Subjects ought to have free Paſſage in Via Regia, & Communi ſtrata, as well to Fairs and Markets, as about their other Affairs, the Lords uſed to diſtrain in the Highways; both which Miſchief this Statute does remedy. 2 Inſt. 131.

* This is *to be underſtood* of Diſtreſſes *by reaſon of a Seigniory*, and not for Diſtreſſes *for Rent-Charges* &c. *or by reaſon of a Leet*. 2 Inſt. 131.

This Branch *is but in Affirmance of the Common Law*, for regularly no Subject can diſtrain out of his Fee and Seigniory, and therefore if the Lord do diſtrain out of his Fee the Tenant may either have an Action of Treſpaſs at the Common Law, or an Action upon this Statute, but in ſome Special Caſe the Lord by the Common Law may diſtrain out of his Fee and Seigniory; as if the Lord come to diſtrain, and the Tenant or any other ſeeing the Lord come to diſtrain them, drive them to a Place out of the Fee of the Lord, yet in this Caſe the Lord may diſtrain them out of his Fee, becauſe the *Lord had a View of them within his own Fee*, by reaſon whereof the Lord ſhall be adjudged in a kind of Poſſeſſion of them; but if the Beaſts go out of the Tenancy of themſelves without enchaſement before the Lord can diſtrain them, there the Lord cannot diſtrain them, though he had the View of them within his Fee and Seigniory. 2 Inſt. 131.

To take Diſtreſſes out of his Fee; A *Heriot Cuſtom* the Lord may ſeiſe in the Highway, for that is no Diſtreſs but a Seiſure, but he cannot diſtrain for a *Heriot Service* there. 2 Inſt. 131.

Nor in the Highway, nor in the common Street, but only to the King or his Officers, having Special Authority. In this Branch, *non liceat ſhall be taken not ſimpliciter* to make it utterly unlawful, as to take Advantage thereof in bar to an Avowry, *but ſecundum quid*, that is to this Purpoſe, that if the Lord diſtrain in the High Street, or in the common Way, the Tenant may have an Action againſt the Lord upon this Statute; and the Reaſon thereof is, that whenſoever any Thing is prohibited by a Statute, the Party ſhall have his * Action upon the Statute, and the Offender ſhall be for his Contempt fined and impriſoned; And ſo it is declared by Act of Parliament, as hath been always obſerved. Now if the Tenant ſhould plead it in bar of the Avowry, the King ſhould loſe his Fine; for in that Nature of Suit he cannot be fined, and therefore the Tenant is to take his Remedy by Action upon the Statute, wherein the King ſhall have his Fine &c. 2 Inſt. 131, 132 —— * S. P. cited per Cur. 3 Lev. 48. Mich. 33 Car. 2. C. B in Caſe of Woodcroft v. Tompſon

This Statute does not extend only to Diſtreſſes between Lord and Tenant, but alſo to all other Diſtreſſes whatſoever, as well at the King's Suit, as at the Suit of the Subject, ſo there be other Goods ſufficient; alſo to all manner of Executions, as well at the Suit of the King, as of the Subject, with the like Caution as is aforeſaid. 2 Inſt. 133.

In Writ upon this Statute he need not put the Price of the Chattle taken. Thel. Dig. 109. Lib. 10. cap. 19. S. 1. cites Mich. 19 E. 2. Brief 842.

15. In Treſpaſs Quare Vi et Armis *Sanctuar'* fregit &c. et Averia cepit, the Bailiff juſtified for Diſtreſs *for Iſſues for the King*, and *could not find Beaſts nor Chattles of the Plaintiff in any other Place*, and well. Br. Diſtreſs, pl. 34. cites 27 Aſſ. 66.

16. The Party cannot diſtrain *in one County and drive it into another*, by Reaſon of the Statute of Marlebridge, cap. 4. but ſhall make Ranſom,

ſom, and this for Rent. But it is doubted there if a Man may do it *for a Fee, or* an *Honour, or* for *Suit, or Caſtle-Guard.* Quære for *Homage* if he diſtrains, and chaſes into another County. Br. Diſtreſs, pl. 36. cites 30 Aſſ. 38.

17. A Man cannot diſtrain *in a Sanctuary.* Per Skipwith. Br. Diſtreſs, pl. 63. cites 29 H. 3. 16.

Br. Diſtreſs, pl. 1. cites S. C.

18. Of Common Right a Man cannot diſtrain for Rent but *in the Land out of which the Rent is iſſuing*; But if the Tenant grants to me that if I am not paid the Rent, that I ſhall diſtrain in other Land, this is good per tot. Cur. and there this is no new Rent. Br. Rents, pl. 1. cites 9 H. 6. 9.

19. *And* per Cand. if a Man *grants* to me *that if I am not annually paid* 10 *s. Rent at Michaelmas, that I ſhall diſtrain in his Land in D.* this is a good Grant of the Rent, and it is a new Rent. Contra in the Caſe above. Br. Rents, pl. 1. cites 9 H. 6. 9.

20. Note for Law, That he who diſtrains Beaſts may put them *in a cloſe Houſe if he will give them Food*; For the Diſtreſs in Pound overt is only to the Intent that the Owner may give them Food. Br. Diſtreſs, pl. 66. cites 33 H. 8.

21. The Stat. Marlb. cap. 15. did not *intend but for Diſtreſſes for Rent or Services*, and not for thoſe Things whereof no Diſtreſs can be but in the Highway; as Toll-thorough due by Cuſtom. Per Cur. Cro. E. 710. pl. 34. Mich. 41 & 42 Eliz. C. B. in Caſe of Smith v. Shepherd.

22. A *Heriot Cuſtom* the Lord may ſeiſe in the Highway, for this is no Diſtreſs but a Seiſure; but he cannot diſtrain for a Heriot *Service* there. 2 Inſt. 132.

(N) In what *Places* it may be taken for a *collateral Cauſe.*

[Freſh Suit.]

Co. Litt. 161. a. S. P. —And ſo it is if any other Perſon does it.

1. **WHEN the** Lord is in view of the Cattle **if the** Tenant **to avoid the Diſtreſs** chaſes them into a Place not within his Diſtreſs, **yet the Lord may take them freſhly; For he ſhall not have Advantage of his own Wrong.** 44 E. 3. 20. b.

Ibid ——If a Man chaſes them out the Lord may diſtrain them. Br. Diſtreſs, pl. 98. cites 11 H. 4. 7.—— S. P. For when they are in his View they ſhall be adjudged in Law in his Poſſeſſion, the Reaſon ſeems to be becauſe they are Tranſitory. Br. Treſpaſs, pl. 296. cites 2 E. 4. 6.

Co. Litt. 161. a. S P.—So if the Lord had no View of them within his Fee; Or if the Cattle after the View go out of the Fee, the Lord cannot diſtrain them out of his Fee. Ibid.——If they go out without chaſing, the Lord cannot diſtrain them. Br. Diſtreſs, pl. 98. cites 11 H. 4. 7.

2. But if **the Tenant, after the Lord has the View, chaſes the Cattle for other lawful Cauſe out of his Fee and** not on purpoſe to avoid the Diſtreſs, **the Lord cannot take them.** 44 E. 3. 21.

3. If a Man comes to diſtrain for *Damage-Feaſant or* for * *Services*, and the Diſtreſs goes into other Land by chaſing, he may *take them in the other Land.* And per Jenney if Beaſts taken for Diſtreſs eſcape, he who diſtrains may *retake them when he will.* Br. Diſtreſs, pl. 49. cites 13 E. 4. 8.

* Co. Litt. 161. a. S. P. the Lord may freſhly purſue and diſtrain the Cattle, and the Tenant cannot make Reſcous, though the Place wherein the Diſtreſs is taken is out of his Fee; For now in Judgment of Law the Diſtreſs is taken within his Fee; and ſo ſhall the Writ of Reſcous ſuppoſe.

4. If a Man comes to diſtrain for *Rent or Service* and *ſees the Beaſts in the Land* held &c. and the *Tenant chaſes them out* the Lord may purſue and take them, but contra for * *Damage-Feaſant* clearly. Per Brian Ch. J. Br. Diſtreſs, pl. 50. cites 16 E. 4. 10.

* If a Man comes to diſtrain for Damage-Feaſant and ſees the Beaſts in his Soil, and the Owner chaſes them out of Purpoſe before the Diſtreſs taken, the Owner of the Soil cannot diſtrain them, and if he does, the Owner of the Cattle may re'cue them, for the Beaſts muſt be Damage-Feaſant at the Time of the Diſtreſs, and ſo note a Diverſity. Co. Litt. 161. a

5. *And* per Brian Ch. J. where a Man *comes to diſtrain for the 15th granted to the King by Parliament*, and ſees the Beaſts, and the other chaſes them out of the Vill, the *Collector cannot diſtrain them in another Vill*, quod nota. Br. Diſtreſs, pl. 50 cites 16 E. 4. 10.

6. If a *Man comes to diſtrain*, and the *Party chaſes the Diſtreſs out of the Land*, the other may *freſhly purſue*, and take the Beaſts for Diſtreſs. Br. Avowry, pl. 13. cites 34 H. 6. 18.

S. P though he chaſes them into the Land of another.

Br. Nuſance, pl. 14 cites 9 E. 4. 35. —— If a Man chaſes them out the Lord may diſtrain them. Br. Diſtreſs, pl. 98. cites 11 H. 4. 7. —— Br. Diſtreſs, pl 90. cites 44 E. 3. 20.
See Stat. 8 Ann. cap. 14. S. 2. at Tit. Rents. (W b).

7. If *Beaſts eſcape* into my Land the *Lord may diſtrain them*, contra *if he retakes them before that the Lord diſtrains them*, and *though* they were *levant and couchant by* 40 *Days* if the Owner takes them before the Lord, there the Lord ſhall not diſtrain them, but if he finds them there, if they were there but an Hour the Lord may diſtrain them. Br. Diſtreſs, pl. 97. cites 10 H. 7. 21.

(O) [Where the Cattle *eſcape* &c. into the Land liable.] Pl. 1 to 8.

1. IF the Cattle of a Stranger eſcape into the Land holden they may be diſtrained though they are not levant and Couchant. Co. Litt. 47.

See pl. 2. Contra. —— See (I) pl. 2. * Fol. 6-2.

2. If the Cattle of a Stranger eſcape into the Lands holden &c. they * cannot be diſtrain'd. 48 E. 3. 34. 2 H. 4. 16. b. Contra 7 H. 7. 1. b. Curia.

3. But the Cattle of the Tenant himſelf may be diſtrain'd if they eſcape there. 48 E. 3. 34.

4. So if there be Arrearages, and after the Tenant aliens, and after the Cattle of the Alienee eſcape there, yet they may be diſtrain'd; for this is not any Eſcape. 2 H. 4. 16. b.

5. If a Stanger keeps or cauſes his Cattle to be kept in a Place where &c. they may be diſtrain'd; For this is not any Eſcape. 2 H. 4. 16. b.

6. So

6. So if a Stranger hath Notice that his Cattle hath uſually, or are accuſtomed to be in the Place where &c. they may be diſtrain'd; For this is not an Eſcape. 2 H. 4. 16. b.

7. The Grantee of a Rent-Charge cannot diſtrain the Cattle of a Stranger which come there by Eſcape, and are freſhly purſued by the Owner, Demurrer. Trin. 17 Ja. B. between *Reynold and Cakeley.*

[(O. 2) At what *Time* it may be taken. Pl. 8. to the End of Roll pl. 16.]

3 Rep. 64. b. S. P. per Cur. and cites 14 Aſſ. 11. accordant. ——

8. If a Man leaſes for Years rendring Rent and the Rent is behind, and after the Term expires the Leſſor cannot afterwards diſtrain for the ſaid Rent. (it ſeems to be intended that he held over.) 14 H. 4. 31.

Keilw. 96. pl. 5. Mich 22 H. 7. Anon. S. P. All the Court of C. B. held clearly that the Leſſor may diſtrain for the Rent, notwithſtanding the Term is paſt; And that if the Leſſor will he may diſtrain the Beaſts for Damage-Feaſant, but ſays Hankford and Hill held Contra. 14 H. 4 31. Ideo Quære, and ſays, ſee 11 H. 7. fol 12. Treſpaſs. —— Where Rent is reſerv'd upon a Leaſe for Years at Eaſter and Michaelmas for one Year ending at Michaelmas, there he cannot diſtrain after Michaelmas; For the *Term is expired.* Br. Diſtreſs, pl. 73. cites Doctor and Student. lib 2.

9. For Rent due the laſt Day of the Term, the Leſſor cannot diſtrain; becauſe the Term is ended before the Rent is due; For the Leſſee hath the whole Day to pay it. Co. Litt. 47.

Cro. J. 442. pl. 15. S C. and becauſe it appear'd that the Eſtate, out of which the Rent was granted, was determined long before the Diſtreſs taken, ſo that the Defendant had no Title to avow, Judgment was given for the Plaintiff.

10. If a Man leaſes Land for Years rendring Rent, and after the Leſſee holds over the Term, the Leſſor cannot diſtrain upon the Land, for the Rent incurr'd during the Term becauſe the Leaſe was ended before, and the Leſſee not in privity of the Leaſe. 14 H. 4 31. Per Hill and Hankford. Mich. 15 Jac. B. R. between *Harriſon and Metcalf*, per Curiam this being mov'd in arreſt of Judgment, and the Poſtea ſtay'd accordingly. Contra 23 H. 7. 96. Per Curiam Keileway.

S C cited by Vaughan Ch. J. Vaugh 40. 41.

11. If a Man be ſeiſed in Fee or for Life of a Rent-charge, and after the Arrearages incurr'd he grants over the Rent to another, he himſelf cannot afterwards diſtrain for the Arrearages incurr'd before the Grant, becauſe now the Arrearages are divided from the Freehold of the Rent, and ſo the Diſtreſs gone. Co. 4 Ognell 50 b. Per Curiam.

12. The ſame Law is of a Rent-Service. Co. 4. *Ognell*, 50. b. per Curiam.

Lat 211. S. C. reſolved per Cur. ——

13. If Leſſee for 20 Years makes a Leaſe for 10 Years reſerving Rent, and Arrearages incur, and after Leſſee for 20 Years dies, by which the Reverſion and Arrearages deſcend to his Executors, the Executors, and Executors of Executors may diſtrain for the Arrearages incurred in the Life of the Teſtator, becauſe theſe Arrearages were never ſevered from the Reverſion, but theſe Executors have the Reverſion, and Rent is annexed thereto, and in the ſame Plight as the Teſtator himſelf had it, in as much as they repreſent the Perſon of the Teſtator, and it is not like a Reverſion which deſcends to the Heir, and the Arrearages go to the Execu-

See the Stat. 32 H. 8. cap. 37. at Tit. Rents (S. b)

tors.

ors. Trin. 3 Car. between *Wade and Marſh* adjudged in a Repleſ.

14. An Attachment by Cattle in an Action of Treſpaſs ought not to be made in the Night. Hill. 37 Eliz. per Curiam.

15. So a Diſtreſs for Rent-Service, or Rent-Charge cannot be in the Night. Co. Litt. 142.

For the Tenant is to be attendant in the Night.

pon the Land all the Day to pay his Rent; but he is not compellable to attend 9 Rep. 66. a. Paſch. 9 Jac in Mackally's Caſe. —— 7 Rep. 7 a. Trin. 29 Eliz. C. B. in Milborn's Caſe, S. P. cites 12 E. 3. Tit. Diſtreſs, 17. and 11 H. 7. 5 a. accordingly. —— S. C. cited 4 Le. 18. pl. 352. —— Br. Diſtreſs, bl. 99. cites 11 H. 7. 5. —— Brownl. 176. S. P. as to Rent-charge, in Caſe of Read v. How.

16. But a Man may diſtrain Cattle Damage feaſant in the Night, for otherwiſe perhaps the Cattle will be gone before he can take them. Co. Litt. 142.

9 Rep. 66. a. S. P. in Mackally's Caſe. —— 7 Rep. 7. a. cites 11 H. 7.

n Milborn's Caſe, S. P. and cites 10 E. 3. 21. accordingly. —— Br. Diſtreſs, pl. 99. 3. S. P.

17. If a Man leaſes for Years rendering Rent, and the Rent is arear, and the *Term expires*, he cannot diſtrain, but ſhall have Action of Debt; Quod nota bene. Br. Diſtreſs, pl. 19. cites 14 H. 4. 31.

18. In *Per quæ Servitia*, if a Man *grants a Seigniory for Term of Life*, the *Remainder over by Fine*, and the *Tenant attorns to the Grantee for Life, ſaving his Acquittal*, and the *Grantee grants the Acquittal*, and after dies, he in Remainder cannot diſtrain till he has granted the Acquittal likewiſe; by all the Juſtices, in a Note. Br. Conſeſſion, pl. 54. cites 18 E. 4. 7.

19. If a Man *grants a Reverſion depending upon a Term, rendering Rent*, he cannot diſtrain till the particular Eſtate be determined, and then he may diſtrain for all the Arrears, but by ſome he may diſtrain immediately if the Beaſts of the Grantee come upon the Land; Quære; For per Moyle, he has nothing to do till the Term be expired. Br. Diſtreſs, pl. 47. cites 10 E. 4. 4.

20. *So* upon a Leaſe *for Term de auter Vie*, and *Ceſtuy que Vie dies*; for in thoſe Caſes the Reverſion is determined. Br. Diſtreſs, pl. 73. cites Doct. & Stud. lib 2.

21. If the *Tenant offers the Fealty*, and the *Lord refuſes*, there he cannot diſtrain after before *a new Requeſt*, and this *to the Perſon*, and not upon the Land. Br. Tender, pl. 24. cites 21 E. 4. 17.

22. *So* of *Homage*; the Reaſon is, in as much as it ſhall be done by the Tenant *in proper Perſon*, and not by Deputy. Ibid.

23. If the *Lord diſtrains for Rent* arrear at a certain Day his Tenant's Cattle, and he ſues a Replevin &c. and the Lord avows for the Rent &c. and the *Tenant pleads Hors de ſon Fee*; if the *Lord (pendant that Plea) diſtrains for Rent behind at another Day after*, the Tenant ſhall have a Writ of Recaption, becauſe the Lord's Title ſhall be tried by the firſt Plea. But otherwiſe it is if the Tenant in the firſt Replevy pleads *Riens arrear, or levied by Diſtreſs*, then (pendant that Plea) the Lord may diſtrain for the Rent behind at a Day after, becauſe that the Seigniory is there confeſſed, and the Tenant ſhall not have a Recaption. F. N. B. 71. (M)

24. In Replevin the Caſe was, the Defendant *avowed for a Rent-charge due* in the Year 1660, *and afterwards he diſtrained and avowed for other Part of the Rent-charge due a Year before*, viz. Anno 1659, and this Diſtreſs was taken of the Cattle of another Perſon who was then Tenant of the Lands; and upon Demurrer the Queſtion was, Whether he was eſtopped to avow for the Arrears of the Rent-charge before the

Lev. 43. Palmer v. Stanage, S. C. held accordingly by all the Court, pre-

ter Mallet, and Judgment for the Conuſant Niſi &c. —— Raym. 21. Palmer v. Stavick, S. C. adjudged for the Defendant.

Year 1660? And adjudged that he was not; but that if he had given an *Acquittance to the laſt Day of Payment* he could not claim the Rent due before, becauſe that was his voluntary Act and Deed, and ſhall be received to claim againſt it; but in an Avowry for Rent he may avow for all, or part, at his Pleaſure, and the firſt Avowry ſhall not bar him from avowing for Rent before. Sid. 44. pl. 1. Mich. 13 Car. 2. B. R. Palmer v. Stabick.

The Reaſon that Mallet went upon was, becauſe an Avowry is a Thing upon Record, and more than an Acquittance. —— Keb. 95. pl 84 Palmer v. Strotwick, S. C. adjornatur —— Ibid. 113. pl. 15. S. C. adjudged accordingly. —— S. P. by Powell J Comb. 59. Trin. 3 Jac. B. R. in Caſe of Fountain v. Gnales. And he ſaid, that there is a Diverſity as to an Acquittance, that where the Acquittance for the laſt Quarter is under the Plaintiff's Hand and Seal, and where it is under his Hand only; For in the firſt Caſe it is an Eſtoppel, but in the latter it is only Evidence.

1 Salk. 209. S. C. but S. P. does not appear. —— Lutw. 213, 214. S. C. & S. P. adjudged accordingly. —— 3 Salk. 136. S. C ſays the Reporter tells us, that the Law is contrary.

25. A *Leaſe* was made *for one Year, and ſo from Year to Year, Quamdiu ambabus Partibus placuerit*, rendering 12 l. a Year Rent ſo long as the Leſſee ſhould occupy the Premiſſes. The Leſſor diſtrained for a Year and a half due after the making the Leaſe. Exception was taken that he could not diſtrain for the Rent after the Year was determined ſince it was but a Leaſe at Will; ſed non allocatur; For it was a good Leaſe for two Years, and after that at Will. Ld. Raym Rep. 170. Hill. 8 & 9 W. 3. Bellaſis v. Burbricke.

—— S. P. and that the Leſſee entered. and was in Poſſeſſion for two Years and an half, and the Rent being in arrear the Leſſor diſtrained; and adjudged that he could not by Law, becauſe by this Agreement there was an Eſtate for two Years created, and no more; the other was a growing Intereſt, or Eſtate at Will, which being a diſtinct Eſtate from the firſt, cannot be ſubject to the Arrears of the firſt. 3 Salk 135 pl. 1. 9 W. 3. C. B. Stanfit v. Hicks. —— Ld. Raym. Rep. 280. Stanfill v Hicks, S. C. adjudged per tot. Cur. that the Diſtreſs was unlawful; For the Intereſts are different, and therefore the ſecond Eſtate cannot be anſwerable for the Debts of the former Eſtate, which was before determined.

26. 11 Geo. 2. *cap.* 19. *S.* 1. *Enables the Landlord, or any Perſon by him impowered, in Caſe of Rent arrear, to diſtrain Goods fraudulently carried off the Premiſſes by Tenant for Life, Lives, Years, at Will, or at Sufferance, within* 30 Days *after ſuch carrying off, and to ſell, or otherwiſe diſpoſe of the ſame, as if deſtrained upon the Premiſſes, unleſs ſold before bona fide, and for a valuable Conſideration, to any Perſon not privy to the Fraud.*

S. 2. *Provided that no Landlord ſhall ſeize Goods ſold bona fide, and for a valuable Conſideration, to any Perſon not privy to ſuch Fraud.*

(O. 3) At what Time for Rent after their being taken in Execution.

1. CASE by an Executor againſt W. Bailiff of the Liberty of the Dutchy of Lancaſter in Norfolk, and declared that *D. C.* on 6 June, 1712. *took an Eſtate of Teſtatrix from Mich. for one Year, and ſo from Year to Year as long as both Parties ſhould pleaſe*, at 70 l. *A Year's Rent being due 6 Octob.* 1713. *W. cepit Bona & Catalla D. C. in & ſuper &c. Terr' exiſten' ad valentiam* 200 *l.* The Executor poſt captionem & ante amotionem Bonorum & Catallorum &c. and the Teſtatrix in Vita ſua dedit W. notitiam de reddit' prædict' ſic debit', and ſhe then demanded of W. the ſaid Rent out of the ſaid Goods and Chattels, which

ich he refuſed to pay, but carried off, and removed the ſame from Premiſſes contra Formam Statuti in eo Caſu edit' & provis'. on Not Guilty there was Verdict, and Judgment for the Plaintiff C. B. and Judgment affirmed in B. R. Hill. 6 Geo. per Powis, Eyre, d Forteſcue. Reſolved 1ſt, The Action may be maintained by the ecutor or Adminiſtrator, there being a Right veſted by the *Statute* Ann. cap. 17. in theſe Goods. The Act *is a general Prohibition, that* Goods &c. *lying, or being upon any Meſſuage &c. ſhall be liable to be ken by Virtue of an Execution* &c. on any Pretence whatſoever, *unleſs* e Party at whoſe Suit &c. *ſhall before the Removal &c. pay to &c. all* ch Sums &c. *as ſhall be due for Rent, provided the ſaid Arrears do not* mount *to more than one Year's Rent, or if more, on Payment of one Year's* ent &c. *and the Sheriff &c. is required to levy and pay to the Plaintiff, as* ell *the Money ſo paid for Rent as the Execution Money.* And the Duty of e Officer is when he has Notice to keep the Goods till Payment, ut if he removes he tranſgreſſes the Act, and he is liable to an Action y the Party who is injured and aggrieved; The Sheriff has Power to vy the Money, as well for the Landlord as for the Plaintiff in Execu- on. Where the Injury is to the Perſon, all fails by the Death of the arty; but when it is to the Eſtate, in any Manner whatſoever, the ction ſurvives if the Eſtate ſurvives. Theſe Goods are not to be re- oved, but to remain as a Pledge, and it is a ſort of Poſſeſſion in the Landlord, and this Act of the Officer not only injures this Poſſeſſion, ut the Intereſt and Property of the Landlord. It is ſtronger than an Action for not ſetting out of Tithes, becauſe there is only a Demand or a particular tenth Part, but no particular Property; for till Sever- nce he had no Right but to an undivided tenth Part. A Year's Rent is ſecured againſt all Events. 2dly, That the Action was well ounded, and the Officer well charged; for the Notice was to him of what was due, and then it was incumbent upon him not to have emoved the Goods till Satisfaction had been made. Notice to the Plaintiff in Execution was no Notice to the Sheriff; but if it were to him, and not to the Sheriff, ſhould the Sheriff be liable? As to what is reaſonable Notice, it is not appointed by the Act. Eyre J. ſaid, that without Notice he could not tranſgreſs the Act, but if he has No- tice the Action is reaſonable. But per Forteſcue, when the Law does not determine it, the Party muſt take Notice, eſpecially here, when the Act ſays he ſhall not remove &c. When there is a Condition in a Will, the Party muſt take Notice in Law and Equity, but here was Notice according to the Equity of the Thing, and the right Per- ſon had Notice. Where no Perſon is directed to give Notice, it is at his Peril. Hill. 6 Geo. B. R. Wyndham v. Palgrave.

(P) *Pound.* [What it is, and] how he ſhall *demean himſelf* towards the Diſtreſs.

Fol. 673.

See Tit. Treſpaſs (G. a) per totum.

1. A Pound overt is a Pinfold made for ſuch Purpoſes, or the Cloſe of him that diſtrains, or the Cloſe of a Stranger, with his Conſent where the Diſtreſs is taken. Co. Litt. 47.

2. A Pound-Covert, or Cloſe, is when the Diſtreſs is impounded in an Houſe. Co. Litt. 47.

3. He

3. He that diſtrains any thing that hath Life, ought to impound it in a lawful Pound, within three Miles, in the ſame County. Co. Litt. 47. b.

4. But if a Man diſtrains dead Goods, as Utenſils of an Houſe, or ſuch like, which may take Damage by Wet or Weather, and the like, he ought to impound them in an Houſe, or other Pound-Covert, within three Miles, in the ſame County; For if he impounds them in a Pound-overt, he ought to anſwer for them. Co. Litt. 47. b.

5. If a Man diſtrains Cattle, and puts them in a Pound-overt, the Owner ought to keep them at his Peril. Co. Litt. 47. b. For it is lawful for him to come there for this Purpoſe.

6 But if he puts the Cattle in a Pound-Covert, or Cloſe, there he ought to keep them at his Peril, and yet he ſhall not have any Satisfaction for it. Co. Litt. 47. b.

Br. Treſpaſs, pl 250 cites S. C. —— Br. Diſtreſs, pl. 86. cites S. C.

7. If a Man takes a Diſtreſs, and puts it into a Pound-overt, and the Horſe which he diſtrains leaps three times over the Pound, which is as high as it is uſed to be, and therefore he takes the Horſe and ties him with a Rope to a Poſt in the ſame Pound, and after he ſtrangles himſelf, yet this will not excuſe him, but he may be puniſhed in an Action of Treſpaſs. 27 Aſſ. 64. adjudged.

Yelv 96. S. C. but S. P. does not appear. ——— Cro. J. 147. pl. 6. Bagſhaw v. Coward, S. C. but S. P. does

8. If a Man takes a Cow for a Diſtreſs, he cannot milk her; For though the Cow be the better for it, yet he ought not to do good to the Owner without his Conſent, and perhaps the Owner would have come before any Damage by this came to the Cow, and if it perish by this, yet he that took the Diſtreſs may diſtrain again, and ſo he is at no Damage. H. 4 Ja. B. R. between *Bagſhaw and Galliard*, per Curiam.

not fully appear; but it is ſaid that a Diſtreſs may not be uſed, becauſe he hath it by Law only as a Gage. —— Noy 119. S. C & S. P. reſolved, and Noy cited S. P. reſolved in one Prideaux's Caſe, becauſe it is a Puniſhment to the Owner, and in Cuſtodia Legis. —— It was argued per Cur. that if a Man takes a Diſtreſs, he cannot work it; For it is only the Act of the Law that gives him Power to the Diſtreſs; For he has no Property in it, nor Poſſeſſion in Jure. Ow. 124. Mich. 7 Ja. C. B. in Caſe of More v. Conham. —— See Tit. Eſtray (E) pl. 2. S. C.

10. Writ of Beaſts taken in one County, and carried into another County, upon the Statute of Marlebridge, cap. 4. and Weſtm. 1. cap. 16. was maintained without making Mention of the Statute in the Writ. Thel. Dig. 118. lib. 10. cap. 28. S. 4. cites 30 Aſſ. 38.

11. *Diſtreſs* taken for *Damage feaſant cannot be converted to his own Uſe*, but ſhall be uſed as a Diſtreſs. Br. Diſtreſs, pl. 81. cites 21 H. 6. 5.

12. If a Man takes *Quick-Chattles* as Diſtreſs, he ought to put them *in Pound-overt*, ſo that the Owner may give them Suſtenance; *But of Chattle dead* a Man may put it *where he pleaſes*, but if they are *corrupted in his Default*, he ſhall anſwer for them. Br. Diſtreſs, pl. 25. cites 9 E. 4. 2. per Choke J.

13. Treſpaſs of taking Sheep, and detaining them till he paid 54s. for Deliverance of them, the Defendant juſtified for Diſtreſs for Relief, and that he took the 54s. for their eating, abſque hoc that he took it for the Deliverance, and by the Juſtices it is no Plea; For if he did *give them Victuals, he cannot compel the Party to pay for it*; For the Diſtrainor is not compellable by the Law to give them Suſtenance. And if they *agree after the Diſtreſs upon this Sum*, yet *it is no Excuſe*, but that it is for the Deliverance. *But if they agree at the Time of the Diſtreſs taken*, that he ſhall give to them Victuals, and that he ſhall have

s. for it, this is a good Bargain. Br. Diſtreſs, pl. 52. cites 21 E. 53,

14. If a Beaſt be put into a Place in which there are *ſharp Spikes, by which the Beaſt is ſtuck*, though it be a publick Pound, the Diſtrainer all anſwer for it, for it is his Pound; Arg. 12 Mod. 660. in Caſe of Piper v. Edwards, cites Doct. and Stud. c 27.

15. A Pound overt is *every Place where the Owner of the Diſtreſs may come and give them Food, and be no Treſpaſſor* for there being there. Br. Diſtreſs, pl. 72. cites Doct. and Stud. lib. 2

16. Beaſts taken Damage-Feaſant *drove into another Country* and ſold there is an Abuſer. And. 65 pl. 139. Mich. 23 & 24 Eliz. Pleadal Knap.

17. If the *Lord takes a Diſtreſs for an Amercement in a Leet*, he may either ſell it or put it into the Pound at his Pleaſure. 8 Rep. 51. b. Trin 30 Eliz C. B. Grieſley's Caſe.

18. Beaſts taken *in Withernam* may be worked. Le. 220. pl. 302. Mich. 32 & 33 Eliz. C. B. Chamberlain's Caſe. 3 Le. 235, 236 pl. 323. Anon.

P.——Becauſe they are *deliver'd to him in lieu of his own.* Arg. 12 Mod. 660. Hill. 13 W. 3.

19. If there be a *Cuſtom* within a Town *that if a Butcher kills any Beaſts* within the Town, *and ſells the Fleſh within the Market he ſhall pay 2 d. for every Hide, and that the Bailiff may diſtrain the Hide for the 2 d.* denied; admitting the Cuſtom good, and the Diſtreſs of an Hide well taken, yet the *Bailiff cannot Tan the Hide* to prevent its being rotten, for the Cuſtom to diſtrain the Hide does not enable them *tan it*, for the Property is quaſi altered thereby, the Marks by which it might be known being taken away from the Owner ſo as he cannot have it again; adjudged. Cro. E. 783. Mich. 42 Eliz. Duncomb v. Reeve and others.

20. But by Popham, in ſome Caſes a Man may meddle with and take a Diſtreſs where it is for the Benefit of the Owner; as if one *diſtrains Armour*, he may cauſe it to be *ſcoured to avoid Ruſt*; Or if one diſtrains *Raw-Cloath*, he may cauſe it *to be fulled.* Ibid.

21. If a Man puts *Cattle in a Pound Covert* or Cloſe, there he ought to keep them at his Peril, and yet he ſhall not have any Satisfaction for it. Co. Litt. 47. b. And if *they die* he ſhall be ſaid a Treſpaſſor ab initio.

et 76. Hill. 3 Car. C. B. Perkins v. Butterfield. —— 51 *Hen.* 3. *enacts that the Owner ſhall not pay for keeping the Cattle, but may feed them himſelf.*

22. Where one diſtrains *dead Goods*, or Things inanimate, he muſt put them in a *Pound Covert within three Miles* of the Place &c. and *in the ſame County*; for if he put them in another open Pound, and they are ſtolen, or receive Damage, the Perſon diſtraining will be anſwerable for them. Co. Litt. 47 b.

23. A Diſtreſs of *live Cattle* may be *kept in any open Place* in the Landlord's own Grounds, or in the Grounds of another by his Conſent, as well as in the common Pounds, if he give *Notice* to the Owner of the Cattle *where they are*; but if he gives no Notice, and the Cattle die for want of Food, the Landlord muſt make Satisfaction for them. Co. Litt. 47. b.

24. *Cattle* taken as a Diſtreſs cannot be *worked*; For it is only the Act of the Law that gives Power to the Diſtreſs; For the Diſtrainor has no Property in the Diſtreſs, nor Poſſeſſion in Jure cites 21 H. 7. Replevin. A Man has *Return irrepleviſable* he cannot work them; For the Judgment is to remit them to the Pound there to remain. Ow. 24. Mich. 7 Jac. C. B. in Caſe of Moor v. Conham, cites S. C. Cro. J. 148. S. P. but a *Cow may be milked* becauſe for the Owner's Benefit. —— If one has Beaſts deliver'd to him *in Withernam* he may work them; becauſe he has them in lieu of his own Beaſts, and it is reaſonable that he ſhall have their Labour and Uſe for their Paſture. D. 280. a. Marg. pl. 14. cites it as agreed for Law by the Juſtices Hill. 33 Eliz. C. B.

Vent. 36. Welſh v. Bell. S. C. and ſays it appear'd alſo in the Declaration, that there was a Servant in the Cart, and therefore it was inſiſted that the Cart and Horſes were privileg'd; Et Adjornatur. ——— Raym. 218. S C. but S P does not appear. ——— 2 Lev. S. C. but not S P. ——— Freem. Rep. 106. S. C. but not S. P.

25. In Treſpaſs for *taking two Horſes from his Cart loaden with Corn*, the Defendant juſtified as a Diſtreſs for *Rent-Service iſſuing out of the Land where* &c. The Court were of Opinion after ſeveral Debates that the Diſtreſs was well taken. Sid. 440. pl. 9. Hill. 21 Car. 2. B. R. Webb v. Bell.

26. Defendant diſtrained a *Trunk*, and being informed that there were Things of Value in it he cauſed it to be *corded* to prevent Damage; and for that he was adjudged a Treſpaſſor ab Initio; Cited per Twiſden to have been ſo adjudged before Roll Ch. J. Vent. 37. Trin. 21 Car. 2 B. R.

27. If *Turves lie upon a Common Damage-Feaſant*, though for this a Commoner may diſtrain them, yet he cannot burn them. 2 Jo. 193. Paſch. 34 Car. 2. Bromhall v. Norton.

Wood. Inſt. 191.

28. One *cannot break open the outer Door* to diſtrain for Rent per Ch. J. But per Pollexfen, If the outer Door be open one may break open the inner Door. Comb. 17. Paſch. 2 Jac. 2. B. R.

29. If a *Landlord* come into a Houſe and *ſeiſes* upon ſome *Goods as a Diſtreſs* in Name of all the Goods in the Houſe that will be a good Seiſure of All; But he *muſt remove them in convenient Time at Common Law; and now ſince the late Statute of* * *W. & M. immediately, except it be Hay or Corn*; and here for that the Seiſure was on Monday, though of Barrels of Beer not eaſily removeable, if at all without Damage, and no Removal till Wedneſday when the Defendant took them by Virtue of a Replevin, in which the Leſſee and not the Diſtrainant, was made Defendant, and beſides the Plaintiff quitted Poſſeſſion of them the two intervening Nights, and had not the Poſſeſſion at the Time of the Taking by Virtue of the Replevin, without which there could be no Reſcous, the Plaintiff was nonſuited; In this Caſe it appeared alſo, that the *Diſtrainant drew Beer out of one of the Barrels*; which per Holt Ch. J. made him a Treſpaſſor ab initio as to that Barrel only. 6 Mod. 215. Trin. 3 Ann. B. R. in Caſe of Dod v. Monger.

* See (H)

30. If *Lands in diſtant Counties are demiſed by one Demiſe, reſerving one intire Rent*, the Diſtreſs taken in the one County cannot be driven into the other; Per Holt Ch J. but otherwiſe if the Counties and Hundreds are contiguous; Per Cur. Ld. Raym. Rep. 55. Trin. 7 W. 3. in Caſe of Walter v. Rumbal.

31. A. diſtrained an *Hog* Damage feaſant; Per Holt, he may put him in a *Pound-Covert*. 1 Salk. 248. pl. 3. Paſch. 12 W. 3. B. R. Vaſper v. Eddowes.

32. A *common* Pound *is the Pound of the Diſtrainor* for the Time, and if he will uſe it he muſt take Care to keep it ſo, that if it be in a broken Condition, or an improper Pound for the Thing to be impounded, As a Pig &c. and the Diſtreſs eſcapes, the Diſtrainor ſhall not take Advantage of his own Neglect ſo as to bring Treſpaſs afterwards. 12 Mod. 664. Hill. 13 W. 3. Vaſpor v. Edwards.

33. Common Pounds *are* either *by Cuſtom, Tenure*, or *Agreement*, among the Inhabitants of a Vill or Manor, and not by Common Law; Per Holt Ch. J. 12 Mod. 664. in S. C.

S. P Arg. Ld. Raym. Rep. 720. cites 27 Aſſ. 64.

34. A Diſtreſs *may not be tied*, for that would be a Miſuſer, and amount to a Converſion; Per Gould. J. 12 Mod. 661. Hill. 13 W. 3 Vaſpor v. Edwards.

35. Diſtrainer

35. Diſtrainer cannot *tan raw Hides* though it be for their Preſervation, cites Cro. E. 783. Nor *milk Cows* to preſerve their Milk, or ſave them from Hurt, cites 1 Roll Abr. 673. though it be allowed, Cro. J. 148. that Kine may be milked to prevent their being ſpoiled; Per Powis J. who ſaid that he took Roll Abr. to be Law. 12 Mod. 662. Hill. 13 W. 3. in Caſe of Vaſpor v. Edwards.

36. If the *Plaintiff ſuffers the Diſtreſs to eſcape by his own Conſent*, this is a Diſcharge of the Treſpaſs, but then it muſt be ſhewn in the Bar; Per Gould. J. 11 Mod. 21. pl. 1. Hill 1 Ann. B. R. in Caſe of Jaſper v. Eadowes.

37. If a Landlord diſtrains for Rent, and *keeps the Goods on the Premiſſes longer than a reaſonable Time*, which the Law allows him to remove them in, *he is a Treſpaſſor ab initio*, cited by Forteſcue J 2 Ld. Raym. Rep. 1427. as a Caſe between **Cartwright and Comber** at Niſi Prius, tried before the Earl of Macclesfield when he was Ch. J. of B. R.

38. No Juſtification can be good for *deſtroying* a Thing diſtrained; For all Diſtreſſes ought to be ſafely kept. 8 Mod. 330. Mich. 11 Geo. Sparks v. Keeble.

39. In *Treſpaſs* for entering his Land Defendant *pleads an Entry and Diſtreſs for Rent.* Plaintiff *replied, that Defendant continued upon the Land 6 Days*, and had eight Bailiffs there. On Demurrer Judgment was for the Plaintiff; For the Court ſaid, that by the Common Law a Perſon that diſtrains was *obliged to carry off the Diſtreſs immediately, and put it into a Pound-covert, or a Pound-overt, and not detain it on the Land*, and that the preſent Caſe is not within the Statute 2 W. & M. cap. 5. And Reynolds J. ſaid, that the very Reaſon why Shocks of Corn could not be diſtrained at Common Law, was, becauſe they could not be carried off without Damage to the Tenant, which implies, that a carrying off the Diſtreſs is neceſſary. Barnard. Rep. in B. R. 3. 4. Mich. 13 Geo. Griffin v. Scott.

Although the Party might enter into the Houſe and diſtrain the Goods, yet *in a reaſonable Time he ought to remove them, and put* them either in a Pound-overt or Cloſe; but at Common Law no Diſtreſs could be impounded on the Premiſſes, and for that Reaſon Sheaves or Shocks of Corn were not diſtrainable for Rent, becauſe nothing could be diſtrained but what might be returned in as good a Condition as it was in when the Diſtreſs was taken, but after a Removal Sheaves of Corn could not be reſtored in the ſame Condition cites Co. Litt. 47. a. and therefore the Statute 2 *W. & M. Seſſ.* 1. *cap* 5. *gives the Leſſor Power to diſtrain Sheaves of Corn* &c. *and to lock up and detain the ſame upon the Place where it was found*; but that is only in the particular Caſes mentioned in that Act; Per Cur. 2 Ld. Raym. Rep. 1426. Mich. 13 Geo. in Caſe of Griffin v. Scott & al'.

40. 11 *Geo.* 2. *cap.* 19. *S.* 10. *Perſons lawfully diſtraining for any Kind of Rent, may impound the ſame, of whatever kind, in ſuch Place, or on ſuch Part of the Premiſſes, as ſhall be moſt convenient for ſecuring the ſame, and to appraiſe, ſell, and diſpoſe of the ſame upon the Premiſſes, as in like Caſe may be done off from the Premiſſes by the* 2 *W. & M.* or the 4 Geo. 2. *And any Perſons may come and go to and from ſuch Place, or Part of the ſaid Premiſſes, where any Diſtreſs for Rent ſhall be impounded, and ſecured as aforeſaid in order to view, appraiſe and buy, and alſo in order to carry off and remove the ſame on Account of the Purchaſor thereof, and that if any Pound-Breach, or Reſcous ſhall be made of any Goods and Chattels, or Stock diſtrained for Rent and impounded, or otherwiſe ſecured by Virtue of this Act, the Perſon or Perſons aggrieved thereby ſhall have the like Remedy, as in Caſes of Pound-Breach or Reſcous is given and provided by the ſaid Statute.*

(P. 2) What ſhall be ſaid a Reſcous of the Diſtreſs.

S. P. But he may purſue and take them, which ſee in Nat. Brev. in the Writ of Reſcous. Br. Reſcous, pl. 24. cites 14 H. 4. and 44 E. 3.

1. WHERE *a Lord comes to diſtrain and ſees the Beaſts*, and the *Tenant perceiving it, chaſes the Diſtreſs out* &c. the Lord ſhall not have Writ of Reſcous; for he never had Poſſeſſion of the Beaſts; Per all the Juſtices. Br. Reſcous, pl. 13. cites 21 H. 7. 40. —— If the *Lord diſtrains* Cattle *out of his Fee* in Lands not held of him, the Tenant may make Reſcous unleſs in ſome Special Caſes, as if the Lord come to diſtrain his Cattle which he *ſees* then *within his Fee, and the Tenant or any other* to prevent the Lord to diſtrain, *drive the Cattle out* of the Fee of the Lord into ſome other Place out of his Fee, yet *may the Lord freſhly follow* and diſtrain the Cattle and the Tenant cannot make Reſcous; Albeit the Place where the Diſtreſs is taken is out of his Fee. For now in Judgment of Law the Diſtreſs is taken within his Fee, and ſo ſhall the Writ of Reſcous ſuppoſe. Co. Litt. 161. a.

2. Reſcous *is* when the Lord in the Land held of him *diſtrains* for his Rent arrear, if the *Diſtreſs is reſcued* from him. Litt. S. 237.

3. So if the *Lord comes on the Land to diſtrain*, and the *Tenant* or another will not ſuffer him. Litt. S. 237.

Reſcous *is not but where he has Poſſeſſion of* the Cattle, or the Thing of which the Reſcous is ſuppoſed to be made; For if one comes to arreſt a Man, or to diſtrain, and he is diſturbed to do it, he ſhall not have a Writ of Reſcous, but an Action on the Caſe. F. N. B. 102. (F)

4. Reſcous is *a taking away and ſetting at Liberty againſt Law a Diſtreſs taken*, or a Perſon arreſted by the Proceſs or Courſe of Law. And all is one as to the Point of the *Diſſeiſin* to reſcue the Diſtreſs *after it is taken, and beforehand to reſiſt* and withſtand the taking of it; but yet it is no Reſcue till it be diſtrained. Co. Litt. 160. b.

5. If the *Tenant reſcues the Diſtreſs, and after is diſſeiſed* of the Tenancy, *yet the Aſſiſe lies againſt him* for the Diſſeiſin done of the Rent by the Reſcous. Co. Litt. 160. b.

5. When a Man has a Diſtreſs, and the *Beaſts*, as he is driving them to the Pound, *go into the Houſe of the Owner*, if he that diſtrain'd them demands them of the Owner, and he delivers them not it is a Reſcous *in Law*. Co. Litt. 161. b.

(Q) *Reſcous* of a Diſtreſs. *Who may* make it.

[And what Remedy the Diſtrainer has where the Diſtreſs was with Cauſe. Roll pl. 6.]

If a Lord diſtrains his Tenant's Cattle, and a Stranger's Cattle for Rent or Service behind, when there is not any Rent or Service behind, the Stranger may reſcue his own Cattle, but not the Tenant's as it ſeems. And that as it ſeems by the Statute of Marlbridge cap. 3 which wills, Non ideo puniatur Dominus per Redemptionem, yet the Opinion of Thorpe. M. 31 E. 3. is contrary; for

1. IF a Man diſtrains my Cattle without a Cauſe, yet a Stranger cannot of his own Head reſcue them from him; For he hath good Cauſe to have them againſt him. 39 E. 3. 35. b.

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he ſays, the Stranger may reſcue as well the Tenants Cattle as his own * Quære. F. N. B. 102. and in Marg. cites S. C ——— * Ibid. in the new Notes there (b) ſays, and note 4 E. 6. Diſ- 74. contra. See 6 E. 4. 11. 5 E. 4. 10. 11. 19 H. 7. 48 E. 3. 33. 3 H. 4. 22. 22 H. 6. 37. tra, 29 E. 3. 35. 4 Co. 11. b. Bevill's Caſe.

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6. But if **the Owner** breaks the Pound **and takes out his Goods, that diſtrain'd them may have his** Action de Parco Fracto, and ay alſo take again the Goods diſtrain'd **where he finds them,** and pound them again. **Co. Litt.** 47. [b].

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9. If a Man *diſtrains tortiouſly*, the Owner of the Beaſts may make eſcous. Br. Diſtreſs, pl. 26. cites 39 E. 3. 35. *But* P. * 4 E. 6. was agreed that *if he* diſtrains tortiouſly, and *impounds them* the wner cannot take them out; For they are in Cuſtody of the Law. . Diſtreſs, pl. 26. Br. Reſcous, pl. 12. cites S Caſes. — * Br Diſtreſs, pl. 74. cites S C. & P by the Juſtices for Law.

10. If the *Lord diſtrains without Cauſe*, yet he *Tenant cannot make Reſ- s* per Mombray. Br. Reſcous, pl. 25. cites 40 E. 3. 32.

11 If a Man *diſtrains my Beaſts which come into his Land by Eſcape* may reſcue them, but if I keep or put them there, or if I have No- e that they uſe to go there, this is no Eſcape. Br. Reſcous, pl. 5. tes 2 H. 4. 16. S. P. Br. Diſtreſs, pl. 12.

12. In Caſe of a Diſtreſs *for 2 d. a Score of Sheep of any Stranger paſſing & trans the ſaid Vill*, and if it was denied on Requeſt that they ed to diſtrain, it was inſiſted that a Man cannot *preſcribe to diſtrain for it a Regia*, for that it is againſt the Stat. of Marlebridge, cap. 15. and ted 17 E. 3 1. 43 E. 3. 40. 11 R. 2. Avowry 87. 17 E. 3. 43. that here a Lord diſtrained in an Highway the Tenant might have Treſ- ſs or make Reſcous; and that againſt a Statute one cannot preſcribe, d cites 9 H. 6. 56. and Dyer 232 and 273. But this Exception was t allow'd; for it was held that *this Statute did not intend but for iſtreſſes for Rents and Services*, and not for thoſe Things whereof no iſtreſs can be but in the Highway. Cro. E. 710. pl. 34. Mich. 41 & Eliz. C. B. Smith v. Shepherd. Mo. 574. pl. 793. S. C. adjudged that that Preſcription is not good not reaſonable to take Toll for Paſſage in Via Regia, and the Inheritance of every Man in Paſſage in

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(P. 2) What ſhall be ſaid a Reſcous of the Diſtreſs.

S. P. But he may purſue and take them, which ſee in Nat. Brev. in the Writ of Reſcous.

1. WHERE *a Lord comes to diſtrain and ſees the Beaſts*, and the *Tenant perceiving it, chaſes the Diſtreſs out* &c. the Lord ſhall not have Writ of Reſcous; for he never had Poſſeſſion of the Beaſts; Per all the Juſtices. Br. Reſcous, pl. 13. cites 21 H. 7. 40.

Br. Reſcous, pl. 24. cites 14 H. 4. and 44 E. 3. —— If the *Lord diſtrains* Cattle *out of his Fee* in Lands not held of him, the Tenant may make Reſcous unleſs in ſome Special Caſes, as if the Lord come to diſtrain his Cattle which he *ſees* then *within his Fee, and the Tenant or any other* to prevent the Lord to diſtrain, *drive the Cattle out* of the Fee of the Lord into ſome other Place out of his Fee, yet *may the Lord freſhly follow* and diſtrain the Cattle and the Tenant cannot make Reſcous; Albeit the Place where the Diſtreſs is taken is out of his Fee. For now in Judgment of Law the Diſtreſs is taken within his Fee, and ſo ſhall the Writ of Reſcous ſuppoſe. Co. Litt. 161. a.

2. Reſcous *is* when the Lord in the Land held of him *diſtrains* for his Rent arrear, if the *Diſtreſs is reſcued* from him. Litt. S. 237.

3. So if the *Lord comes on the Land to diſtrain*, and the *Tenant* or another will not ſuffer him. Litt. S. 237.

Reſcous *is not but where he has Poſſeſſion of* the Cattle, or the Thing of which the Reſcous is ſuppoſed to be made; For if one comes to arreſt a Man, or to diſtrain, and he is diſturbed to do it, he ſhall not have a Writ of Reſcous, but an Action on the Caſe. F. N. B. 102. (F).

4. Reſcous is *a taking away and ſetting at Liberty againſt Law a Diſtreſs taken*, or a Perſon arreſted by the Proceſs or Courſe of Law. And all is one as to the Point of the *Diſſeiſin* to reſcue the Diſtreſs *after it is taken, and beforehand to reſiſt* and withſtand the taking of it; but yet it is no Reſcue till it be diſtrained. Co. Litt. 160. b.

5. If the *Tenant reſcues the Diſtreſs, and after is diſſeiſed* of the Tenancy, *yet the Aſſiſe lies againſt him* for the Diſſeiſin done of the Rent by the Reſcous. Co. Litt. 160. b.

5. When a Man has a Diſtreſs, and the *Beaſts*, as he is driving them to the Pound, *go into the Houſe of the Owner*, if he that diſtrain'd them demands them of the Owner, and he delivers them not it is a Reſcous *in Law*. Co. Litt. 161. b.

(Q) *Reſcous* of a Diſtreſs. *Who may* make it.

[And what Remedy the Diſtrainer has where the Diſtreſs was with Cauſe. Roll pl. 6.]

If a Lord diſtrains his Tenant's Cattle, and a Stranger's Cattle for Rent or Service behind, when there is not any Rent or Service behind, the Stranger may reſcue his own Cattle, but not the Tenant's as it ſeems. And that as it ſeems by the Statute of Marlbridge cap. 3 which wills, Non ideo puniatur Dominus per Redemptionem, yet the Opinion of Thorpe. M. 31 E. 3. is contrary; for

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bound to repair the Bridge or Cauſey &c then it may be reaſonable Cauſe for the Commencement of the Toll and Preſcription; But for Toll Traverſe it is clear that a Man may preſcribe. —— See Tit Toll (A) per totum.

Where a Man diſtrains the *Tenant cannot make Reſcous though no Rent be arrear*, quod nota bene. Br. Reſcous, pl. 16. cites 9 H. 7. 2.

13. The Rent muſt be behind, or elſe the Tenant may make Reſcous; For if *no Rent* be *behind* when the Diſtreſs is taken, how can the Reſcous amount to a Diſſeiſin of the Rent when none is due? Co. Litt. 160. b.

14. And *ſo* it is *if the Tenant reſiſts* the Lord to diſtrain when there is no Rent behind, this can be no Diſſeiſin of the Rent for the Cauſe aboveſaid, and this (as it appears by Littleton) holds as well in the Caſe of a Rent-Service between Lord and Tenant, as in Caſe of a Rent-charge &c. And ſo I heard Sir Chriſtopher Wray ſay that he had adjudged it. Co. Litt. 160. b.

15. And *that which the Tenant may do* when there is no Rent behind, *may a Stranger do*, if his Beaſts are diſtrained. Co. Litt. 160. b.

16. If the Tenant *tender the Rent to the Lord when he is to take the Diſtreſs*, if notwithſtanding the Lord will diſtrain, the Tenant may make Reſcue. Ut ſupra.

If the Rent of the Lord be behind, and the Lord *diſtrains* the Cattle of the Tenant *in the Highway* within his Fee, the Tenant may make Reſcous; for that it is defended by Law to diſtrain in the Highway. Ut ſupra.

17. And by the ſame Reaſon, if the Lord will diſtrain *Averia Carucæ, where there is a ſufficient* Diſtreſs to be taken *beſides*; Or if the Lord will diſtrain *any thing that is not diſtrainable*, either by the Common Law, or by any Statute, the Tenant may make Reſcous. Co. Litt. 160. b. 161. a.

18. If the *Lord coming to diſtrain had no View* of the Cattle within his Fee, tho' the *Tenant drives them off purpoſely*, or if the *Cattle themſelves after the View go out of the Fee*, or if the *Tenant after the View removes them for any other Cauſe* than to prevent the Lord of his Diſtreſs, then cannot the Lord diſtrain them out of his Fee, and if he does the Tenant may make Reſcous. Co. Litt. 161. a.

1 Salk. 247. pl. 2. Mich. 8 W. 3. C. B. Cotſworth v. Bettiſon, S. P. accordingly. —— Ld. Raym. Rep. 104. 105. S. C. & S. P. held accordingly.

19. Where *Goods* are *diſtrained without Cauſe*, the Owner may reſcue them *before they are impounded*, but he cannot afterwards break the Pound and take them out, becauſe they are then in the Cuſtody of the Law. Co. Litt. 47. b.

20. If the Lord diſtrains *his Tenant's Cattle, and a Stranger's Cattle* for Rent or Service behind, *where there is not any Rent or Service behind*, the *Stranger may reſcue his own* Cattle, but not the Tenant's, as it ſeems. And that, as it ſeems by the Statute of Marlebridge, cap. 3. which willeth Non ideo puniatur Dominus per Redemptionem; yet the Opinion of Thorp. M. 31. E. 3. is contrary; for he ſays, the Stranger may reſcue as well the Tenant's Cattle as his own. Quære F. N. B. 102. (E).

(Q. 2

(Q. 2) Reſcous. Writ and Pleadings.

1. IN Writ of Reſcous made of Goods and Merchandizes reſcued, for which Toll ought to be paid, the Writ was, that the Chattles were *taken at C. for* the *Toll*, and would have detained them according to the Law &c. and that the *Defendants reſcued the ſame Chattles without ſaying where* the Reſcous was made, and yet held good; For it ſhall be intended at the Place where the Taking was. Thel. Dig. 99. lib. 10. cap. 9. S. 6 cites Mich. 30 E. 3. 20.

2. So in *Treſpaſs for* taking an *Eſtray*. Thel. Dig. 99. lib. 10. cap. 9. S. 6. cites Brief 333.

3. Reſcous, becauſe the *Plaintiff diſtrained in his Fee in B. in Land held of him*, and the *Defendant made Reſcous*, and the *Defendant ſaid, that he held two Acres there of the Plaintiff, and three Acres there of N. and the Plaintiff would have diſtrained in the three Acres which are out of his Fee, and the Defendant made the Reſcous*. The *Plaintiff ſaid, that he came to the two Acres to have diſtrained, and ſaw the Beaſts there, and the Defendant perceiving it chaſed them into the three Acres, which are out of his Fee, and the Plaintiff came there freſhly and would have diſtrained, and the Defendant made Reſcous Vi & Armis*. Cand. demanded *Judgment of the Writ*, which is, that he diſtrained within his Fee, and now he confeſſes that it out of his Fee, and in this Caſe he ought to have Writ accordingly; but Thorp [awarded him to] anſwer; For *there is no other Form of Writ in this Caſe*; and alſo when he came to the two Acres to diſtrain, and you perceiving it chaſed them into other Land, it is lawful for him to purſue and diſtrain there, and this taking refers to the firſt Place; by which the *Plaintiff ſaid, that he was harrowing in the two Acres, and when he had finiſhed it, went to the three Acres to perform his Overaigne* prout &c. *abſque hoc that he chaſed for this Cauſe*, and the others e contra, and ſo the Cauſe in Iſſue. Br. Reſcous, pl. 3. cites 44 E. 3. 20. Br. General Brief, pl. 4. cites S. C. —Br. Iſſues Joines, pl. 45. cites S. C. —Thel. Dig. 86. pl. 9. cap. 7. S. 12. cites S. C.

4. Where a Man *avows for Rent, and after diſtrains and avows for Homage*, and the *Plaintiff ſues Recaption, and after in the Avowry diſclaims to hold of the Defendant*, by this he has not abated his Recaption; and ſo ſee that a Man may have Recaption *againſt him who has not Tenure if he diſtrains twice for one and the ſame Cauſe*; but if he diſtrains for Rent of one Day, and after, pending the ſame Replevin, diſtrains for Rent of another Day, Recaption does not lie. Br. Recaption, pl. 4. cites 47 E. 3. 22.

5. *And* alſo it ſeems there, that where a Man *diſtrains for one Cauſe, and after for another pretended Cauſe which is not true*, yet Recaption does not lie, and the Iſſue was, if he took the ſecond Diſtreſs for the firſt Cauſe or not? Ibid.

6. In Reſcous of Diſtreſs it was awarded a good Plea, *that he had a great Waſte adjoining to his Manor, and he put his Beaſts there, and they eſcaped into the Place where* &c. *and the Plaintiff took them, and he made Reſcous*; Nota. Br. Diſtreſs, pl. 12. cites 2 H. 4. 16. Br. Reſcous, pl. 12. cites S. C. and S. P.

7. *But* it was ſaid, that it a *Man keeps his Beaſts in the Place*, or *has Notice that they uſually came to this Place*, this is not an Eſcape; Quod Nota. Br. Diſtreſs, pl. 12. cites 2 H. 4. 16. Br. Reſcous, pl 12. cites S. C. and S. P.

8. Writ

8. Writ of Reſcous upon *Diſtreſs taken for Rent arrear*; it was ſaid, that * *Riens Arrear*, and || *Ne unques ſeiſie*, are good Pleas in Writ of Reſcous, quod non negatur, tamen quære inde. Br. Reſcous. pl. 6. cites 2 H. 4. 22.

* Br. Reſcous, pl. 18. cites 5 E. 4. 8 and 7 E. 4. 19. 20 Contra that it is no Plea; For he may aid himſelf in Replevin and ſuffer the Diſtreſs, Per Choke; Quære inde. —— S. P. Br. Reſcous, pl. 20. cites 6 E. 4. 11. —— || *Ne unques ſeiſie after the Limitation* is no Plea, per Yelverton; Contra in Avowry. Br. Reſcous, pl. 20. cites 6 E. 4. 11.

9 In Reſcous the Plaintiff was compelled to *ſhew for what Rent he diſtrained, and for what Term being in Arrear* and otherwiſe ill, by which he ſhewed the Tenure, and for 20 d. arrear ſuch a Feaſt he diſtrained, and the Defendant made Reſcous; the Defendant took Exception becauſe he *did not allege Seiſin*, et non allocatur. Br. Reſcous, pl. 7. cites 8 H. 4. 2.

10. By which he *ſaid that where A. B. granted to the Plaintiff the Seigniory, the Tenant did not attorn by which he made Reſcous*, et non allocatur *without ſhewing that he is Tertenant or other Authority.* Ibid.

11. *And* therefore he *ſaid that he as Servant to the Tertenant, and by his Command* made the Reſcous. Ibid.

12. In Reſcous the *Defendant to the Vi et Armis pleaded Not Guilty*, and *to the Reſcous* ſaid that the Plaintiff's *Servant took the Defendant's Sheep in his Several in C. and he made Reſcous, abſque hoc that he took them in A. Priſt* &c. et adjournatur. Br. Reſcous, pl. 9. cites 7 H. 6. 1.

13. In Reſcous the Plaintiff *counted that R. was ſeiſed of two Houſes and held them of him by Fealty and two Shillings Rent payable at Eaſter annually, of which Services he was ſeiſed by the Hands of the ſaid R.* as by the Hands *of his very Tenant*, and for the 2 s. Rent-Arrear ſuch a Feaſt he diſtrained, and the Defendant made Reſcous; The Defendant *pleaded Unques ſeiſie per my les mains, Priſt*, and the others e contra; Per Newton this is no Plea *in this Action*, for here *the Tenure is only traverſable and no other Thing.* Br. Reſcous, pl. 10. cites 22 H. 6. 27.

14. And from hence it follows that *Riens Arrear* is no Plea in this Action, by which Priſot imparl'd, and the like Paſchæ hoc Anno. Ibid.

15. Reſcous that he *diſtrained T. in D. for Services* &c. *and he made Reſcous*, it is *no Plea that the Plaintiff diſtrained in S. abſque hoc that he diſtrained in D.* for he *ought to juſtify the Reſcous*, per tot. Cur. By which Pole *ſaid he diſtrained in four Acres in S. which was the Franktenement of the Defendant, by which he made Reſcous, abſque hoc that he diſtrained in D.* but after he *ſaid that he was ſeiſed in Fee of the four Acres in S. and the Property of the Beaſts were in him, and the Plaintiff diſtrained, by which he made Reſcous, abſque hoc that the Plaintiff diſtrained in D. Priſt*, and the others e contra. Br. Reſcous, pl. 11. cites 22 H. 6. 54.

Br. Aſſiſe, pl. 27. cites 33 H 6. 20. S. C.

16 Reſcous may be and yet *not Vi et Armis.* Br. Reſcous, pl. 2. cites 33 H. 6.

17. In Reſcous *Hors de ſon Fee* is a good Plea, per Cur. Br. Iſſues joines, pl. 26. cites 38 H. 6. 26.

Thel. Dig. 238. Lib. 16. cap. 10. S. 59. cites Trin. 9 H. 7. 4 S. P. and that it was adjudg'd 39 H. 6. 7.

18. Reſcous becauſe he *diſtrained for Rent-Arrear for three Days*, and the *Defendant made Reſcous*, and *it appeared that the third Day was not come at the Time of the Taking*, by which the Defendant demanded *Judgment of the Count* and that the Writ abate, and per Cur. the Count is good; for *if he had any Cauſe to diſtrain the Defendant cannot make Reſcous*, and the Matter is only to the Action for the third Day. Br. Reſcous, pl, 14. cites 39 H. 6. 7.

19. In

19. In Reſcous it is no Plea *that he held by other Services* or the like, for if he holds of him it is not lawful for him to make Reſcous. Br. Reſcous, pl. 18. cites 5 E. 4. 8. and 7 E. 4. 19. 20.

20. *Rien Arrear* is no Plea in Reſcous, but he may ſuffer the Diſtreſs and aid himſelf in Replevin. Br. Eſtoppel, pl. 162. cites 5 E. 4. 7. 8. and 7 E. 4. 19. 20.

21. Reſcous, *and alleged Tenure and Seiſin by the Hands of his Tenant as his very Tenant, and that he diſtrained and the Tenant made Reſcous*; The Defendant ſaid that *Ne unques ſeiſie per my les mains after the Limitation of Aſſiſe*, and the beſt Opinion was that it is no Plea; for if he has Seigniory there he may diſtrain, ſo *traverſe the Tenure and not the Seiſin*, for *no Limitation is given in Reſcous, but in Replevin, and Aſſiſe, and Writ of Right.* Br. Reſcous, pl. 17. cites 5 E. 4. * 52. Br. Seiſin, pl. 29. cites 5 E. 4. 62. S. C. * It ſhould be 62.

22. In Reſcous the Defendant pleaded *Hors de ſon Fee*, and per Cur. this is no Plea in this Action nor in Treſpaſs; but he *ſhall ſay that it is held of a Stranger, and ſo Hors de ſon Fee*, and then a good Plea, and ſo he did. Br. Reſcous, pl. 19. cites 6 E. 4. 4. In Reſcous if the *Plaintiff ſuppoſes that he diſtrained within his Fee, and the other made Reſcous*, there *Hors de ſon Fee is a good Plea*, per Cur. Brooke ſays, *Quære if he may reply for Rent-Charge*; for *it ſeems that there is no other Form of Writ.* Br. Reſcous, pl. 22. cites 38 E. 3.

23. And per Choke and Danby Ch. J. the ſame Year Fol. 87. where the *Tenant holds by* 2 *d.* and the *Lord incroaches* 4 *d.* the *Tenant may aid it by Reſcous and ſpecial Pleading, and ſhall not be drove to Ne injuſte Vexes, or contra formam Feoffamenti.* Ibid.

24. *So* in *Aſſiſe.* Ibid.

25. *Contra in Avowry.* Ibid.

26 In Reſcous the Defendant pleaded *always ſeiſed after the Limitation*, and the *Plaintiff would have demurred*, and the *Defendant durſt not* demur, the Reaſon ſeems to be that a Man may diſtrain that never was ſeiſed, Quære. Br. Reſcous, pl. 23 cites 5 E. 4. 6.

27. If a *Man ſends his Servant to diſtrain* for Rent, or Service, or Damage-Feaſant, and Reſcous be made upon the Servant, the Maſter ſhall have the Writ of Reſcous and not the Servant, for the Wrong is done to him who ought to have the Rent or Service, or is damnified &c. F. N. B. 101. (F)

28. If a *Collector* or Sub-Collector *diſtrains for Fifteenths*, and Reſcous be made, he ſhall have a Writ of Reſcous &c. F. N. B. 101. (F)

29. If the *King's Bailiff diſtrains for Rent*, and Reſcous be made, the Bailiff ſhall have the Writ of Reſcous and not the King. F. N. B. 102. (B)

30. If the *Sheriff ſend to the Bailiff of the Liberty to levy Fines* and Amercements *for the King*, and the Bailiff diſtrains certain Cattle, and the Reſcous is made. Now the *Lord of the Liberty* ſhall have a Writ of Reſcous *of the Reſcous* done to the Bailiff, *and for the Battery and Aſſault* made upon him, *and for the Loſs of his Service*, and all in one Writ. F. N. B. 102. (B)

31. In Reſcous &c. the Plaintiff *declared that he had diſtrained* 40 *Sheep of the Defendant's, and* 80 *of R. S.'s Damage-Feaſant, and that the Defendant took, chaſed, and reſcued all of them*; the *Defendant juſtified the putting his* 40 *Sheep* in the Place where, as for *Common, and that* the Plaintiff de injuria ſua propria chaſed them, and that the Defendant would have taken them from him, but *they ran amongſt the other* 80 *Sheep of R. S.* and flocked with them, *and becauſe he could not ſever them he chaſed them* &c. quæ eſt eadem Reſcuſſio. Upon a Demurrer the Plaintiff had Judgment, for though the Defendant had ſome Colour to reſcue his own Sheep, he had none to reſcue the Sheep of a Stranger who appeared not to have any Right of Common. He ſhould have ſaid, 2 Roll Reps 163 S C. Haughton J. ſaid that in Treſpaſs the Defendant might juſtify the chaſing the Sheep of R. S. to ſever them from his own, but as to driving

them away he could not do ſo by any

that he chaſed them all to ſuch a Place to ſever them. Cro. J. 568. pl. 6. Paſch. 18 Jac. B. R. Jennings v. Playſtoe.

Means, Quod Doderidge conceſſit, but ſaid that if Defendant had put the Sheep of R. S into the Common again, it had been good, Judgment for the Plaintiff. ——— Palm. 172. Genings v. Plaiſto, S C adjudged for the Plaintiff. But Doderidge ſaid that Defendant might have aided himſelf in Pleading, if he ſaid after, that he had ſevered the 40 Sheep and had reſtored the 80 to the Plaintiff.

32. It was agreed in a Caſe by Hobart, that where a Man brought an Action de parco fracto, and declared upon the Breach of a Pound, and alſo of the taking out of Beaſts; and the Defendant as to the taking out of the Beaſts, *pleaded Not Guilty*, and as to breaking of the Pound he ſaid, *that he was Lord of the Soil upon which the Pound ſtood, and that he brake off the Lock and put a Lock of his own*; and Hobart ſaid in this Caſe, that he ought to plead the general Iſſue, for in Verity this is not any Breach of the Pound, except the Beaſts come out of it; And Jones J. was of Opinion, that if he put out the Beaſts this Action would not lie, becauſe the Freehold was in him, but he ought to have a *ſpecial Action upon the Caſe*. Win. 80, 81. Paſch. 22 Jac. C. B. Anon.

(Q. 3) Pound-Breach. What is. And how puniſhed.

1. WHERE one *breaks the Pound and takes the Diſtreſs*, yet he who diſtrained may retake them and put them in again, notwithſtanding that he may have Parco Fracto; quod non negatur. Br. Avowry, pl. 13 cites 34 H. 6. 18.

2. The *Diſtrainor* may have *Parco Fracto* for the Breach of the Pound, and *not the Lord*. Arg. 12 Mod. 660. cites Dr. and Stud. c. 27.

3 A. brought Parco Fracto, and declared upon the Breach of a Pound, and alſo of the taking out of Beaſts; As to the taking out of Beaſts the Defendant pleaded Not Guilty, and As to the breaking the Pound he ſaid he was *Lord of the Soil* on which the Pound ſtood, and that he broke the Lock and put a *Lock* of his own. Per Hobert, He ought to plead the general Iſſue, for in Truth this is not any Breach of the Pound except the Beaſts come out. And per Jones J. If he put the Beaſts out he may not have this Action, becauſe the Freehold was in him, but he ought to have a ſpecial Action on the Caſe. Winch. 80. Paſch. 22 Jac. C. B. Anon.

4. If the *Door of the Pound be open*, it is no Pound-Breach to take the Diſtreſs out of it; per Powell J. 2 Lutw. 1262. Trin. 7 W. 3. Alwayes v. Broom.

This is only meant treble Damages and ſingle Coſts; and he may ſue either

5. 2 *W. & M. Stat.* 1. *cap.* 5. *S.* 4. *Upon any Pound-Breach or Reſcous of Goods diſtrained for Rent, the Perſon grieved ſhall in a ſpecial Action upon the Caſe recover treble Damages and Coſts againſt the Offenders, or againſt the Owner of the Goods if they come to his Uſe.*

the Owner or the actual Offender in all Caſes, and the Owner if the Goods come to his Uſe or Poſſeſſion, but if he recovers againſt the Offender he ſhall not ſue the Owner afterwards. Sir Barth. Shower's Obſervations, ut ſupra, fol. 162, 163.

6. If the Owner breaks the Ponnd and let the Diſtreſs go, the Diſtrainor may have a Parco Fracto, *or may retake the Diſtreſs*; per Gould J. 12 Mod. 661. Hill. 13 W. 3. Vaſpor v. Edwards.

(Q. 4) Eſcape

(Q. 4) Eſcape. What Remedy lies.

1. IF a Man *diſtrains Beaſts* and *they go back to the Owner of their own Accord*, he who diſtrains *cannot retake them by Reaſon of the firſt Diſtreſs unleſs he comes freſhly*; For there is Negligence in the Diſtrainor; per Danby J. Br. Diſtreſs, pl. 25. cites 9 E. 4. 2.

2. Where the Perſon diſtraining puts the Diſtreſs in a *broken Pound, or ſuch as cannot keep the Thing impounded*, and the Diſtreſs eſcapes, he cannot maintain an Action for the ſame Treſpaſs, and its being a common Pound varies not the Caſe. 12 Mod. 658, 663. 664. Hill. 13 W. 3. Vaſpor v. Edwards. Ld. Raym. Rep. 719. S. C. adjudged.

3. If *Diſtreſs* taken Damage feaſant *eſcapes*, the Diſtrainer cannot bring *Treſpaſs* unleſs he *ſhews that the Eſcape was without his Default*, and ſaying that it was without his Conſent and Will is not ſufficient. 12 Mod. 658. Hill. 13 W. 3. Vaſpor v. Edwards.

4. *But* if they *eſcape without his Default* he has other Remedy; becauſe he cannot otherwiſe ſecure them than by impounding; For he cannot tie them; Per Powis J. 12 Mod. 662. in Caſe of Vaſper v. Edwards, cites 27 Aſſ. pl. 64.

5. *So* if they are *ſtole out of the Pound*-overt he is not anſwerable for them, nor remedileſs unleſs the Things ſtolen were not proper to be put into a Pound-overt; Per Powis J. 12 Mod. 662. cites Co. Litt. 47 b.

(Q. 5) Death of Beaſts in the Pound; At whoſe Loſs it ſhall be.

1. IF the *Beaſts die in Pound after Offer of ſufficient Amends*, this is at the Peril of the Owner if they are in Pound-overt; *But if they are not in Pound-overt*, this is at the Peril of the Diſtrainor. But *if the Writ of the King comes to deliver them*, and the *Diſtrainor reſiſts it*, there *if they die*, this is at the Peril of the Diſtrainor, and the Owner ſhall recover his Damage by Action upon the Statute for diſobeying the Writ. Br. Diſtreſs, pl. 72. cites Doct. and Stud. lib. 2.

2. If *Cattle diſtrained* be put in Pound-overt, the Owner at his Peril muſt feed them, and if they *die* the Diſtrainor ſhall bring his *Action*, or * *diſtrain again*; Per Powis J. 12 Mod. 662. cites D. 280. Co. Litt. 47. Dr. and Stud. 102. and ſaid, that the Reaſon is becauſe he has loſt his Pledge without any Fault in him.

*If the Diſtreſs was for Rent; Per Powis J. 12 Mod. 663. in S. C.

(Q. 6)

(Q. 6) Actions and Pleadings.

1. WRIT of Treſpaſs for Diſtreſs *taken in the High Street*, contrary to the Statute of Marlebridge, was *without ſaying contra pacem*, and yet adjudged good. Thel. Dig. 114. lib. 10. cap. 24. S. 1. cites Mich. 19 E. 2. Brief 842.

2. [So] Writ of Diſtreſs taken in the High Street, contrary to the Statute of Marlebridge, was *was without Ad grave dampnum*, and yet held good. Thel. Dig. 115. lib. 10. cap. 25. S. 1. cites Mich. 19 E. 2. Brief 842.

3. It ſeems by the Argument of a Recaption, that where a Man diſtrains, he *ſhall ſhew for what Cauſe he diſtrains*, or at leaſt if he ſhews Cauſe *this is material as to the Recaption*, though he avows for other Cauſe. Br. Diſtreſs, pl. 61. cites 28 E. 3. 92. and Fitzh. Tit. Recaption 6.

4. It was granted per Cur. that of *Rent*, if the *Tenant tenders upon the Land*, the other cannot diſtrain. Br. Diſtreſs, pl. 36. cites 30 Aſſ. 38.

5. If a Man *takes Beaſts for one thing*, yet when he comes into Court of Record he *may make Avowry for what Thing he pleaſes*; Per Cur. 3 Rep. 26. cites it as adjudged Mich. 34 E. 1. Tit. Avowry, 232.

6. Of *taking in the High Street* a Man ſhall *not have Replevin, but Writ upon the Statute.* Thel. Dig. 117. lib. 10. cap. 27. S. 8. cites Trin. 11 R. 2. Avowry, 87.

7. But *otherwiſe* it is *of Oxen of his Plough, or Sheep*, taken againſt the Statute. Thel. Dig. 117. lib. 10. cap. 27. S. 8. cites Trin. 11 R. 2. Avowry, 87. Quære.

8. If the *Rent of three Terms be arrear*, and the *Lord diſtrains for the Rent of the firſt Term*, and the *Tenant ſues Replevin*, and the *Lord avows*, and the *Tenant pleads Hors de ſon Fee*, or other ſuch *Thing which brings the Seigniory in Debate*, there the Lord cannot diſtrain for the Rents of the other Terms till the Seigniory be tried; Per Brickhill for Law, quod conceditur per all the Juſtices. Br. Diſtreſs, pl. 14. cites 7 H. 4. 4.

9. In *Treſpaſs oetween Lord and Tenant upon Diſtreſs*, the *Tenure* is only traverſable. Br. Traverſe Per &c. pl. 360. cites 10 H. 6. 24.

10. *Contra in Avowry*, note the Diverſity. Br. Ibid.

11. In Treſpaſs the *Defendant ſaid that he leas'd to the Plaintiff for 10 Years, rendring annually 20 s. at two Feaſts* &c. and for 10 s. arrear he diſtrain'd, and the Plaintiff was not permitted to ſay, that De ſon tort Demeſne without ſuch Cauſe; But *ſhall ſay that De ſon tort Demeſne abſque hoc that he leas'd, or* abſque hoc *that any Rent was arrear.* Br. De ſon tort &c. pl. 29 cites 10 H. 6. 3.

12. Treſpaſs of three Horſes taken; Suliard ſaid, Actio non; For J. S. was ſeiſed of the Cloſe where &c. and held of him by Fealty and 10 s. &c. and for the *Rent arrear* he came and found the Horſes levant and couchant by which he took them, and within his Fee; the Defendant ſaid that they *eſcaped in default of Incloſure* of the Tertenant, who ought to incloſe it, *as he was chaſing them in the Highway.* Suliard ſaid they were levant and couchant there by ſix Days after the Eſcape. Per Brian he may well diſtrain them. Per Choke when the Beaſts of a Stranger enter in default of Incloſure of the Tenant of the Frank-tenement, there if the Owner has Notice of them and does not take them away, the Lord may diſtrain them. Per Catesby J. where the Beaſts enter in default of Incloſure, the Owner of the Land cannot diſtrain them Damage-Feaſant, though they are there by half an Year, and

and therefore the Lord cannot diſtrain. But where the Tenant of the Land is not bound to incloſe it, there if Beaſts enter the Lord may diſtrain. But ſee Brian Ch. J. above made the beſt Reaſon, as it ſeems. Br. Diſtreſs, pl. 56. cites 22 E. 4. 49

13. If Diſtreſs be *ſtole or ſet at large by a Stranger* he ſhall not be anſwerable for it; but even in that Caſe if *Replevin* be brought, and an *Elongatur* return'd, as it muſt be, there ſhall be a *Withernam*, and the Diſtrainer liable till he *ſhew that Matter*, which being no Default of his will excuſe him. Per Holt Ch. J. 12 Mod. 660. Hill. 13 W. 3. Vaſpor v. Edwards.

16. If Diſtreſs be *ſtole* out of Pound, and *Elongat'* be returned, the Diſtrainer *to prevent a Withernam may ſhew* that they were ſtolen. Per Powis J. 12 Mod. 662. in Caſe of Vaſpor v. Edwards, cites 32 H. 6. 27. b. Br. Ret. brev. 135. Nat. B. 74. and ſome Books ſay the Sheriff may return it.

(R) What ſhall be ſaid *Exceſſive*, and what not.

1. If 40 Sheep are taken for 2 d. and 16 Oxen for 9 d. this is Exceſſive. 41 E. 3. 26.

2. If two Oxen for four Pair of Gloves, ten Sheep for one Pair, and ten for another, it is an exceſſive Diſtreſs. 29 E. 3. 24. adjudg'd.

3. But if a Man takes five Horſes join'd in a Cart for 3 d. Rent this is not Exceſſive for the Intierty. 8 H. 4. 15. Cheynie ſaid it was Exceſſive ad quod non fuit reſponſum. But Brooke ſays that it is not becauſe they were join'd in one Plough, and *could not be ſever'd*. Br. Diſtreſs, pl. 15. cites 8 H 4. 16.

A Man cannot *ſever* a Diſtreſs, and therefore in ſome Caſes a Diſtreſs of great Value, as a *Cart and Horſes* may be taken for a ſmall Matter becauſe not ſeverable; Admitted Arg. 2 Vent. 185. Trin. 2 W. & M. in C. B. in Caſe of Clark v. Tucker.

4. No Diſtreſs for Homage ſhall be ſaid Exceſſive for the high Eſteem thereof in the Law. 42 E. 3. 26. Co. 4 *Bevill* 8. b.

5. The ſame Law of Fealty. Co. 4. *Bevill*. 8. b. 29 E. 3. 24. He who diſtrains *for Homage* may take as many of the Beaſts as he can find upon the Land; For, for Homage the *Diſtreſs ſhall not be ſaid Exceſſive*. Per Belk. Quære; For Finch was contra, but it was not adjudged, therefore Quære. Br. Diſtreſs, pl. 4. cites 42 E. 3. 26 —— Though the Lord diſtrains the Tenant ſo that he is not able to manure his Land. Ibid. —In Aſſiſe it was ſaid for Law, that if the Tenant holds of his Lord by *Homage* the Diſtreſs cannot be Exceſſive, nor for *Suit of Court* nor *Fealty*, but it was ſaid that the Law is not very clear for Suit nor Fealty. Br. Diſtreſs, pl. 35. cites 28 Aſſ. 50.

6. A Diſtreſs of more than the Value ſhall not be ſaid Exceſſive for the Expences of Knights of Parliament, becauſe the King is in a Manner Party. 13 H. 4. Fitzh. Avowry 239. Br. Diſtreſs, pl. 79. cites 11 H. 4. 2. S. P. —— Diſtreſs ſhall not be ſaid Exceſſive where the *King is Party*, As for Fees of Knights of the County for the Parliament, and no Miſchief; For by Payment of it they ſhall re-have the Beaſts. Br Prerogative, pl. 98. cites 11 E. 4 2. —— S. P. 2 Inſt. 107. but Lord Coke adds that the Statute of Marlbridge is General and extends to All.

7. No Diſtreſs can be Exceſſive for *Homage*, *Fealty*, or *Suit*, and Aſſiſe lies not for too often diſtraining or for exceſſive diſtraining for thoſe Duties. F. N. B. 178. (I) in the new Notes there (b.) cites 28. Aſſ. 50. and 42 Ed. 3. 26.

8. If a Man diſtrains *a Load of Grain and four Horſes for* 2 *s.* this is exceſſive Diſtreſs; Contra if they are *annexed to the Waggon*; for then it is a Thing intire, which cannot be ſevered. Br. Diſtreſs, pl. 88. cites 20 E. 4. 3.

9. *And* it was in a Manner agreed, that a *Fold of Sheep in the Field* may be diſtrained for 2 s. and ſhall not be ſaid exceſſive; for the Diſtrainer cannot ſever them. Br. Diſtreſs, pl. 88. cites 20 E. 4. 3.

(R. 2) Cauſeleſs and exceſſive Diſtreſs. Remedy for it.

If the Lord diſtrain *two or three Oxen for* 12 d. or the like

1. 52 *H.* 3. *cap.* 4. *THE Diſtreſſes ſhall be reaſonable, and not too great; and he that takes great and unreaſonable Diſtreſſes ſhall be grievouſly amerced for the Exceſs.*

ſmall Sum, and the Owner bring a Replevy of the Oxen, and the Lord avow the taking of them for the 12 d. &c. of his own ſhewing he ſhall make Fine &c. or the Party may have his Action upon the Statute 2 Inſt. 107.

If the Lord diſtrain *an Ox or Horſe for a Penny*, if there were *no other Diſtreſs upon the Land* holden, the Diſtreſs is not exceſſive; but if there were a Sheep or Swine &c. then the taking of the Ox or Horſe is exceſſive, becauſe he might have taken a Beaſt of leſs Value. 2 Inſt. 107.

Mod. 71. pl. 25. The King v. Legingham, S. C. & S. P. by Twiſden, ſed adjornatur. ——

2. An Information was brought againſt a Lord of a Manor for taking unreaſonable Diſtreſſes upon ſeveral Tenants of his Manor; but Judgment was ſtayed; for the taking unreaſonable Diſtreſſes is *puniſhable by Action on the Statute of Marlebridge, and not by Information.* Lev. 299. Mich. 22 Car. 2. B. R. The King v. Leſingham.

—— Ibid. 288. pl. 34. Trin. 29 Car. 2. B. R. The King v. Ledgingham, S. C. held that it will not lie. —— Raym. 205. S. C. and by Twiſden Information lies not for Diſtreſſes, becauſe they are private Offences; And ſo Judgment againſt the Defendant was ſtaid. —— Vent. 104. S. C. & S. P. held accordingly; For exceſſive Diſtreſſes were not puniſhable until the Statute of Marlb cap. 4. which ſays, that he who ſo diſtrains ſhall be amerced, whereas upon an Information he muſt of Neceſſity be fined; and cites 2 Inſt. 107.

3. Avowry for 2 d. and for 9 d. and that he took *two Sheep for the 2 d.* and 15 *Oxen for the 9 d.* and therefore he was amerc'd to 20 s. for the exceſſive Diſtreſs; quod nota. Br. Diſtreſs, pl. 2. cites 41 E. 3. 26.

4. 2 *W. & M. Stat.* 1. *cap.* 5. *S.* 5. *If any Diſtreſs or Sale ſhall be made for Rent where no Rent is due, the Owner of the Goods, his Executor, &c. may by Action of Treſpaſs, or upon the Caſe, recover double the Value of the Goods diſtrained with Coſts.*

5. *Treſpaſs* does not lie for entering and taking an exceſſive Diſtreſs; and ſo a Judgment in C. B. was reverſed. Gibb. 85. Trin. 2 & 3 Geo. 2. B. R. Lyne v. Moody.

(R. 3)

(R. 3) Remedy by Aſſiſe of Souvent Diſtreſs.

1. IN Aſſiſe, the *Defendant ſaid that the Plaintiff himſelf is ſeiſed* &c. to which the *Plaintiff ſaid, that the Defendant claimed Seigniory in his Land, and had diſtrained him by Beaſts of his Plough, and by Souvent Diſtreſs*, ſo that he could take no Advantage of the Land; The *Defendant ſaid, that the Land was held of him in Jure Uxoris by Homage, Fealty, and Eſcuage, and Suit of Court and Rent*, and for the Fealty and Suit he diſtrained. Br. Aſſiſe, pl. 274. cites 27 Aſſ. 51.

2. *And* it was ſaid there by ſome, that Aſſiſe *does not lie by Souvent Diſtreſs, but where the Lord diſtrains*; For *if another diſtrains he may make Reſcous*; And it was held, that it is a *good Plea* for the Plaintiff, in Caſe of Souvent Diſtreſs, *to ſay that he does not hold of him*, but then the Aſſiſe of Souvent Diſtreſs does not lie, by ſome. Ibid.

3. *And* it was ſaid, where *Lord Meſne and Tenant are*, and the *Lord diſtrains for the Services of the Meſne*, the *Tenant may ſay that Riens Arrear* in the Aſſiſe; Contra in Replevin; Quære of the Souvent Diſtreſs; for the Plaintiff dared not demur. And hence it ſeems that he thought that the Aſſiſe did not lie of Souvent Diſtreſs but where the Lord of whom &c. diſtrains. Ibid.

4. *For Suit* the Souvent Diſtreſs is maintainable, for this cannot be extended to any Value, Quære of *Fealty*; For by ſome the ſame Law of Fealty, but Rent is valuable in certain. Br. Diſtreſs, pl. 33. cites 27 Aſſ. 51.

In Aſſiſe, the *Tenant ſaid, that the Plaintiff himſelf is ſeiſed of the Frankteneement*; Judgment of the Writ; The *Plaintiff ſaid, that the Defendant had diſtrained him by Souvent Diſtreſs*, ſo that he could not plough his Laud, and prayed the Aſſiſe; to which the *Defendant ſaid, that the Plaintiff held of him by Homage Fealty, and Suit of Court*, for which Services he had diſtrained; Judgment if Aſſiſe; For, *for Homage the Diſtreſs cannot be ſaid exceſſive*; And the Plaintiff ſaid that he held of J. who held over of the Defendant by 12 d. and as to this Riens arrear, and prayed the Aſſiſe, and the Aſſiſe awarded, and by the Opinion of ſome of the Juſtices, *Aſſiſe does not lie for Souvent Diſtreſs where the Lord diſtrains for Homage Fealty or Suit* Br. Aſſiſe, pl. 291. cites 28 Aſſ. 50. —— 4 Rep. 8. a. Mich. 17 & 18 Eliz. C. B. Bevil's Caſe, S. P. held accordingly, and cited S. C. and 11 H. 4. 2. a. 42 E. 3. 46. a. and Br. Diſtreſs, 80.

5. If the Lord, or other Man who has a Rent iſſuing out of the Lands, do *often diſtrain for the Rent or Service where none is behind*, the Tenant may have Aſſiſe for this Diſtreſs by the Common Law; and that Aſſiſe lies between the Lord and the Tenant, or between the Lord Paramount and the Tenant Paravail, as appears 27 Aſſ. 51. But it ſeems reaſonable, that the Tenant have the Aſſiſe of Souvent foits diſtrained againſt him who claims a *Rent-charge* out of the Land; tamen quære. F. N. B. 178. (I)

6. Aſſiſe of Souvent Diſtreſs *lay at Common Law*, in which the *Writ ſhall be general, and the Count ſpecial*, that the Lord Souvent foits diſtrained &c. and *Judgment* ſhall not be that the Demandant recuperet Seiſinam, for he has that, but *quod teneat abſque multiplici Diſtrictione*. 8 Rep. 50. a. b. Mich. 6 Jac. C. B.

(R. 4) Several Diſtreſſes for the ſame Thing. Lawful in what Caſes.

The Word (not) is omitted in the Editions of Brook, and therefore miſprinted.

1. WHERE the *Lord* comes to diſtrain, and *takes an Ox, which is* [*not*] *Sufficient for the Rent arrear*, and then there are *no more Beaſts there*, he *may come at another Time and take a Cow*, and *at another Time and take another Cow*, and *at another Time another Cow*, till he has ſufficient Diſtreſs. Br. Diſtreſs, pl. 96. cites the printed Abridgment of Aſſiſes, Tit. Bar.

2. In Replevin the Defendant avowed; the *Plaintiff pleaded Hors de ſon Fee* &c. and *pending this Iſſue the Defendant cannot diſtrain again*; Quære; For it is ſaid elſewhere, that pending an Aſſiſe, if a Man diſtrains he ſhall abate his Aſſiſe; But contra of Replevin. Br. Diſtreſs, pl. 62. cites 18 R. 2. and Fitzh. Recaption 8.

3. Where a Man *takes Diſtreſs for Rent, and upon Avowry has Return irrepleviſable*, if *a Beaſt dies in the Pound*, now he may diſtrain anew; for the Sum of Rent, or Valuation of the Damage, is not adjudged to the Avowant in the Replevin, and then the Beaſt taken by him in Execution, but where he had taken the Beaſts by Diſtreſs, and that is replevied from him. Now upon the Right of diſtraining appearing the Beaſts are reſtored unto him in that State as they were before, to remain with him as a Diſtreſs lawfully taken by Judgment of the Court, and not to be replevied, be it in Kent-Service, or Rent-Charge, or Damage-Feaſant, that he may diſtrain and retain till the Rent or Damage be ſatisfied, ſo that even as *if the Beaſt had died before Judgment* he might have diſtrained again, So *after Judgment*, for it is alike in both Caſes; Per Hobart Ch. J. Hob. 61. cites 14 H. 4. 4. 15 E. 4. 10.

4. In Reſcous, where *Return of Beaſts is adjudged* to a Man this is no Payment of the Rent, but only a Pledge, till he be ſatisfied or paid the Rent; For if the *Beaſts die in the Pound* he may diſtrain de novo; per Brian, quod nota. Br. Diſtreſs, pl. 22. cites 15 E. 4. 10.

Br Avowry, pl. 139. cites S.C.

5. Lord and Tenant by Fealty and 3 *d. Rent*, the Lord dies, the *Feme is endowed* of the Seigniory, the Feme of the Lord *may diſtrain for* 1 *d. and the Heir for* 2 *d.* and ſo now the Tenant is cherged with two Diſtreſſes where he was charged but with one before; but this is not inconvenient, for he pays no more Rent than he paid before. Br. Diſtreſs, pl. 59. cites 24 H. 8.

6. *So* where *a Seigniory* is *divided by Partition between Heirs Female* &c. Br. Diſtreſs, pl. 59. cites 24 H. 8.

7. If for 10 *l. Rent* due at one Day, a Man *diſtrains Goods of the Value of* 40 *s. only*, and *at the Time of the taking* the Diſtreſs *there are Goods of a ſufficient Value* upon the Premiſes, he cannot for the ſame Rent diſtrain again; for it is his Folly that at the firſt he diſtrained no more; adjudged. Mo. 7. pl 26. Mich. 3 E. 6. Anon.

8. But if there be *Rent in Arrear at ſeveral Days*, a *Diſtreſs may be taken for what was due at one of the Days, and after* a Diſtreſs may be taken *for what was due at the other Days*; Per Brown. Mo. 7. pl. 26. Mich. 3 E. 6. Anon.

D. 280. a. Marg. pl 14. cites it as ſo agreed per Cur 7 Jac. C B. For they are to be impound-

9 In a *Repleg' the Plaintiff is Nonſuit*, and the *Defendant had Retorn, and the Plaintiff ſued a ſecond Deliverance, and is alſo Nonſuit* upon that, by which the Defendant is to have a Retorn irrepreviſable; but whether the Defendant ought to avow, ſhewing the Certainty of the Place, Day, and Beaſts, in order to have a Writ of Inquiry of Damages, was doubted. Divers thought he need not, but that he might

might juſtify the detaining till the Plaintiff offered ſufficient Amends for his Damages, others held he might work the Beaſts, but others e contra; becauſe he had not a Property in 'em but as a Gage; And he may *put them again into the common Pound, and if they die there he may take another Diſtreſs for the firſt Cauſe*, inaſmuch as he was never ſatisfied. D. 280. pl. 14. Mich. 10 & 11 Eliz. Anon.

ed again, and cites 19 E 2 Replevin 26.

10. If one *takes Trop petit Diſtreſs for Rent*, and after *takes another Diſtreſs for the ſame Rent*, this is not good, for he cannot avow two Diſtreſſes for the ſame Rent; for it was his Folly that he took not a better Diſtreſs at the firſt; But Nota in the Abridgment of the Aſſiſes it was ſaid, That *if there be not ſufficient Diſtreſs when he diſtrained he may diſtrain again.* Cro. E. 13. pl. 8. Hill. 25 Eliz. C. B. Anon.

Mo. 7. pl. 26. Mich. 3 E. 6. Anon. S. P. held accordingly. And per Montague, Recaption lies for the ſecond Diſtreſs. —— 2 Lutw 1536 cites ſame Caſes and S P. adjudged accordingly.; And the Reporter adds a Quære if the ſecond Diſtreſs had been juſtifiable, admitting it had been pleaded that at the Time of Caption of the firſt Diſtreſs there was not ſufficient upon the Land demiſed and that the firſt Diſtreſs was not but of ſuch a Value &c.

11. By *Act of the Party* the Tenant ſhall not be made liable to two Diſtreſſes, though by *Act in Law* he may. Cro. E. 742. pl. 18. Hill. 42 Eliz. C. B. in Caſe of Wotton v. Shirt.

12. 17 *Car.* 2. *cap.* 7. *S.* 4. *Where the Diſtreſs ſhall not be found to be to the Valuc of the Arrears, the Party, his Executors or Adminiſtrators, may diſtrain again for the Reſidue.*

By 19 Car 2. cap. 5. this Act is made to extend to Wales and Counties Palatine. —— It was a Miſchief before this Statute, that in Caſe a Diſtreſs was too little one could not diſtrain again (be the Demand never ſo great) but the other might plead Levied by Diſtreſs which ſhews that Diſtreſſes could not be ſplit; Per Holt Ch. J. Comb 346. Mich. 7 W. 5. B. R. Johnſon v. Bane.

13. In Treſpaſs for taking 10 Beaſts 1 Apr. and alſo for taking 12 more on the ſaid firſt Day of April; The Defendant pleaded, that the Plaintiff had a Leaſe granted to him rendering Rent, and that there *was* 70 *l. Rent in Arrear*, and that he (the *Defendant*) *did take the firſt* 10 *Beaſts for* 60 *l. Parcel* of the ſaid 70 l. *and the other* 12 Beaſts *afterwards for* 10 *l. Reſidue* of the ſaid 70 l. and upon a Demurrer to this Plea it was adjudged ill; for one cannot avow for two Diſtreſſes made for one and the ſame Rent; it was the Defendant's Fault to diſtrain too little at firſt. But the Reporter tells us, that if the Defendant had *pleaded, that at the Time of the taking the firſt Diſtreſs there was not ſufficient to be taken for the whole Rent* upon the Land, and that the firſt Diſtreſs was but only of ſuch a Value, it had been good. 3 Salk. 137. pl. 6. Mich. 8 W. 3. C. B. Anon.

2 Lutw 1532 1536. Trin. 15 W. 3. Wally and Savil S P. adjudged that the ſecond Diſtreſs was not lawful.

14. If Diſtreſs for *Damage-Feaſant dies in a Pound or Eſcape* the Party ſhall not retake them, *but* if it were *for* * *Rent*, in either Caſe he may diſtrain de novo; and Eſcape of Cattle out of Pound is not like Eſcape of Priſoner out of Gaol; For if Pound be not good, the Diſtrainant may be his own Keeper, and put them in his own Pound, but he cannot be Keeper of his Priſoner, and every Pound-Keeper is the Servant of him who impounds the Cattle pro hac vice; per Holt. 12 Mod. 397. Paſch. 12 W. 3. Anon.

* S. P. per Powis J. or he may bring *Debt*. 12 Mod. 663.

15. If *Cattle diſtrained die in the Pound* the Diſtrainor may diſtrain again if the Diſtreſs was for Rent. Arg. Ld. Raym. Rep. 720. cites Dr. and Stud. cap. 27.

(S) *How* it is to be taken.

Notice for what a Diſtreſs is taken.

1. IF the Lord diſtrains for Rents or Services he need not give Notice to the Tenant for what Thing it is he diſtrains it; for the Tenant by Intendment of the Law knows what is in Arrear from his Land. 45 E. 3. 9.

2. The ſame Law is if the Lord diſtrains for an Amercement in a Leet. 45 E. 3. 9.

3. A *Bailiff* who diſtrains *ought to ſhew in whoſe Right* he diſtrains. Br. Diſtreſs, pl. 77. cites 7 H. 4. 28.

Br. Covenant, pl. 30. cites S. C.

4. The King may diſtrain *for his Debt or* for a *Thing granted by Parliament, though no Clauſe of Diſtreſs be expreſſed* in the Act of Parliament thereof. Br. Diſtreſs, pl. 51. cites 17 E. 4 6.

5. If the *Bailiff* upon the Diſtreſs ſhews the Cauſe and Reaſon of it he cannot afterwards *vary* from it, but the other Party may trick him by Traverſe. But if he diſtrain'd generally without ſhewing Cauſe, he may ſhew what Cauſe he will, and the other Party ſhall anſwer to it. And when a Bailiff diſtrains, he ought, if he be requir'd, to ſhew Cauſe of his Diſtreſs, but if he be *not requir'd* then he is not tied to do it. 'Le. 50. pl. 64. Paſch. 29 Eliz. C. B. Buller's Caſe.

The Perſon diſtraining muſt give *Notice* but need not be immediately, but *at any Time* after the Diſtreſs.

6. *2 W. & M. Seſſ. 1. cap. 5. S. 2. For ſelling Diſtreſſes for Rent in five Days if not replevied, requires five Days after the Diſtreſs taken, and Notice thereof with the Cauſe of taking left at the Manſion Houſe or other moſt notorious Place in the Premiſſes.* But then the five Days are to be computed from the Notice. The Notice ought to be *in Writing*, though the Act doth not in expreſs Words require it, yet the Nature of the Thing doth, for Notice is to be left at the moſt notorious Place, which can never be intended a *Parol* Notice. The Notice ought to contain the *Party's Name, from whom* ſuch Diſtreſs is made, the *Name of the Land* or Farm, or ſome general Diſcription of the Thing out of which the Rent iſſues, and the *Quantity of Rent in arrear and when due*; and it is adviſable to name the Time *when the Diſtreſs was taken*, and the *Place where it is carried*; That the Tenant or Owner may know where to reſort to make his Replevin. (All which ſeems to be the Intention of the Act, in requiring Notice, with the Cauſe of taking.) Sir Barth. Shower's Obſervations on this Statute.

Perſonal Notice anſwers the Meaning of the Statute, though it appoints

7. *Perſonal Notice* is *ſufficient* for Notice is the Thing required. Notice to the Owner is ſufficient againſt him in Trover; but if the Tenant had brought Replevin, that would not have ſerved as to him, but he muſt have had Notice alſo. Per Cur. 1 Salk. 247. pl. 1. Trin. 7 W. 3. B. R. Walter v. Rumball.

local Notice; For Perſonal Notice is better; Per Holt Ch. J. Comb 336. in S. C.——Notice to the Owner is ſufficient, but if not it ſeems to be ſupplied after a Verdict by the Words Juxta Formam Statuti Notitiam dedit &c. And it ſeems to be at the Election of him who diſtrains to give Notice either to the Tenant or to the Owner of the Goods; Per Cur. 4 Mod. 390. 395. S. C —— 12 Mod. 76. S. C. and per Cur. the Intent of the Statute was only to give a certain Notice, and ſeeing that in this Caſe they have gone further than the Letter of the Act a Perſonal Notice muſt needs be ſufficient. And though the Notice was given to the Owner only of the Goods, and not to the Tenant in Poſſeſſion, the Court held Notice to either ſufficient, the Words of the Statute are in the Disjunctive. —— Ld. Raym. Rep. 53. S. C. and ſame Points held accordingly. But if the Owner had ſued a Replevin then the Notice muſt have been given to him.

8. The Notice may be *to the Party, or left at the chief Manſion-Houſe*; if *no Perſon there* affix it on the fore Door of the Houſe; if more Houſes than one, at the Chief or Beſt. If *no Houſe, but Barn or Stable*, at the Door thereof; At the Gate or *moſt common Entrance into a Field* or Wood

Wood. If in a *common Field*, where neither Hedge, Gate or Tree, then affix a Stick at the moſt uſual Entrance, with the Notice on it. Sir Barth. Shower's Obſervations on the Statute 2 W. & M.

9. Upon the 2 W. & M. cap. 5. Notice of the taking the Diſtreſs is ſufficient when it is given *to the Party himſelf*, as if he be met with at any Place; and ſuch Notice *ſaying that the Diſtreſs was taken for Rent due at Michaelmas laſt without particularly mentioning the Quantum* was held ſufficient per Trevor Ch. J. C. B. at the Sittings. Mich. Vac. 11 Ann. Cheſterfield (Earl) v. Farringdon, & al'.

For more of Diſtreſs in General, See **Avowry**, **Rent**, and other proper Titles.

(*Donatio cauſâ Mortis. See tit. Executors Z. 4. v. 11. p. 176.*

Donative.

(A) Original.

1. DONATIVES *beban* only by the Foundation and Erection of the Donor, and as the Incumbent comes in by the Donor, ſo he may *reſign it* to him, and this determines his Incumbency. Cro. J. 63. Paſch. 3 Jac. B. R. Fairchild v. Gayer. It began by the Conſent of all Perſons who had any Manner of Intereſt, viz. the Ordinary and Pariſhioners Per Popham Ch. J. Yelv. 61. ——— It is a *Lay Foundation* as it is ſaid 2 Roll. 343. ——— It is of the Foundation and Erection *of the Doner* not by the Ordinary. Per Eyre J. Show. 499.

2. Donatives are *either by Royal Foundation or by Royal Licence, or* by *original Agreement with the Ordinary*. 3 Salk. 140.

(B) Conſidered How.

1. BENEFICE Donative by the Patron only *is a Lay Thing* and *the Biſhop ſhall not viſit*, and therefore ſhall not deprive, and then *if he meddles* in it *he is in the Caſe of Premunire* by ſome. Br. Premunire, pl. 21. cites 8 Aſſ. 29. And in this Caſe was Barlow Biſhop of Bath in the Time of E. 6. and was compell'd to obtain a Pardon, inaſmuch as he had deprived the Dean of Wells, which was Donative by Letters Patents of the King by Act of Parliament made thereof, but 8 E. 3. above is not adjudg'd.

2. Donatives uſually *paſs as Lay Fees*, and the paſſing of them as Lay Fees alters not the Nature of the Chapels. Arg. Sty. 81. Hill. 23 Car. in Caſe of Rawſon v. Bargue.

(C) Power

(C) Power of the Patron.

1. THE Donative *Patron* when the Church is *void* may take the *Profits to his own Uſe* if the Pariſhioners will pay them, till a new Incumbent is made. Arg. 2 Roll Rep. 100. cites Fitzh. Aide 103. 6 H. 7. 14. but he has no Remedy to compel them to pay the Tithes to him.

2. A Donative cannot fall in *Lapſe*, but the Patron may loſe the Profits if he will, but if any take the Profits from him, he cannot maintain the Action; but he ought to put in his Clerk and he maintain the Action. Arg. Cro. J. 518. cites 33 E. 3. Aid 107. 6 H. 7. 14. 17 E. 3. 45.

3. Incumbent of a Benefice Donative may *reſign* to his Patron, and it being of the Foundation of his Patron is alſo of his *Viſitation* and Corection, and the Ordinary has nothing to do with him. Mo. 765. pl. 1062. Paſch. 3 Jac. B. R. Fairchild v. Gayer.

And where there are *two Patrons* a Reſignation *to one* only is good.

For it enures to both as a Surrender ſhall do, eſpecially where they both conſent thereto and grant it de Novo as here they did. Cro J. 63. S. C. —— Reſignation by the Word of *Eccleſia* is ſufficient, and extends to all the Poſſeſſions. Cro. J. 64. S. C.

4. The Patron cannot *preſent a Layman*. Per 3 Juſtices againſt Popham Ch. J. Yelv. 61. Paſch. 3 Jac. B. R.

(D) Power of the Ordinary.

1. WHERE it is Donative by the Founder and his Heirs *the Ordinary cannot Viſit it, and when* a Free-Chappel Donative is *void* the *Founder may retake it and not appoint another Incumbent*, contra of a Preſentative. Br. Preſentation, pl. 43. cites 6 H. 7. 14. Per Keble.

2. Note, that the Ordinary cannot viſit a Free Chapel Donative. King E. 1. had divers Chapels which his Commiſſioners ſhall viſit and not the Ordinary, *but thoſe which have Cure of Souls ſhall be viſited by the Ordinary*; Per Keble. Br. Depoſition, pl. 9. cites 6 H. 7. 14.

Contra if it be with Cure of Souls. Arg. ſays the Biſhop may compel Parl. Caſes 176. cites Cro. Car. 330. 2 Roll 331.

3. If the Patron of ſuch a Donative *will not collate* there is no Remedy to compel him; and he may in Time of Vacation take all the Profits and ſue for the Tithes in the Spiritual Court; per Popham, but denied by the reſt. See Yelv. 61. Paſch. 3 Jac. B. R. Fairchild v. Gaire.

—— It was ſaid by Counſel that in Caſe of a Donative the Ordinary might compel the Patron to put in a Clerk. But Holt Ch. J. ſaid, He cannot. Holt's Rep. 659. ——— The Biſhop may compel the Patron *by Eccleſiaſtical Cenſures*, to nominate a Clerk Wood Inſt. 265.

The Parſon of a Donative is liable to the Eccleſiaſtical Juriſdiction, as he is a Member of the Eccleſiaſtical Body,

4. The Parſon of a Donative is privileged from the Juriſdiction of the Ordinary in reſpect of the Place, but if he *preach Hereſy* the Patron may Commiſſion and *examine* the Matter, and thereupon ouſt and deprive him, and ſo it happened in **Covert's Caſe**, as Gawdy and Wms. J. ſaid, wherein the Biſhop of Winchester was the Donor of ſuch a Donative. Brownl. 202. Paſch. 3 Jac. B. R. in Caſe of Fairchild v. Gayer, cites 13 E. 4.

for perſonal Offences, though for Matters relating to the Church he is exempt; and therefore the Spiritual

Spiritual Court ought not to deprive him; but for Drunkenneſs or preaching Hereſy they might cenſure him. 2 Ld. Raym. Rep. 1206. Mich. 4 Ann. in the Caſe of Colefatt v. Newcomb, ſaid by the Reportet in a Note at the End of the Caſe to have been told him by Mr. Mead and Mr. Salkeld, that they had known the ſame Diſtinction taken by the Ch. Juſtice, and the Reporter ſays, that that ſeems upon the Conſideration of the Caſe in Yolv. to be the better Opinion.

5. The *Rectory* only is *exempt* from the Juriſdiction of the Ordinary, *and not the Patron*, and this goes as well to the Charges to be taxed upon the Church by the Ordinary, Attendance in Viſitations &c. Per three J. Yelv. 61. Paſch. 3 Jac. B. R. in Caſe of Fairchild v. Gayer.

6. Ordinary may *ſequeſter* a Church Donative if the *Patron does not preſent*, and the Incumbent thereof may be *deprived*. Arg. Roll Rep. 453. cites 3 Jac. Gaer v. . . . .

7. The Incumbent of a Donative *of the King* is not *viſitable or deprivable* by any Eccleſiaſtical Authority, but *by the Chancellor or by Commiſſioners under the Great Seal*. 12 Rep. 41. Mich. 5 Jac. in the Exchequer, in Nich. Fuller's Caſe.

8. If the Biſhop go about to *viſit* a Donative this Court of B. R. will grant a *Prohibition*; Per Hale Ch. J. Mod. 90. pl. 56. Mich. 22 Car. 2. B. R. Anon.

9. The Incumbent of a Donative was *cited* in the Spiritual Court *to take a Licence from the Biſhop to preach*, and the Pretence was that it was a Chapel, and that the Parſon was Stipendiary; And per Cur. If it is a Donative and the Biſhop will viſit, a *Prohibition* ſhall be granted. 3 Salk. 141. pl. 3. Anon.

The Ordinary in this Caſe cannot puniſh him for preaching without a Licence,

but he may proceed to cite him, to convict him for ſo doing. If he preach any Thing againſt the Doctrine of the Church, or marry without Licence, the Ordinary may proceed to puniſh him; *A Prohibition was granted as to the Suſpenſion, and* the *Spiritual Cenſures*, and putting him out of Poſſeſſion; but *not as to certifying to the Juſtices* for preaching without a Licence; Per Holt Ch. J, Holt's Rep. 659. Mich. in Caſe of Bewick v. Twiſden.

10. As to Ley's Opinion in Davis 47, that a Sentence of *Deprivation by an Ordinary* was effectual in Law till reverſed, it is not Law; For it is all Coram non Judice, cites Br. Ptæmunire. 21. F.N.B. 42. The Ordinary cannot *viſit* a Boneſice Donative. Arg. Parl. Caſes 53. in Caſe of Philips v. Bury,

15. per Curiam obiter. Paſch. 21 Car. 2. B. R.

Donatives which are conferred by Laymen are Sine-Cures. Vent.

11. Though Donative be *exempted from the Ordinary's Juriſdiction* the Clerk of it is not, who may be puniſhed by Eccleſiaſtical Cenſures, but not to Deprivation. 12 Mod. 640. Hill. 13 W. 3. Finch v. Harris

12. *Libel in the Spiritual Court*, for that J. S. being the Parſon of &c. did make himſelf drunk at the Sacrament, and that he was a Whoremaſter; and upon Suggeſtion that they would proceed to *Deprivation, and that the Beneſice was a Donative*, a *Prhibition* quoad the Suing in order to deprive was granted, but not quoad the other Matter. Farr. 31. Trin. 1 Ann. B. R. Anon.

13. The Ordinary *has a Power as to the Parſon of a Donative, tho' not to the Place*; For if the Parſon marries without a Licence, or *commits any Miſdemeanor*, the *Ordinary may puniſh him* in that Reſpect, *but he cannot regulate the Seats in the Church*. And *if the Patron will not preſent the Ordinary may compel him*; and the *Parſon is exempt from Attendance at Viſitations*; Per Holt Ch. J. 3 Salk. 140. pl. 1. Anon.

2 Ld. Raym Rep. 1206. Mich. 4 Ann. in Caſe of Colefatt v. Newcomb. Powell J.

ſaid he had known Prohibitions denied frequently to Suits againſt Parſons of Donatives for marrying without Licence.

5. A Miniſter of a Donative was *ſued in the Eccleſiaſtical Court, becauſe when he read Prayers he did did not read the whole Service*, but left out what Parts of it he thought fit, and for *preaching without a Licence*. Powell J. (abſente Holt) took a *Difference where the Suit* in the Eccleſiaſtical Court *is in order to the Deprivation and where only for Reformation of Manners*; that *in the firſt Caſe the Court will prohibit, but not in the laſt*; and therefore in this Caſe if the Spiritual Court proceeded to Deprivation, the Court would prohibit them but not till then. 2 Ld Raym. Rep. 1205. Mich. 4 Ann. Coleſatt v. Newcomb.

(E) Right of the Patron preſerved; In what Caſes.

1. ADmiſſion and Inſtitution of a Clerk preſented to a Donative vacant by a *Stranger* is no *Uſurpation* to the true Patron, but it is all utterly void. Co. Litt 344.

Show. 415. S. C. and S P. —— Arg Parl. Caſes 176.

2. In Caſe of a Donative, if the King makes *the Incumbent a Biſhop*, he ſhall not preſent, for they are not incompatible. Cumb. 302. Mich. 6 W. & M. in B. R. Obiter. in Caſe of The King v. Dr. Birch.

S. C. —— —— A Donative with Cure of Souls will be *void by Promotion* of the Incumbent. Arg. Show. 415. cites Yelv 61. and 2 Roll. 341. that the King ſhall not preſent to a Donative on the Promotion of the Incumbent, was admitted by all in Caſe of the King v. Dr. Birch. —— In the ſaid Caſe it is given as the Reaſon by S. Eyre J. That a Donative makes no Figure in the Order and Oeconomy of the Church, and a Biſhoprick and a Donative are compatible. Show. 499.

(F) Deſtroyed.

Cited Parl. Caſes 181. in the Caſe of the King v. Doctor Birch.

1. ADmiſſion and *Inſtitution* is not requiſite in caſe of a Donative, but if to ſuch a Donative the *Patron preſents* to the Ordinary, and ſuffers Admiſſion and Inſtitution thereupon, he thereby has made it always preſentable. Cro. J. 63. pl. 1. Paſch. 3 Jac. B. R. Fairchild v. Gayer.

2. Preſentation may *deſtroy* an Impropriation, but not a Donative, becauſe the Creation thereof was by Letters Patents, whereby Land is ſettled to the Parſon and his Succeſſors, and he to come in by Donation; Per Holt and Powell. 4 Salk. 541. pl. 3. Mich. 1 Ann. B. R. Ladd v. Widow.

For more of Donatives in General, See **Preſentation**, and Watſon's Compleat Incumbent.

See also tit. Donative in Bunn's Eccles. L. & the cases in 3. Wils. 355. & 1. Term Rep. 396.

Double

Double Pleas.

(A) Double Plea. What is.

1. IN Account, the *Tenant ſaid that he is within Age, and was within Age at the Time of the Receipt*, and held double, but this is to the Action. Thel. Dig. 214. lib. 15. cap. 3. S. 6. cites Paſch. 16 E. 3. Accompt 52.

2. In Writ upon the *Statute of Labourers*, the Defendant *ſaid, that he was the Apprentice of the Plaintiff, and the Plaintiff would not inſtruct him in his Myſtery, but beat him*; Judgment of the Writ, and held double, by which he held him to this, that he was his Apprentice, and not his Servant &c. Thel. Dig. 215. lib. 15. cap. 3. S. 20. cites Mich. 39 E. 3. 28.

3. *Prior would have avoided the Fine of his Predeceſſor, becauſe he was dative and removeable*; The *Defendant ſaid, that he had the Moiety of an Advowſon for the Annuity in demand, and alſo that he had a Common Seal, and is perpetual.* And per Thirn, this is double, viz. *the Moiety of the Advowſon*, and that it is *perpetual.* Br. Double, pl. 128. cites 11 H. 4. 69.

4. In Writ upon the Statute ſuppoſing the *Foreſtalling* to be *in the Port of Ciceſter*; The Defendant *ſaid that the Port of Ciceſter is no Vill, nor Hamlet, nor Place known &c. but a Place which extends itſelf into diverſe Vills* &c. and held double; by which the Defendant held himſelf to this, that it extended itſelf into divers Vills, and this laſt Plea held good. Thel. Dig. 215. lib. 15. cap. 3. S. 19. cites Paſch. 7 H. 6. 24. 37.

5. If the *King confirms W. N. in the Advowſon of D. and wills by the ſame Patent that he ſhall not be thereof vexed nor troubled*, and *he pleads it accordingly*, yet this is not Double; Per Cur. Br. Double Plea, pl. 117. cites 32 H. 6. 21.

6. If a Man *pleads Deviſe of Goods, and that he took them by Command of the Executor*, this is not Double; For the one cannot be without the other; For the Deviſee cannot take them without Command to take, or by Delivery of them to him made. Contrary of Gift of Goods; For the Donee may take them. Br. Double Plea, pl. 140. cites 37 H. 6. 30.

7. *Several Cauſes of Suſpicion of Felony* are not Double; For it is only a *Conveyance to prove the Cauſe to arreſt him.* Br. Double, pl. 148. cites 2 E. 4. 8.

8. Note, per Brian, if a *Man makes two Attornies in one and the ſame Action conjunctim & diviſim*, they ought to join in Plea; For if they *ſever in Plea* it ſhall be ſaid Double; Quære. Br. Double, pl. 156. cites 12 H. 7. 10.

9. In *Caſe againſt a Sheriff*; The Plaintiff *declared that an Execution was directed to him, by Virtue whereof he had taken Goods to the Value of the Debt, and had ſold them, and had not returned the Writ.* Defendant demurred,

demurred, alleging that it was Double ; but per Cur. if *the one Matter is depending on the other*, the Declaration ſhall not be Double, and here all is for not returning the Writ. Gouldsb. 96. pl. 13. Trin. 30 Eliz. Matthew's Caſe.

10. *Inducement* does not make a Plea Double. Goldsb. 88. pl. 13. Paſch. 30 Eliz. White's Caſe.

11. Whether, where the *Words in a Deed* are *ſufficient to paſs a Thing by ſeveral Means*, and they are *pleaded generally without ſhewing any Election* which way the Thing paſſes, this be a Double Plea was doubted. Skin. 63. pl. 7. Mich. 34 Car. 2. B. R. in Caſe of Pauling and Hardy.

12. Where *Matter of Fact and Law* is aſſigned for Error it is Double, and Plaintiff may have Advantage of it on a Demurrer, but after In nullo eſt Erratum pleaded it is too late. Carth. 338. Hill. 6 W. 3. B. R. Edmonds v. Probert.

As to *Agreement.*

13. Note, by the beſt Opinion, that where a *Man ſuppoſes that he retained a Carpenter to make a Houſe, and that the Carpenter aſſumed to do it* &c. *or* that he *retained ſuch a Servant to ſerve* &c. to *which &c. the Servant agreed*, this is not Double ; For it is no Bargain unleſs both Parties aſſent. Br. Double, pl. 116. cites 11 H. 6. 18.

14. And per Newton, a Man may *aver all Matters agreed in an Aſſumption in one and the ſame Action.* Br. Double, pl. 116. cites 11 H. 6. 18.

15. As a Man may declare of *all the Covenants in one and the ſame Indenture*, and it is not Double ; Quod non negatur. Br. Double, pl. 116 cites 11 H. 6. 18.

Annuity.

16. *Annuity* was granted *pro Conſilio & Auxilio habend'* ; The *Defendant ſhewed that he had demanded Counſel and Aid of the Plaintiff, who was a Phyſician, and he would not give it* ; and it was held that the Demand de Conſilio & Auxilio is not Double ; For *the one depends upon the other.* Br. Double, pl. 20. cites 41 E. 3. 6.

Aſſiſe.

17. In Aſſiſe the *Tenant pleaded Fine upon Grant and Render of the Anceſtor of the Plaintiff to two with Warranty, and that the one releaſed to the other, who infeoffed the Tenant* ; Judgment &c. and *relied upon all the Fine and Warranty*, and admitted. Br. Double, pl. 38. cites 38 E. 3. 34.

18. *So* of a *Deed with Warranty.* Br. Double, pl. 38. cites 38 E. 3. 34.

19. *Contra* it is ſaid elſewhere *of Feoffment with Warranty* ; for the Feoffment may be without Deed, and the Warranty by Deed. Br. Double, pl. 38. cites 38 E. 3. 34

20. In Aſſiſe, the *Tenant pleaded the Deed of the Great Grandfather with Warranty to W. P. who infeoffed J. who infeoffed the Tenant* ; Judgment &c. The *Plaintiff ſaid, that after this his Great Grandfather was ſeiſed, and died ſeiſed, and his Grandfather entered, and died ſeiſed, and he entered as Heir, and was ſeiſed, and diſſeiſed by the Defendant*, and relied upon the dying ſeiſed of his Great Grandfather, and nevertheleſs well, and otherwiſe Double. Br. Double, pl. 37. cites 38 E. 3. 21.

21. *Aſſiſe of Rent* ; the *Tenant ſaid, that A. brought Aſſiſe of other Land againſt B. Father of J. which Deed of Grant of the Rent is now ſhewn, and recovered the Land and Damages, and took Elegit for Execution of the Damages, and had the Moiety of the Land put in View in Execution, and pleaded all in certain*, (as he ought) *and after A. who recovered leaſed his*

his Eſtate to the now Tenant, and after B. granted the Rent charge now in Plaint to the Plaintiff his Son and Heir apparent, and after B. granted, ratified, and confirmed to the now Tenant for Term of their Lives, and after B. by his Deed ſhewn &c. *releaſed all his Right to the Tenant, and warranted the Land to him and died, and ſo demanded Judgment, becauſe the Plaintiff as Heir of B. the Grantor is bound to warrant the Land diſcharged, if againſt the Deed of your Anceſtor Aſſiſe ought to be, and averred that Execution is not yet incurred, and* it was held Double, viz. *the Execution before the Charge*, and the *Releaſe with Warranty*, by which he relied upon the Releaſe with Warranty. Br. Double, pl. 87. cites 31 Aſſ. 13.

22. In Aſſiſe, *Leaſe for Term of Life*, and *Releaſe of the Leſſor with Warranty*, was admitted for a good Plea, and it was not excepted for the Doubleneſs; For it ſeems that it *is only Conveyance*, but the *Plaintiff was not Heir to the Warranty*; For this countervails Feoffment with Colour. Br. Double, pl. 142. cites 37 H. 6. 16.

23. In Aſſiſe, the *Tenant pleaded a Gift in Tail, and Confirmation in Fee*, this is Double. Br. Double, pl. 110. cites 30 H. 6. 9 E. 4. 4.

24. In Aſſiſe, the *Tenant pleaded in Bar that J. S. was ſeiſed, and leaſed to A. for Life, and after granted the Reverſion to his Father, and the Tenant attorned and died, and the Father entered and died, and the Tenant entered as Heir*, and gave Colour; and per Cur. this *Grant of the Reverſion*, and the *Entry of the Heir* upon this Title are Double, though he does not plead it as a Dying Seiſed; For if the Father was diſſeiſed and died, and he re-entered, he is in as Heir, and the Entry of another toll'd, and ſo Double, by which he relied upon the Grant of Reverſion. Br. Double, pl. 29 cites 9 H. 4. 4. 5.

25. And there it was agreed, that where the *Plaintiff alleges a Dying Seiſed* after, and the *Tenant alleges a Continual Claim in his Father, and another in himſelf after the Death of his Father*, it is Double, by which he held him to the Claim of his Father. Br. Double, pl. 29. cites 9 H. 4. 4. 5.

26. *So* of a *Leaſe for Life and a Releaſe*, it is Double; for the one of the Matters with Colour to the Plaintiff makes a good Bar; So of a *Grant of the Reverſion* in Aſſiſe, *and after the Tenant ſurrendered, and the Grantee died ſeiſed*, this is Double; For the dying ſeiſed is ſufficient. Br. Double, pl. 110. cites 30 H. 6. and 9 H. 4. 4.

27. But *where the Contention is between the Heir of the Donor or Grantor, and the Tenant upon the Execution of the Fee ſimple*, there *he may plead both*, and it is not Double; For he cannot do otherwiſe. Br. Double, pl. 110. cites 30 H. 6. and 9 H. 4. 4.

28. *In Aſſiſe, and* divers *other Actions of Treſpaſs two Deſcents* are Double; *But* it is ſaid there, that *in Formedon* it is otherwiſe; for there the *Gift* only is traverſable, and not the *Deſcents*. Br. Double, pl. 16. cites 33 H. 6. 32.

29. In *Aſſiſe*, the *Tenant pleaded Fine levied by the Anceſtor of all in Demand, and concluded to the Moiety, and pleaded Recovery or Releaſe of the Anceſtor of the Whole, and concluded to the other Moiety*; Judgment if Aſſiſe, and it was challenged for Doubleneſs, and the beſt Opinion was that it is not Double, unleſs he concludes his Plea to the Whole, quod nota, by which the Plaintiff paſs'd over and made Title. Br. Double, pl. 139. cites 37 H. 6. 23.

30. *Aſſiſe by two of the Office of Clerk of the Crown in the Chancery*, and *to one the Defendant ſaid that he was an Alien born*, and *to the other, that there was no ſuch Office*, and per Cur. the laſt Plea goes to all, and therefore both make it Double; for the laſt Plea goes to both the Defendants, and therefore he has pleaded a Plea to both, and two Pleas a-

gainſt the Alien born, by which he amended his Plea. Br. Double, pl. 152. cites 7 E. 4. 29.

Br. Aſſiſe, pl. 382. cites S. C. —— Jenk. 182. pl. 68. cites S. C. by the Judges in the Exchequer Chamber.

31. In Aſſiſe, the *Tenant ſaid that he himſelf was ſeiſed till by the Plaintiff diſſeiſed, againſt whom he brought Aſſiſe and recovered*, this Plea is not Double, per Huſſey Ch. J. and Fineux, and tot. Cur. conceſſit, and yet he alleged *Seiſin and Diſſeiſin*, and alſo a *Recovery*; but the one is *Conveyance* to the other. Br. Double, pl. 95. cites 9 H. 7. 23.

Audita Querela.

So Defeaſance by Indenture, and *Releaſe of all Actions*, is Double, and therefore he held him to the Indenture, and yet it ſeems that the Releaſe is not good; For Releaſe of Actions ſhall not ſerve for Execution. Br. Double, pl. 123. cites 44 E 3. 36.

32. In Audita Querela, the *Conuſor put two Releaſes*, the *one general*, and the *other of the Sum in the Statute Merchant*, and therefore was compelled to keep to one; For each grows to all. Br. Double, pl. 63. cites 24 E. 3. 27.

Avowry.

33 Avowry *for Rent reſerved between three Siſters for Equality of Partition*, and the *Plaintiff ſaid, that the Place where the Diſtreſs was taken was not Parcel of the Land put in Partition, and that this is in the Seiſin of the King*, and therefore Double; Per Cur. by which he *took the Seiſin of the King by Proteſtation, and the other Matter by Plea*. Br. Double, pl. 2. cites 2 H. 6. 14. 15.

34. Avowry *for Homage and 20 s. Rent*, the *Plaintiff prayed Aid*, and the *Plaintiff and the Prayee joined and ſaid that one A. was ſeiſed of the Seigniory whoſe Eſtate the Defendant has, and one B. was ſeiſed of the Tenancy and of other Land, whoſe Eſtate the Prayee has in the Tenancy, to which B. the ſaid A. then Lord, releaſed all his Right that he had in the Land, rendering 1 d. for all Services*, and demanded *Judgment if for ſeveral Services* &c. and not double, per Martin, viz. The *Releaſe* and the *Tenure of this Land and other by one entire Service*, becauſe he *relies upon the Releaſe*, Judgment if for ſeveral Services &c. quod admittitur &c. Br. Double, pl. 4. cites 3 H. 6. 28.

35. In Avowry the *Defendant avowed becauſe* J. *Lord of the Manor of D. was ſeiſed of the Services* &c. *and Fine ſe levavit between him and one P. upon Conuſance of Right come ceo* &c. *which P. granted and rendered to the ſaid J. for Life, the Remainder over to the Avowant*, and *alleged Seiſin in the Tenement for Life who is dead, and in him in Remainder who now avows*, and the Avowry was held double, becauſe he alleged *Seiſin in the Lord of the Manor in Fee and two others, the one in the Lord for Life, and another in him in the Remainder*, where *one Seiſin in the Conuſor and another in the Grantee for or in him in Remainder ſuffices*; for they two are *as one and the ſame Lord*, and therefore ſhall not allege it in both &c. and therefore he amended the Avowry. Br. Double, pl. 14. cites 20 H. 6. 7.

* S P. Br. Double, pl. 121. cites 3 H. 6. 43.

36. Avowry *of a Rent-Charge* the *Plaintiff ſaid, that after the Grant the Avowant and J. were ſeiſed in Fee, and enfeoffed A. B. who enfeoffed the Plaintiff*, and this is ſingle Plea and is not double, viz. The * *Seiſin* and *Feoffment*; for a Feoffment cannot be pleaded without Seiſin. Br. Double, pl. 89. cites 4 H. 7. 17.

37. *So in Writ of Aiel*, to ſay that *after the Death of the Grandfather the Demandant himſelf was ſeiſed and enfeoffed him*; Per Townſend, Brian and Haughes J. B. Double, pl. 89. cites 4 H. 7. 17.

38. Avowry

38. Avowry *for* 10 *s. due for two Acres of Land of the Defendant*, the *Plaintiff ſaid that he had of him theſe two Acres and two other Acres by* 4 *s. abſque hoc that he held the two Acres by* 10 *s.* and therefore double; per Keble; For he ought to take the one by Proteſtation, Contrà per Brian, and that the Plaintiff cannot do otherwiſe; for the falſe Avowry of the Defendant ſhall not prejudice the Plaintiff. Quære. Br. Double, pl. 93. cites 8 H. 7. 5.

39. The Caſe on the Pleading to an Avowry was thus; *A. ſeiſed of the Place where* &c. *and other Lands granted* to the Plaintiff 20 *l. per Ann. in Fee out of the other Lands, with Clauſe of Diſtreſs, and after ſold the Lands charged to the Defendant, and to free them* of this Incumbrance *granted a Rent of* 20 *l. per Ann. out of the Place where* &c. to commence *from the Time that a Diſtreſs for the* 20 *l. ſhould be taken in the Lands charged, and ſhews how that at ſuch a Day a Diſtreſs was taken*; and therefore &c. in Bar of the Avowry they come and *traverſe abſque hoc that any Diſtreſs was taken for Rent-Arrear* &c. to this they demur ſpecially, for that it is a complicated Traverſe, whereas it ſhould be a Point ſingle, and that Riens-Arrere &c. and of this Opinion was the Court, and ordered Judgment, Niſi they re-plead and pay Coſts. Skinn. 63. pl. 8. Mich. 34 Car. 2. B. R. Amias and Chaplein.

Champerty.

40. In Champerty the *Defendant ſaid, that the Plaintiff in the firſt Suit for whom it is ſuppoſed that he maintained was an Alien born in Burgundy out of the King's Allegiance, and can neither ſpeak Engliſh or Latin, and prayed this Defendant who could ſpeak his Language to obtain him Men of Law to be of his Counſel, and where the ſame Alien was in Debt to this Defendant he granted him that if he recovered in this Suit, that he ſhould be paid of the Sum ſo to be recover'd* &c. *by which he gained him Counſel*, which is the ſame Maintainance &c. and a good Plea, and is not double; quod nota. Br. Double, pl. 58. cites 15 H. 7. 2. Br. Champerty, pl. 6. cites S. C.

Conſpiracy.

41. Conſpiracy *againſt two becauſe they procuried A. to ouſt the Plaintiff of his Land, againſt which A. one J. N. recovered by Scire Facias, by which the Plaintiff loſt his Warranty*, and the *Procurement*, and the *Recovery* was not adjudged vitious for doubleneſs; For the Procurement without doing more does not give Cauſe of Action. Br. Double, pl. 157. cites 42 E. 3. 1.

Covenant.

42. Covenant *for ouſting of a Termor*, the *Defendant juſtified by Clauſe of Re-entry for Rent arrear*, and the *Plaintiff ſaid that there being a Diſcourſe between him and the Defendant that the Defendant ſhould be at Table with him and ſhould recoup his Rent ſecundum ratam*, &c. *and that he was at Table for ſo long Time which amounted to* 40 *s. of the Rent, and as to* 4 *s. he tender'd it to the Defendant and he refuſed and enter'd*, and this *Diſcourſe* and the *Tender* was held good, and not Double; For the *one goes to part of the Rent and the other to the Reſt*. Br. Double, pl. 27. cites * 47 E. 3. 77.

* All the Editions of Brook are as here, but the ſame is miſprinted.

43. In Writ of Covenant a Man may *allege as many Covenants broken* as he will, and it is not Double. Br. Double, pl. 94. cites 9 H. 7. 13.

Cuſtom.

44. Cuſtom *to tax a Sum for Reparation of a Church by Aſſent of the Pariſhioners* was not held double; but the *Aſſent* is the Effect, and the *Cuſtom* ſhall enforce; Per Thorp. Br. Double, pl. 24. cites 44 E. 3. 19. Br. Cuſtoms, pl. 6. cites 44 E. 3. 18, 19.

Debt.

45. Debt *againſt Executors* who *plead Plene adminiſtravit & Riens enter mains* the Day of the Writ purchaſed nor ever after, this is not a Double Plea; For *Aſſets anſwers all*; quod nota; Per Cur. Br. Double, pl. 3. cites 3 H. 6. 4.

46. Where

Br. Taile, de Exchequer, pl. 3. cites S. C. accordingly.

46. Where a *Man ſhews Bill of* 40 *l. to the Collector of Tenths, and he refuſes to pay*, by which *he brings Debt*, the *Collector ſhall plead that Writ was directed reciting the Act of Parliament, becauſe the Mayor of the Staple had lent to the King* 1000 *l. the which ſhall be firſt paid, and that the Writ commanded him to pay to him* 300 *l. and another Bill came to him by another of* 100 *l. before the Bill of the Plaintiff ſhewn, and beyond* 400 *l. he has not any Thing in his Hands to pay*; Judgment &c. and the Plaintiff demurr'd and therefore was barr'd, and brought Writ of Error, and per Cur. the Plea ſhall be good and not double as the Plaintiff aſſigned, viz. the *Act of Parliament*, and that he *had only* 400 *l.* For the 400 l. is the Matter, and the other is only the *Recital and Introduction*; and alſo it is a Particular Act whereof Strangers to it ſhall not be bound to take Conuſance as of a General Act. Br. Double, pl. 74. cites 37 H. 6. 15.

47. Debt *upon Obligation*, the *Defendant ſaid that he is Lay and not letter'd, and the Deed was not read to him by other Days of Payment, and alſo that he ſealed it and deliver'd it to T. N. as an Eſcrow, to the Intent that* if J. N. named in the Obligation would ſeal it, then to deliver it as his Deed, and if not, to retain it, and ſaid that J. N. ſealed it, and yet T. deliver'd it to the Plaintiff *and ſo Not his Deed*, and is not double, viz. the *Nient literat'*, and the *Delivery as an Eſcrow*, becauſe he concludes Non eſt factum, which is only the Plea, and the other is but Evidence; and a Man *may allege* 20 *Matters to avoid a Deed when he concludes Non eſt factum*; quod nota, per Cur. Br. Double, pl. 80. cites 38 H. 6. 13.

48. In Debt the *Plaintiff counted that the Prior of J. Parſon of O. in proper Uſe leaſed to him for ſix Years, and he leaſed to the Defendant for four Years rendering Rent, and for the Rent-Arrear* &c. The *Defendant ſaid that before this the Prior leaſed to W. N. for* 10 *Years the ſame Year; and after he leaſed to the Plaintiff, and after W. N. ſurrendered, to which the Prior agreed, and after leaſed to the Defendant for ten Years, and that the Vicar is endowed of the ſmall Tithes, and leaſed them to the Defendani alſo, and the Plaintiff would have taken them, and the Defendant would not ſuffer him*, and this was held double, viz. *The old Leaſe* and *the Endowment of the Vicar*, by which he relied upon the old Leaſe, and took the other by Proteſtation. Br. Double, pl. 34. cites 9 H. 5. 8.

Br. Count, pl. 10. cites S. C.

49. The Plaintiff comes and *counts upon an Obligation of an Abbot, Predeceſſor ſealed with his Seal only, and* counts *how the Thing came to the Uſe of the Houſe*, and yet well and not double. Br. Double, pl. 10. cites 9 H. 6. 25.

50. *Debt upon Obligation againſt Executors*; Per Danby, the *Deceaſed made the Defendant and A. his Executors* and died, after whoſe Death *Alice adminiſtered as Executrix, to whom the Plaintiff by the Deed* &c. *releaſed, and after the Defendant married the ſaid Alice*; and per Paſton, Aſcue and Port, the Plea is not double, viz. The *Releaſe*, and that he has *another Executor*; for it is not alleged that A. is alive, and he *concludes upon the Releaſe to the Action*; and per Cur. he may anſwer without abating the Writ, by which the Plaintiff ſaid, that not his Deed &c. Br. Double, pl. 52. cites 22 H. 6. 59.

51. Debt *upon Obligation* which had *a Condition that if the Defendant was ready when he ſhould be warned at D. at the Coſts of the Plaintiff to account and to pay*, that then &c. and *ſaid that he was not warned to come at the Coſts of the Plaintiff*, Judgment &c. per Perſey the Plea is double, viz. the *Garniſhment* and the *coming at the Coſts* &c. & non allocatur. For if there are *divers Conditions in one Defeaſance*, he ought to anſwer to All. Br. Double, pl. 124. cites 46 E. 3. 16.

52. Debt

52. *Debt againſt an Abbot upon an Obligation ſealed* * *with the Covent Seal*, the *Defendant ſaid, that the Abbot impriſoned the Prior, and menaced all the Monks to make the Obligation* by which they made it; Judgment. And it was held double, the *Impriſonment* and the *Menace*; by which he held him to the Menace by Award; for this goes to all by reaſon of the Menace of all; for the greater Number ſuffices. Br. Double, pl. 54. cites 15 E. 4. 1. 2.

* Orig. (enter). — S. P. and yet the Impriſonment of the Prior is no Plea; For it was brought againſt the Abbot-Succeſſor of him who made the Obligation, and ſo ſee that *two Matters* ſhall be double, *though the one be no Plea*, as a Feoffment with Warranty in Aſſiſe; For a Feoffment only is no Plea, and therefore it is uſual to rely upon the Warranty to avoid the Doubleneſs. Br. Double, pl. 133. cites S. C.

53. *Debt upon Obligation of* 10 *l. with Condition to pay* 5 *l.* the *Defendant pleaded Payment to the Bailiff of the Plaintiff by his Command, which came to the Uſe of the Plaintiff*, this is a double Plea, by which he relinquiſhed the *coming to the Uſe of the Plaintiff*, and then a good Plea; quod nota. Br. Double, pl. 107. cites 22 E. 4. 25.

54. *Debt upon Obligation of* 40 *l.* againſt D. who *ſaid that he had paid the* 40 *l. and the Plaintiff had re-delivered the Obligation in lieu of Acquittance, and after the Plaintiff re-took it with Force and Arms*, Judgment ſi Actio. Per Vaviſor the Plea is double, viz. the *Payment* and the *Re-delivery of the Obligation* in lieu of Acquittance. Per Colow, No; For it is *purſuant*, *as* to ſay that J. N. was *ſeiſed in Fee, and enfeoffed him*, this is not double, viz. the *Seiſin* and *Feoffment* are not double. Per Keble, it is ſingle; For it ſhall not be ſaid double, but where the Court ſhall be inveigled to give Judgment where the one Part is found with the Plaintiff, and the other with the Defendant, or for the Miſchief where the Plaint anſwers to one Part, and the Defendant concludes to the other, and here there is not any of theſe Points; For the Payment is only for one conformity of the Plea, and the one may *depend* upon the other, and that *Payment* and *Acquittance* is not double; quod fuit conceſſum. Townſend and Brian ad idem; For here the *Payment is not iſſuable nor contrariant to the Re-delivery of the Obligation*, and ſo by All, it is not double, but becauſe the Re-delivery is no Plea, therefore the Plaintiff recover'd. Br. Double, pl. 88. cites 1 H. 7. 14.

55. *Debt upon Obligation* which was *upon Condition to ſtand to the Arbitrement of J. N. ſo that he made it and delivered it to the Parties by ſuch a Day*, the *Defendant ſaid that no Arbitrement was made nor delivered before the Day*, and this is double, per tot. Cur. For it is a good Plea that he did not make any Arbitrement by the Day, and it is a good Plea that he did not deliver the Arbitrement before the Day. Br. Double, pl. 90. cites 5 H. 7. 7.

56. And the ſame quod *non deliveravit arbitrium in Script'* &c. where the Submiſſion is to be in Writing. Br. Double, pl. 90. cites 5 H. 7. 7.

57. And ibid in a Note, *Debt upon Indenture*, the Plaintiff *counted of ſeveral Covenants broken*, and not double; For the Defendant pleaded all performed, and the Plaintiff ſhall ſhew one broken only upon which the Iſſue ſhall be joined. Br. Double, pl. 90. cites 5 H. 7. 7.

58. *Debt againſt a Succeſſor of an Abbot*, he *counted of the Obligation of the Predeceſſor, and of a Contract which came to the Uſe of the Houſe*, this is double. Br. Double, pl. 161. cites 10 H. 7. 21.

59. *One Action* of Debt was brought *on two Bonds*, and the Defendant pleaded *Non ſunt facta*, or per Minas; and adjudged good by *one Plea*. Noy. 132. Denton's Caſe.

Deeds.

60. Where a Man *pleads two Deeds of the Anceſtor of the Plaintiff*, though none of them ſhall be a Bar by itſelf, yet it ſhall be double and inſufficient. Br. Double, pl. 78. cites 21 H. 7. 10.

Deſcent.

61. Note per Brian & Cur. that *two Deſcents of one Tail* ſhall be double; For a Man cannot traverſe the Gift where there was ſuch Gift in Fact; and if he traverſes the one Deſcent, the other may rely * upon the other. Br. Double, pl. 154. cites 20 E. 4. 3.

* Orig (pur) and ſo are all the Editions.

Detinue.

62. *Detinue of Charters*, the *Plaintiff counted of a Bailment made by his Father to re-bail to him or his Heirs, and ſhewed how the Land was given by his Anceſtor, whoſe Heir he is in Tail, and that the Reverſion is reverted to him as Heir by the Death of the Tenant in Tail without Iſſue*; and this is double by three Juſtices, viz. the *Bailment* to re-bail to him or his Heirs, and the *Title to the Land*, by which he *relinquiſhed the Deſcent of the Reverſion*. Br. Double, pl. 7. cites 9 H. 6. 4.

* S. P. Per Newton. Br. Double, pl. 45. cites 19 H. 6. 11.

63. Note, that *in Detinue of Charters* the *Plaintiff counted how the Deed was delivered to the Defendant to enſue the Eſtate of the Land, and ſaid that he is Heir to the Land* &c. This is not double. * Contra if he had ſaid that theDeed had been *delivered to re-deliver* to the Plaintiff, and that he is *Heir to theLand*; For rhis is two Titles, Nota differ entiam. Br. Double, pl. 8. cites 9 H. 6. 14.

64. In Detinue the *Garniſhee came and ſaid that the two Obligations in Demand were deliver'd to the Defendant upon Condition, that if the Plaintiffs and Garniſhee ſtood to the Arbitrement of the Defendant, and if* &c. that *then each ſhould have his own Obligation, but otherwiſe if any broke the Award, and the other performed it, that he who performed it ſhould have both, and that they awarded that the Plaintiff ſhould recover the Profits of a Manor from Midſummer to Michaelmas, and ſhould pay* 10 *Marks to the ſaid Garniſhee, and that the Plaintiff ſhould make Partition of the ſame Lands and ſuffer the Garniſhee to chuſe his Moiety, and the Plaintiff ſhall have the other Moiety*, and *ſaid that W. the Plaintiff did not make the Partition, nor did he pay the* 10 *Marks*, and prayed delivery of the Obligation. Per Newton, Paſton, & Cur. the Plea is double, the one that the Plaintiff *did not make a Partition*, the other that the Plaintiff *did not pay to the Garniſhee* the 10 Marks; For *both entitles the Garniſhee to the Writings*. Br. Double, pl. 48. cites 21 H. 6. 18.

Dal. 30. pl. 9. S. C. held accordingly. —S. C. cited 2 Lutw. 1492.—

65. In *Detinue* for Goods bailed the Defendant pleaded, that *after the Bailment Plaintiff married J. S. who during the Eſpouſals releaſed* to the Defendant, and held by all the Juſtices not to be Double, for he could not plead the Refuſal without ſhewing the Marriage. Mo. 25. pl. 85. Paſch. 3 Eliz. B. R. Audley's Caſe.

Dower.

66. In *Dower* the *Tenant ſaid that he had nothing but in Ward with W. N. of the Grant of G. of whom the Anceſtor of the Infant Son of the Baron held in Chivalry* &c. Per Hals, the Plea is double, one that he has *nothing but in Ward*, and the other that he *held jointly*, and becauſe if he ſhall be compelled to hold to the one, he at another Time ſhall loſe the other, therefore for the Miſchief, he ſhall have the Plea; Per tot. Cur. Br. Double, pl. 33. cites 9 H. 5. 4.

Entry.

67. *Entry ſur Diſſeiſin made to C. his Couſin, whoſe Heir he is, viz. C. was the Daughter of T. Siſter of the Demandant*, the *Tenant ſaid that J. Brother of the Demandant, whoſe Heir the Demandant is, was ſeiſed in Fee, and gave to T. and A. in Tail between whom C. was iſſue, and C. died without Heir of her Body, and J. your Brother entred as in his Reverſion and enfeoffed the Tenant and after by his Deed releaſed to us*, Judgment if againſt the Deed comprehending Warranty &c. and becauſe he *relied upon the Deed with Warranty*, therefore good, notwithſtanding

withſtanding that he alleged Tail where the Demandant demanded Fee-Simple, and the Feoffment, and Releaſe with Warranty. Br. Double, pl. 65. cites 24 E. 3. 75.

68. Entry *in Nature of Aſſiſe*, *Defendant pleaded that he is in by Leaſe for* 40 *Years of the Leaſe of the Predeceſſor of the Plaintiff by Indenture, and ſo has he nothing but for Term of Years, and that the Demandant himſelf is ſeiſed of the Franktenement*, Judgment of the Writ, and per tot. Cur. this is a double Plea, viz. *Leaſe by Indenture*, and that the *Plaintiff himſelf is ſeiſed of the Franktenement.* For if the Plaintiff anſwers to the Leaſe, the other may demur becauſe he does not deny but that he himſelf is Tenant of the Franktenement; and if he anſwers to the Franktenement, the other may likewiſe rely upon the Leaſe by Indenture, which is Eſtoppel; by which he was *awarded to hold him to the one*, and ſo he did, viz. that the Plaintiff himſelf is Tenant. Br. Double, pl. 68. cites 4 H. 6. 27. Thel. Dig. 215. Lib. 15. cap. 3. S. 23. cites Trin. S. C.

70. *Entry in Nature of Aſſiſe in* 100 *Acres of Land*; the *Tenant ſaid that he had Common there appendant to his Manor of B. by which he put his Beaſts in, abſque hoc that he claimed any thing but the Common, and abſque hoc that he had other Poſſeſſion or Eſtate in the Land, and that W. N. was Tenant the Day of the Writ purchaſed, and yet is, not named in the Writ*; Judgment of the Writ; and per Cotteſmore J. it is a good Plea, and not Double; For the Common is nothing to the Purpoſe, and the Plea is a *ſpecial Nontenure*, and the *Common is mentioned to prove his Entry into the Land to uſe his Common, and not to have Franktenement in the Land*, by which the Plaintiff imparled. Br. Double, pl. 44. cites 8 H. 6. 33.

Eſcheat.

71. *Eſcheat upon Seiſin of A. ſuppoſing that he died without Heir*; the *Tenant ſaid that A. had Iſſue K. who entered and endowed the Feme of A. and after releaſed to her, whoſe Releaſe the Tenant has*; Judgment &c. And by the beſt Opinion the Plea is Double; For the *Seiſin of the Heir goes to the Writ*, and the *Releaſe conveyed the Right, and goes to the Bar*, by which he relied upon the laſt Seiſin of K. the Heir of A. to which the Demandant ſaid, that the ſaid A. had no ſuch Daughter as K. who ſurvived &c. Br. Double, pl. 159. cites 11 H. 4. 10.

Forcible Entry.

72. Treſpaſs of Forcible Entry; the *Defendant ſaid that J. was ſeiſed, and gave to his Father in Tail, who died ſeiſed*, and *the Land deſcended to him*, and *he entered and was ſeiſed till by the Plaintiff diſſeiſed, upon whom he entered*; Per Littleton, the Plea is Double, viz. the *Gift* and *Deſcent*, and Laicon and Priſot contra; For it is ſufficient to ſay that he was ſeiſed till by the Plaintiff diſſeiſed, upon whom he entered, and *cannot ſay ſeiſed in Tail wiehout ſhewing How*, and therefore the Reſidue is only *Conveyance* to it. Br. Double, pl. 18. cites 3 H. 6. 15.

73 *Contra in Aſſiſe*, and then if he *ſhews ſpecially How he was ſeiſed by Tail*, as here, the Plea is not the better, and *one Anſwer may make an End of all*, viz. *Ne dona pas*; by which the Plaintiff replied, and the Defendant imparled &c. Br. Double, pl. 18. cites 3 H. 6. 35.

74. In Forcible Entry, the *Defendant juſtified his Entry by Gift to J. for Life, the Remainder to his Father in Tail, who was ſeiſed, and died ſeiſed, and he entered as Heir in Tail*; the *Gift in Tail* and the *Deſcent* is Double, therefore he ought to take the one by Proteſtation, and the other by Matter in Fact, Quod fuit conceſſum; Per Hody and Paſton, but it is not argued. Br. Double, pl. 129. cites 9 H. 7. 13.

75. Treſ-

75. Treſpaſs upon the Statute of *Forcible Entry*; the *Defendant alleged Bar*, and the *Plaintiff alleged Deſcent to him to avoid the Entry of the Defendant*, and *he avoided it by continual Claim made by his Predeceſſor, and by himſelf*; Per Port. the Plea is Double; For if the Anceſtor died in the Life of your Predeceſſor, then your Claim is void, and if he died in your Time, then the continual Claim in the Time of your Predeceſſor is not good; by which he alleged continual Claim in his Time only, and that the Anceſtor died in his Time, aod then well; Quod Nota; and otherwiſe Double. Br. Double, pl. 50. cites 22 H. 6. 37.

Formedon.

76. In *Formedon*, the *Tenant pleaded a Fine of the Anceſtor upon Conuſance of Right with Warranty*, and not Double, nor was the Tenant compelled to rely upon the one by Award; For it is only one intire Deed. Br. Double, pl. 25. cites 46 E. 3. 14.

77. In *Formedon*, the *Tenant ſaid that the Donee was ſeiſed in Fee till by the Donor diſſeiſed, and after the Donor married the Donee to his Daughter, and gave to him in Tail, and compelled him by Menace to take the Gift, whoſe Eſtate the Tenant has, and ſo remitted to the Fee Simple*; *Judgment* &c. and per Culpepper and Martin, the Plea is Double, viz. the *Diſſeiſin* and *Remitter by Repriſal*, and the *taking by Menace*; Contra per Hank. and that the Diſſeiſin and Repriſal is the Effect. Brook ſays Contrarium videtur Lex. Br. Double, pl. 31. cites 12 H. 4. 19.

S. C. cited 2 Lutw. 1402 in Caſe of Pell v. Garlick —— 12 Mod. 507. cites S. C.

78. In Formedon in Deſcender the Plaintiff declared of a Gift in Tail to his Father who died, and that the Land deſcended to Demandant's elder Brother, who alſo died without Iſſue. The Tenant pleaded *that the elder Brother had Iſſue a Daughter, who levied a Fine to him*, and he relied upon the Fine and the Proclamation. It was objected that this Plea was Double, that the one is the Iſſue, and the other is the Fine. But per Cur. ſince he cannot come to the one without ſhewing the other, it ſhall not be Double; beſides, here he relies upon the Eſtoppel. Gouldsb. 88. pl. 13. Paſch. 30 Eliz. White's Caſe.

Garniſhment.

79. Where a Plea includes double Matter, as *Garniſhment by the Sheriff to levy a Fine*, and *Garniſhment by the Party*, this is Double, *tho' one ſhall not be material.* Br. Double, pl. 127. cites 11 H. 4. 18. per Thirn and Culpeper.

Juris Utrum.

80. In Juris Utrum the *Tenant ſaid, that his Father was ſeiſed and died ſeiſed, and the Predeceſſor of the Plaintiff abated, againſt whom he recovered in Mortdanceſtor and entered, and ſo this is his Lay-Fee, and not the Frankalmoigne of the Plaintiff*; and this is not double, per Cur. viz. the *Recovery* and the *Lay-Fee* &c. for he ought ſo to conclude, becauſe it is a Writ of Right in its Nature, and ſo in Writ of Right if he pleads a Recovery he ſhall concludes and ſo has he more mere Right. Br. Double, pl. 1. cites 19 H. 8. 7.

Maintenance.

81. In *Maintenance*, the *Defendant juſtified as Attorney of the Plaintiff*, and the *Plaintiff ſaid, that he gave* 10 *s. to one Jury, and* 10 *s. to another, to give Verdict for his Client*, and it is not Double, per tot. Cur. Becauſe *all* does not *prove but one ſpecial Matter*; Quod *mirum*? Br. Double, pl. 114. cites 11 H. 6. 10.

Monſtraverunt.

82. In Monſtraverunt, the *Defendant ſaid that he held of a Manor in the ſame Vill, which is ſub Titulo Terræ Epiſcopi de E. tempore E. Regis & Confeſſoris*,

ris, and not in the Manor of the ſame Name contained in the Book of Doomſday ſub Titulo Terræ Regis, and that the Plaintiffs held of him at Will, and it was held double Matter; *for each of them is a good Bar.* Br. Double, pl. 19. cites 40 E. 3. 45.

Replevin.

83. In Replevin, *Avowry* is made *for Rent reſerved upon Equality of Partition made between two Coparceners*; the *Plaintiff ſaid that there were three Coparceners, and the third was Extra Patriam Tempore Partitionis, and returned within Age and entered, by which they made new Partition* &c. and the *Re-entry*, and new *Partition* were ſuffered by Award, and the Plea ſingle; Nota. Br. Double, pl. 62. cites 24 E. 3. 52.

84. In Replevin, the Defendant ſaid, that the *Property of the Beaſts is in another, and that he took them in another Vill*; and this is Double; Quod Nota. Br. Double, pl. 21. cites 42 E. 3. 18.

Thel. Dig. 214. lib. 15. cap. 3. S. 16. cites 42 E. 3. 19. S. C.

that the Defendant was compelled to hold himſelf to the one. —— *But* in Replevin, *as to one Ox*, the Defendant *ſaid, that the Property was to a Stranger, and as to another Ox, that he took it in another Place, and in another Vill* &c. And this laſt Plea was held Double; For the one Part of the Plea goes to the Place, and the other to the Vill. Thel. Dig. 214. lib. 15. cap. 3. S. 16. cites Mich. 9 H. 6. 39.

85. In Replevin the *Demandant avowed by two Avowries upon the Plaintiff for two ſeveral Tenures of two Acres* &c. *as upon Tenant of Fee-Simple*, and the *Defendant ſaid that the Father of the Defendant, whoſe Heir* &c. *gave them to him in Tail, to hold by one and the ſame Tenure; Judgment of the Avowry ſuppoſing two ſeveral Tenures*, and it is not double, viz. The *Tenure of Fee Tail*, and the *intire Tenure*; becauſe he *relied upon the laſt*. Br. Double, pl. 12. cites 9 H. 6. 26.

Br. Avowry, pl. 8. cites S. C.

86. In Replevin if a *Man pleads two Matters to the Avowry, of which the one goes in the Abatement of the Avowry* to prove that they ought to have made another Manner of Avowry, *and the other Matter goes in Bar of the Avowry*, this is double. Br. Double, pl. 158. cites 35 H. 6. 51.

87. In Replevin *where the Defendant ought to have gaged Deliverance*, he *ſaid, that the Beaſts died in Default of the Plaintiff where the Defendant diſtrained for ſuch Cauſe and put them in open Pound* &c. the *Plaintiff ſaid that the Defendant eſloigned them to a Place unknown, and there they died in Default of the Defendant*; & non allocatur; For it ſuffices to ſay that he *eſloigned* them only, which *ſhall be intended out of the County* &c. and it is ſufficient to ſay that they died in Default of the Defendant; quod nota per Cur. therefore two Matters. Br. Double, pl. 91. cites 5 H. 7. 9.

88. In Replevin the *Tenant in Tail of a Rent purchaſed the Land and made a Feoffment in Fee of Land diſcharged with Warranty, and died, and Aſſets is deſcended, the Iſſue in Tail was vouched for the Rent*, and this Matter is pleaded in Bar of the Avowry; and becauſe he *did not ſhew whether the Anceſtor who made the Feoffment with Warranty was Anceſtor Collateral or Lineal*, therefore per Cur. the Bar is ill, and it *ſhall be intended Anceſtor Collateral*; Per Vaviſor J. and then this and the *Aſſets* is double, and he ought to have rehearſed the *Warranty* or upon one of them. Br. Double, pl. 78. cites 21 H. 7. 10.

Reſummons.

89. Reſummons *upon Writ of Ward againſt Executors*, who *ſaid that the Heir was of full Age in the Life of Teſtator, and that they have fully adminiſtered*; and Wilby awarded the Plaintiff to anſwer to the laſt Plea, and awarded that the Plaintiff ſhould recover the Ward, and that they try the Iſſue of Fully adminiſtered for Damages. Br. Double, pl. 61. cites 24 E. 3. 49.

Quare Ejecit.

90. Quare Ejecit infra terminum againſt B. *that C. was ſeiſed and leaſed to him for* 10 *Years, and B. ejected him*; Port. ſaid, that *C. leaſed and entered, and enfeoffed us, and after the Plaintiff made a Regreſs, and after ſurrendered to us, and we entered, which is the ſame Ejectment.* And per Newton and others, the Plea is not double, viz. The *Leaſe*, and the *Feoffment*, and the *Regreſs* of the Tenant, and after the *Surrender*; For he cannot come to plead the Surrender without *conveying the Reverſion* to him; quod nota. Br. Double, pl. 45. (bis) cites 19 H. 6. 55. 56.

Recordare.

91. In Recordare the *Leſſor avowed for a Fine for Alienation made by his Tenant*; the *Tenant pleaded that the Lord was ſeiſed of the ſame Land within Time of Memory, and by Deed aliened to R. whoſe Eſtate the Plaintiff has, to hold to him by certain Rent and Services pro omnibus Serviciis et demand*'; and this held double, viz. The *Unity of Poſſeſſion*, and the *Deed to hold* ut ſupra; and yet he cannot plead the Gift, but he ought to allege the Seiſin in the Donor or Feoffor; nor can a Man plead a Deed of Feoffment with Warranty, but he ſhall mention both, but he ought to rely upon the Warranty only, or rely upon the Deed of Gift in the Caſe Supra only, and then this is not double; quod nota; Per Hank. & nemo negavit. Br. Double, pl. 32. cites 14 H. 4. 5.

Scire Facias.

92. Scire Facias *out of a Fine* by which *W. and K. his Feme gave to M. in Tail, ſaving the Reverſion to K. and his Heirs, of whoſe Inheritance the Land was, and that W. died, and K. married R. and* [*M.*] *died without Iſſue, by which R. and K. brought the Scire Facias to execute the Fine*, the *Tenant ſaid that W. and K. were ſeiſed as in their Reverſion after the Death of M. and enfeoffed T. whoſe Eſtate he has*; Judgment ſi Actio; Per Wich. the Plea is double, viz. *Seiſin* by the Reverſion after the Tail determined, which is Execution, and alſo *Feoffment* after; Per Thorp, the Feoffment is the Subſtance, and the Seiſin is only *Conveyance*, by which anſwer. Br. Double, pl. 36. cites 38 E. 3. 16.

93. By which the *Plaintiff ſaid that another Time he recovered upon Scire Facias upon the ſame Fine againſt the ſame Tenant, and after the Execution he enfeoffed the ſame T. upon Condition, and for the Condition broken he entered, and the now Tenant brought Writ of Diſceit and reverſed the firſt Judgment and Execution, after which he was not warned and entered and now the Plaintiff brought other Scire Facias*; Per Belk. the Plea is double, one that the *Feoffment is undone by the Condition*, and another that his *Seiſin is undone by Writ of Diſceit*; Per Finchden, the Concluſion is all upon the Feoffment by which the other paſſed over. Br. Double, pl. 36. cites 38 E. 3. 16.

Treſpaſs.

94. In Treſpaſs the *Defendant ſaid that the Franktement belonged to a Stranger who leaſed to him for five Years, which yet indure, by which he entered and did the Treſpaſs*; Judgment &c. Godred ſaid the Plea is double, viz. The *Franktenement* is in a Stranger, and he has a *Leaſe* for five Years, but tot. Cur. contra eum; For *the Leaſe is only Conveyance.* Br. Double pl. 6. cites 3 H. 6. 50.

95. Treſpaſs upon the Statute of *Foreſtalling at the Port of C.* Paſton ſaid there is *no ſuch Vill, Hamlet or Place known out of the Vill and Hamlet, but* is a Place which *extends into divers Vills*, viz. into A. B. and D. Per Strange, this is double, viz. *No ſuch Vill* or Place &c. and alſo that it *is a Place which extends into divers Vills* &c. Br. Double, pl. 40. cites 7 H. 6. 22.

96. In

96. In Treſpaſs the *Defendant pleaded Arbitrement* &c. who *awarded that he ſhould pay 10 l. to the Plaintiff in Satisfaction of the Treſpaſs, which he has paid*; Judgment and the Plea good, and not double, viz. The *Arbitrement* and the *Payment*; for the one is *purſuant* upon the other; for per Martin, Arbitrement is no Plea if he does not plead it performed, or ſays that he has been at all Times ready, and yet is &c. Br. Double, pl. 43. cites 8 H. 6 25.

97. In *Treſpaſs* the *Defendant pleaded his Frauktenement*; the *Plaintiff ſhall not ſay that before this J. N. was ſeiſed and enfeoffed A. who enfeoffed the Plaintiff*; For it ſuffices to ſay, that A. was ſeiſed in Fee and enfeoffed the Plaintiff &c. Br. Double, pl. 131. cites 19 H. 6. 32.

98. Treſpaſs *Quare Filium ſuum et Hæredem rapuit et abduxit apud D. Defendant ſhewed by Proteſtation that he hdd re-delivered the Infant, and for Plea, that the Plaintiff married Jane P. and had Iſſue the Son, and J. died, and after it was noiſed in the Country that the Plaintiff was dead, and that the Defendant as Prochein Amy of the Infant ſaw the Infant in Ward, ſcil. ill-governed and out of good Ward, in Negligence of N. his Nurſe, by which he took the Infant as lawfully he might* &c. and it is not double, ſcil. that he is *Prochein Amy*, and that the *Infant was ill-governed*; for the one *depends upon the other*, but if he had not taken the Re-delivery by Proteſtatioa but for Plea, then it had been double. Br. Double, pl 47. cites 21 H. 6. 15.

99. Treſpaſs of a Cloſe broken and Graſs ſpoiled, the *Defandant pleaded his Franktenement*; the *Plaintiff ſaid* that to this he ſhall not be received; For the *Father of the Plaintiff whoſe Heir* &c. *enfeoffed him with Warranty by the Deed which he ſhewed* &c. Judgment if againſt the Deed of his Anceſtor which comprehends Warranty he ſhall be received to ſay that it is a Franktenement. The *Defendant ſaid that R. N. was ſeiſed in Fee, and enfeoffed him and his Father and to the Heirs of his Son, and the Father enfeoffed the Plaintiff, by which he entered into the one Moiety in the Life of the Father by Alienation to his Diſinheritance, and into the other Moiety he entered after the Death of of the Father for the Diſſeiſin of this Moiety*; Per Newton, the Plea is double; for if any of the Iſſues are found for the Defendant the Plaintiff ſhall be barr'd; for if he enters into a Moiety only then the Plaintiff is Tenant in common with the Defendant, and one Tenant in common or Joint-tenant cannot have Action againſt the other. Br. Double, pl. 51. cites 22 H. 9 50. 51.

100. *By which* the *Defendant pleaded as above, and alleged the Entry into the Whole in the Life of the Father*, and the *Plaintiff alleged the Feoffment of the Father with Warranty as above, abſque hoc that R. enfeoffed the Defendant and his Father Modo et Forma*, and ſo ad Patriam. Br. Double, pl. 51. cites 22 H. 6. 50. 51.

97. In Treſpaſs, the *Plaintiff counted that a Leaſe for Years, and a Deed indented of it was deviſed to him by the Leſſee, and he died, and the Executors bailed to him* &c. and it is not Double, viz. the *Deviſe* and the *Bailment* of the Executors, for the one is *Conveyance* to the other; Quod Nota, per Cur. Br. Double, pl. 15. cites 27 H. 6. 8.

98. In Treſpaſs, the *Defendant preſcribed in a Way to the Market of B. and to the Church of D.* and held Double; Quære inde; For it ſeems that he ought to claim the Way as his Title is; Quære; for it is only the Opinion of the Reporter in a ſhort Note. Br. Double, pl. 128. (bis) cites 28 H. 6. 9.

103. Treſpaſs *of Aſſault and Menace*, theſe Words *dixit, retulit, & publicavit* &c. make not any Plea double or treble, per Cur. Br. Double, pl. 72. cites 37 H. 6. 20.

104. Treſ-

104. Treſpaſs *in Land*, the *Defendant juſtified for the third Part for one Cauſe, and for the two Parts for another Cauſe*, this is not Double; For *it cannot be that the third Part is in Severalty*, and then the Plaintiff and Defendant ſhall not be Tenants in Common; for if they were Tenants in Common, Juſtification for the one Part undivided ſuffices. Br. Double, pl. 141. cites 37 H. 6. 38.

105. In Treſpaſs, where a Man *pleads a Recovery and ſhews Title, by which he recovers alſo*, this is Double; Per Littleton, which Danby J. denied; For the one is *ſubſequent* to the other. Br. Double, pl. 75. cites 39 H. 6. 24. & concordat 9 H. 7.

106. In Treſpaſs *Abatement* and *Intruſion* are Double, and yet it ſeems that both ſhall be of one and the ſame Nature, and where a Man pleads Double Plea, and relies upon the one, then it is not Double. Br. Double, pl. 147. cites 39 H. 6. 27.

107. Treſpaſs upon the *Caſe eo quod liberavit Obligation' defend' ad ſalvum Cuſtod' & reliberand' cum* &c. *and that the Defendant has broken it.* The *Defendant ſaid, that it was bailed to him by the Plaintiff to deliver to W. N. the which he has done, abſque hoc that he broke it*; Per Priſot, the Plea is double; for it is a good Plea that it was delivered to him to deliver to W. N. which he has done; and then [if] he breaks the Obligation, Action is given to W. N. and not to the Plaintiff, which is another Matter of Bar; by which Coke *ſaid* for the Defendant *ut ſupra, abſque hoc that he broke the Obligation before the Delivery made to W. N.* and per Cur. now he *ought to ſhew what Day he delivered it to W. N.* and *ſo he did, and traverſed ut ſupra*; then the Plaintiff demurred, and the Defendant ſimiliter, and it ſeems that this Traverſe is pregnant, viz. the Breaking before the Delivery to W. N. Br. Double, pl. 84. cites 39 H. 6. 44.

Br. Treſpaſs, pl. 302. cites S. C.

108. In Treſpaſs a *Leaſe at Will*, and a *Licence to cut the Underwood*, is not Double; For Tenant at Will cannot cut Underwood without Licence. Br. Double, pl. 149. cites 2 E. 4. 22.

* All the Editions are without thoſe Words.

109. Treſpaſs *of a Cloſe broken*, viz. *two Acres*, and the *Defendant juſtified the breaking of one, and the Entry* * [*into one*] *for one Matter, and into the other for another Matter*, and therefore double, per Cur. for he has juſtified two Breakings; *Quære*; For contra in Treſpaſs upon 5 R. 2. Br. Double, pl. 153. cites 18 E. 4. 11.

110. In Treſpaſs where *Deſcent is pleaded*, the *Plaintiff pleaded Diſſeiſin to his Father by him who died ſeiſed, and that his Father made Continual Claim and died, and after he made Continual Claim, and the Diſſeiſor died ſeiſed within the Year* &c. and per Cur. he ſhall plead the one Continual Claim only, viz. of him in whoſe Time the Deſcent came. Br. Double, pl. 53. cites 15 E. 4. 22.

111. In Treſpaſs it was agreed, that where a Man *makes a Bar or Title by Gift in Tail of Land or Advowſon*, and *alleges divers Deſcents or Preſentations*, this is not Double; For the Traverſe of the Gift anſwers to all. Br. Double, pl. 104. cites 19 E. 4. 4. —— And yet contra per Brian and Cur. 20 E. 4. fol. 3. But Quære thereof. Ibid.

112. In Treſpaſs, if a Man makes *Avowry or Replevin or Juſtification in Treſpaſs for Homage, Fealty, Suit, Rent* &c. this is not Double; For this *is all one and the ſame Tenure. Contra* if it be for a *Rent-Charge and Rent-Service* in one and the ſame Avowry. Br. Double, pl. 94. cites 9 H. 7. 13.

113. Treſpaſs *againſt ſeveral of a Cloſe broken*; the *Defendant ſaid that each of them has Common there appendant to his Franktenement ſeverally, by which they entered and broke* &c. *to uſe their Common*, and a good Plea, per Cur. and not Double; For *it ſhall be intended that each juſtified for his own Intereſt, and none for the Intereſt of his Companion.* Br. Double, pl. 59. cites 15 H. 7. 10.

114. *But*

114. *But* in Treſpaſs of a Cloſe broken, *if the Defendant ſays that A. has Common there, and B. ſimiliter, and C. ſimiliter, and he as their Servant, and by their Commandment put in the Beaſts*, this is Double, per Cur. Br. Double, pl. 59. cites 15 H. 7. 10.

115. *But* if he *ſays that he put in two Beaſts for A. and three for B. and the reſt for C.* this is a good Plea, and is not Double, per Cur. Br. Double, pl. 59. cites 15 H. 7. 10.

116. In Treſpaſs it was agreed, that where *one intitled himſelf that A. was ſeiſed in Fee, and infeoffed B. who infeoffed C. who infeoffed D. whoſe Eſtate the Defendant has, and gave Colour to the Plaintiff by the firſt Feoffor*, this is not Double; and the reaſon ſeems to be, becauſe all theſe are only *Conveyances*. Br. Double, pl. 60. cites 15 H. 7. 11.

Utlawry.

117. Defendant pleads *ten Outlawries* againſt the Plaintiff; this is Double; for he is as much diſabled by one as by the other nine, to which ſeveral Anſwers are required. Carth. 8. Trin. 3 Jac. 2. B. R. Trevillian v. Secomb.

Ward.

118. In Ward the Plaintiff *counted that he held of him by Homage, Eſcuage and Servage, which gives Ward by Uſage of the Country*, and therefore double; by which he was compelled to keep to the one. Br. Double, pl. 26. cites 46 E. 3. 25.

119. If the Defendant in Raviſhment of Ward *traverſe the Title of the Plaintiff, and makes Title to himſelf*, this not double; for he ought ſo to do; nota. Br. Double, pl. 28 cites 2 H. 4. 12

Br. Ravtſhment de garde, pl. 6. cites S. C,

120. Ward of Land and Body, the *Defendant pleaded a Feoffment*, and the *Plaintiff alleged*, that it was by *Colluſion, and* it was upon *Condition to infeoff the Heir at full Age to toll him of his Ward*, and therefore double, viz. The *Colluſion* and the *Condition*, by which he omitted the Condition and held him to the Colluſion, to which the Defendant ſaid that it was Bona Fide, and not by Colluſion; but per Cur. Trin. 4 H. 6. Fol. 29. the Plea pleaded in Bar is not good if he does not *traverſe the dying in his Homage*. Br. Double, pl. 5. cites 3 H. 6. 32.

121. In Ward the *Tenant pleaded Jointenancy by Fine to the Anceſtor and to him, and that he is in by Survivor*; Judgment &c The *Plaintiff ſaid that the Conuſor enfeoffed certain Perſons to enfeoff the Heir at his full Age by Colluſion to toll him of his Ward, abſque hoc, that thoſe who were Parties to the Fine had any Thing at the Time levied*, and it was held double, viz. The *Colluſion* and the *Voidance of the Fine*, by which he held himſelf alone to the Voidance of the Fine. Br Double, pl. 39. cites 7 H. 6. 20.

S. P. But Brook ſays Miror inde; for by the Traverſe he relied upon one, and therefore it ſeems beſt that he plead the

the Feoffment without ſpeaking of the Colluſion, and traverſe the Seiſin at the Time of the Fine. Br. Double, pl. 130 cites 4 H. 6. 14.

Warrantia Chartæ.

122. Warrantia Chartæ *quod de eo tenet et unde chartam ſuam habet*, this is not double Lien but ancient Form of the Writ; quod nota per Cur. Br. Double, pl. 64. cites 24 E. 3. 74.

123. Scire Facias *upon a Fine*, the *Plaintiff conveyed himſelf by Deſcent to two Coparceneus, and from them to him*, and the *Tenant pleads Releaſe with Warranty of theſe two Parceners, Judgment if contrary to the Deed of his Anceſtors, which compriſes Warranty, Action* &c. the Plaintiff ſaid that it was double by reaſon of the *two Warranties*, and therefore he held him to the one, notwithſtanding that he pleaded according to the Fine. Br. Double, pl. 35. cites 9 H. 5. 12. 13.

124. If a Man pleads *Releaſe with Warranty and relies upon the Whole*, this is not double; for one Anſwer may make an End of all. Br. Double, pl 117. cites 32 H. 6. 21.

125. But *Feoffment with Warranty* is double if he does not rely upon the Warranty; for Feoffment may be without Deed, and [paſſes] by two Circumſtances. Br. Double, pl. 117. cites 32 H. 6. 21.

126. But *Releaſe with Warranty*, or *Confirmation and Grant that he ſhall not be vexed* as above, all this *paſſes by one Deed or Patent*. Br. Double, pl. 117. cites 32 H. 6. 21.

Waſt.

126. Waſt *in Grange* as *to a Moiety the Defendant Decay before the Leaſe*, and *as to the reſt it was uncovered by Tempeſt, and before the Defendant could repair it the Plaintiff entered, and was ſeiſed the Day of the Writ*; Judgment &c. and per Hank. this is double, The *Tempeſt* and the *Entry* of the Plaintiff. Contra per Hull, for the Entry is all the Matter; for the Tempeſt is not Waſt unleſs the Defendant permits the Timber to putrify after the Tempeſt. Br. Double, pl. 30. cites 12 H. 4. 5.

127. Waſt *in cuting* 10 *Oaks the Defendant ſaid that the Plaintiff granted the* 10 *Oaks to R. C. and commanded the Defendant to cut and deliver them to the ſaid R. C.* which he did. Per Markham, the Plea is double, viz. The *Grant* and the *Commandment*. Per Newton and Paſton the Plea is good; for it is *purſuant*, by which the Plaintiff replied and denied the Commandment; quod nota. Br. Double, pl. 49. cites 21 H. 6. 46.

(B) Allowed in what Caſes.

1. IN *Aſſiſe of Rent* the Tenant *cannot plead Miſnoſmer of himſelf, and if it be found, Hors de ſon Fee* &c. for the firſt Plea is waived by the other. Thel. Dig. 214. lib. 15. cap. 3. S. 1. cites Paſch 3 E. 3. 78. 3 Aſſ. 9.

2. In *ſur Cui in Vita of a Houſe and 2s. Rent*, the Tenant *ſaid that the Demandant had put in View only a Houſe, and ſo he ſuppoſes that the Rent is ariſing from this Houſe, in which Houſe he has nothing unleſs jointly with ſuch a one not named*; Judgment of the Writ, and held that he ſhall have the two Pleas. Thel. Dig. 214. lib. 15. cap. 3. S. 2. cites Trin. 5 E. 3. 192.

3. In Writ of *Waſte* as to Parcel, the Tenant *falſified the Demiſe, ſuppoſed by the Writ, in Abatement of the Writ, and as to other Parcel he ſaid that it was within the Vill* ſuppoſed by the Writ &c. and had both the Pleas. Thel. Dig. 214. lib. 15. cap. 3. S. 5. cites Paſch. 8 E. 3. 402.

4. In *Writ of Entry* the Tenant pleaded *that one Tho. was ſeiſed and died ſeiſed, from whom the Tenements deſcended to three Daughters, and the Tenant is Iſſue of one of them, and he has the Eſtate of the other by Purchaſe, and one Ro. has the Eſtate of the third by Purchaſe, and ſo he holds in common pro indiviſo with Ro. not named* &c. And held that he ſhall not have the two Pleas, ſcil. the Nontenure of the third Part, and the Tenancy in common of the Whole. Thel. Dig. 214. lib. 15. cap. 3. S. 7. cites Trin. 8 E. 3. 218. Quære.

5. In

5. In *Treſpaſs for a Cloſe broken brought by two, as to one of the Plaintiffs the Defendant ſaid that he was Tenant in Common of this Cloſe with the Plaintiff*, Judgment of the Writ, *and as to the other Plaintiff the Defendant pleaded Not Guilty* &c. Thel. Dig. 215. Lib. 15. cap. 3. S. 21. cites 8 E. 3. 436. in Mortdanceſter. Quære.

6. In *Quare Impedit*, the Defendant may *plead Darrein Preſentment* to the Writ, *and make Title of Right alſo to the Preſentment*, and his Plea ſhall be taken according to that which he concludes to the Writ by the Darrein Preſentment, or Action by the Title. Thel. Dig. 215. Lib. 15. cap. 3. S. 22. cites Mich. 8 E. 3. 426.

7. In *Debt by two Femes as Executrixes of the Teſtament of ſuch a one*, the Defendant as to one *ſaid that ſhe was Covert of Baron the Day of the Writ purchaſed, and yet is &c.* And *as to the other that ſhe has taken Baron pending the Writ* &c. and had both the Pleas, but the Iſſue was taken upon the one. Thel. Dig. 214. Lib. 15. cap. 3. S. 8. cites Mich. 8 E. 3. 441. Mich. 9 E. 3. 477.

8. In *Aſſiſe of Rent* the Tenant *pleaded Miſnoſmer of the Vill, and* if it be found &c. *That another is Tenant of the Rent not named* &c. Thel. Dig. 214. Lib. 15. cap. 3. S. 10. cites Mich. 15 E. 3. Aſſiſe 95.

9. The Tenant *pleaded Non-tenure of Parcel and ſhew'd who was Tenant, and as to the other Parcel pleaded Non-tenure alſo by reaſon of Recovery, and Execution ſued againſt him pending the Writ*, and had both the Pleas. Thel. Dig. 214. Lib. 15. cap. 3. S. 11. cites Trin. 15 E. 3. Brief 285.

10. In *Treſpaſs of Beaſts taken*, the Defendant cannot *plead That the Deliverance is made by Replevin in the County, and alſo juſtify as Diſtreſs* &c. Thel. Dig. 214. Lib. 15. cap. 3. S. 12. cites Mich. 17 E. 3. 585.

11. In *Writ of Aiel* the Tenant was received to *plead Laſt Seiſin in his Father who was Son and Heir to the Grandfather, and that the Demandant was Son and Heir to the younger Son of the Grandfather, and ſo he could demand nothing*. Thel. Dig. 214. Lib. 15. cap. 3. S. 9. cites cites Hill. 10 E. 3. 483.

12. In *Aſſiſe* the *Tenant ſaid that he had another Surname, and pleaded Jointenancy with one not named* &c. And held good without ſaying that he is the ſame Perſon &c. and the Plaintiff cannot reply to the Miſnoſmer but to the Jointenancy. Thel. Dig. 214. Lib. 15. cap. 3. S. 4 cites Mich. 5 E. 3. 215. and ſays ſee 22 Aſſ. 1.

13. A Man ſhall plead *Nontenure of Parcel of which another is Tenant, and alſo that the Demandant himſelf is ſeiſed of Parcel.* Thel. Dig. 214. Lib. 15. cap. 3. S. 13. cites Mich. 19 E. 3. Brief 244. And that a Man ſhall plead 20 *Nontenures to the Writ, but* the Tenant was *not* received to plead *Nontenure of Parcel and Jointenancy of Parcel* alſo. Paſch. 22 E. 3. 6.

14. In *Writ of Aiel* it is ſaid that the Tenant may *plead laſt Seiſin in the Demandant, and* after *waive this and plead laſt Seiſin in the Father of the Demandant*. Thel. Dig. 214. Lib. 15. cap. 3. S. 14. cites Paſch. 32 E. 3. Nuper Obiit. 2.

15. In *Aſſiſe of Common*, the *Defendant ſaid that the Land in which* &c. *is* 60 *Acres, and that the Grantor had nothing in the Land unleſs in five Acres at the Time of the Condition*, and *to the five Acres that the Grantee of the Common who granted his Intereſt to the Plaintiff had nothing in the Common at the Time of the Gift*, and had both the Pleas; For the one Plea goes to the five Acres, and the other Plea to the reſt, Contra if each Plea had been pleaded to the Whole. Br. Deux plees, pl. 31. cites 37 Aſſ. 14.

16. *Debt*

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(B) Allowed in what Caſes.

1. IN *Aſſiſe of Rent* the Tenant *cannot plead Miſnoſmer of himſelf, and if it be found, Hors de ſon Fee* &c. for the firſt Plea is waived by the other. Thel. Dig. 214. lib. 15. cap. 3. S. 1. cites Paſch 3 E. 3. 78. 3 Aſſ. 9.

2. In *ſur Cui in Vita of a Houſe and 2s. Rent*, the Tenant *ſaid that the Demandant had put in View only a Houſe, and ſo he ſuppoſes that the Rent is ariſing from this Houſe, in which Houſe he has nothing unleſs jointly with ſuch a one not named*; Judgment of the Writ, and held that he ſhall have the two Pleas. Thel. Dig. 214. lib. 15. cap. 3. S. 2. cites Trin. 5 E. 3. 192.

3. In Writ of *Waſte* as to Parcel, the Tenant *falſified the Demiſe, ſuppoſed by the Writ, in Abatement of the Writ, and as to other Parcel he ſaid that it was within the Vill* ſuppoſed by the Writ &c. and had both the Pleas. Thel. Dig. 214. lib. 15. cap. 3. S. 5. cites Paſch. 8 E. 3. 402.

4. In *Writ of Entry* the Tenant pleaded *that one Tho. was ſeiſed and died ſeiſed, from whom the Tenements deſcended to three Daughters, and the Tenant is Iſſue of one of them, and he has the Eſtate of the other by Purchaſe, and one Ro. has the Eſtate of the third by Purchaſe, and ſo he holds in common pro indiviſo with Ro. not named* &c. And held that he ſhall not have the two Pleas, ſcil. the Nontenure of the third Part, and the Tenancy in common of the Whole. Thel. Dig. 214. lib. 15. cap. 3. S. 7. cites Trin. 8 E. 3. 218. Quære.

5. In

5. In *Treſpaſs for a Cloſe broken brought by two, as to one of the Plaintiffs the Defendant ſaid that he was Tenant in Common of this Cloſe with the Plaintiff*, Judgment of the Writ, *and as to the other Plaintiff the Defendant pleaded Not Guilty* &c. Thel. Dig. 215. Lib. 15. cap. 3. S. 21. cites 8 E. 3. 436. in Mortdanceſter. Quære.

6. In *Quare Impedit*, the Defendant may *plead Darrein Preſentment* to the Writ, *and make Title of Right alſo to the Preſentment*, and his Plea ſhall be taken according to that which he concludes to the Writ by the Darrein Preſentment, or Action by the Title. Thel. Dig. 215. Lib. 15. cap. 3. S. 22. cites Mich. 8 E. 3. 426.

7. In *Debt by two Femes as Executrixes of the Teſtament of ſuch a one*, the Defendant as to one *ſaid that ſhe was Covert of Baron the Day of the Writ purchaſed, and yet is &c.* And *as to the other that ſhe has taken Baron pending the Writ* &c. and had both the Pleas, but the Iſſue was taken upon the one. Thel. Dig. 214. Lib. 15. cap. 3. S. 8. cites Mich. 8 E. 3. 441. Mich. 9 E. 3. 477.

8. In *Aſſiſe of Rent* the Tenant *pleaded Miſnoſmer of the Vill, and* if it be found &c. *That another is Tenant of the Rent not named* &c. Thel. Dig. 214. Lib. 15. cap. 3. S. 10. cites Mich. 15 E. 3. Aſſiſe 95.

9. The Tenant *pleaded Non-tenure of Parcel and ſhew'd who was Tenant, and as to the other Parcel pleaded Non-tenure alſo by reaſon of Recovery, and Execution ſued againſt him pending the Writ*, and had both the Pleas. Thel. Dig. 214. Lib. 15. cap. 3. S. 11. cites Trin. 15 E. 3. Brief 285.

10. In *Treſpaſs of Beaſts taken*, the Defendant cannot *plead That the Deliverance is made by Replevin in the County, and alſo juſtify as Diſtreſs* &c. Thel. Dig. 214. Lib. 15. cap. 3. S. 12. cites Mich. 17 E. 3. 585.

11. In *Writ of Aiel* the Tenant was received to *plead Laſt Seiſin in his Father who was Son and Heir to the Grandfather, and that the Demandant was Son and Heir to the younger Son of the Grandfather, and ſo he could demand nothing*. Thel. Dig. 214. Lib. 15. cap. 3. S. 9. cites cites Hill. 10 E. 3. 483.

12. In *Aſſiſe* the *Tenant ſaid that he had another Surname, and pleaded Jointenancy with one not named* &c. And held good without ſaying that he is the ſame Perſon &c. and the Plaintiff cannot reply to the Miſnoſmer but to the Jointenancy. Thel. Dig. 214. Lib. 15. cap. 3. S. 4 cites Mich. 5 E. 3. 215. and ſays ſee 22 Aſſ. 1.

13. A Man ſhall plead *Nontenure of Parcel of which another is Tenant, and alſo that the Demandant himſelf is ſeiſed of Parcel.* Thel. Dig. 214. Lib. 15. cap. 3. S. 13. cites Mich. 19 E. 3. Brief 244. And that a Man ſhall plead 20 *Nontenures to the Writ, but* the Tenant was *not* received to plead *Nontenure of Parcel and Jointenancy of Parcel* alſo. Paſch. 22 E. 3. 6.

14. In *Writ of Aiel* it is ſaid that the Tenant may *plead laſt Seiſin in the Demandant, and* after *waive this and plead laſt Seiſin in the Father of the Demandant*. Thel. Dig. 214. Lib. 15. cap. 3. S. 14. cites Paſch. 32 E. 3. Nuper Obiit. 2.

15. In *Aſſiſe of Common*, the *Defendant ſaid that the Land in which* &c. *is* 60 *Acres, and that the Grantor had nothing in the Land unleſs in five Acres at the Time of the Condition*, and *to the five Acres that the Grantee of the Common who granted his Intereſt to the Plaintiff had nothing in the Common at the Time of the Gift*, and had both the Pleas; For the one Plea goes to the five Acres, and the other Plea to the reſt, Contra if each Plea had been pleaded to the Whole. Br. Deux plees, pl. 31. cites 37 Aſſ. 14.

16. *Debt*

16. *Debt againſt Executors* who *pleaded Acquittance as to Parcel, and fully adminiſtered as to the Reſt*, and both were ſuffered, quod nota. Br. Deux plees, pl. 27. cites 28 E. 3. 91.

Br. Conuſance, pl. 10. cites S. C.

17. *Three Iſſues were permitted in alleging that the Bailiffs of the Franchiſe after Conuſance of the Plea granted had failed of Right to the Plaintiff*, inaſmuch as it *confirms the Juriſdiction of the Court of the King, and the King is as Party to it*, the Plea of which ſhall not be challenged for doubleneſs. Br. Double, pl. 119. cites 40 E. 3. 11.

18. In *Dower* the *Tenant ſaid that Baron had nothing unleſs in Special Tail to him and his firſt Feme*, the *Remainder to J. N. in Tail*, the *Remainder to the Baron in Fee*, the *Baron died and* he in the *Meſne Remainder ſurviv'd*, the *Demandant ſaid to Parcel Nient compriſe*, and *to the Reſt that he in Remainder did not ſurvive the Baron, by which the Baron was ſeiſed in Fee; For he had no Iſſue by the firſt Feme*, and he had both the Pleas, and yet if the Baron ſurviv'd ſhe ought to have Dower. Br. Deux plees. pl. 34. cites 46 E. 3. 16.

But ſee 4 H. 6. 29 the Plea is not good if he does not *traverſe the dying in his Homage* Per Cur.

19. In *Ward of Land and Body*, the *Defendant as to the Body pleaded Delivery by the Plaintiff himſelf upon certain Conditions perform'd to re-deliver, and othewiſe to retain him* &c. and *to the Land that the Anceſtor in his Life infeoffed J. N. Que Eſtate he has*, and becauſe this laſt Plea goes to all, therefore per Cur. he was drove to the one, by which he held him to the Feoffment. Br. Deux plees, pl. 2. cites 3 H. 6. 32.

20. In *Dower againſt one Jo.* he *ſaid, that he and one Ro. not named, held the Tenements jointly as Guardians in Chivalry by the Nonage of ſuch an one Heir* &c. Judgment of the Writ &c. And adjudged that he ſhould have the Plea &c. notwithſtanding that it is Double, viz. that he was Guardian not named Guardian, and the Jointenancy. Thel. Dig. 215. lib. 15. cap. 3. S. 17. cites Paſch. 9 H. 5. 4.

21. In *Dower*, the *Tenant ſaid, that he had nothing but in Ward with W. N. of the Grant of G. of whom the Anceſtor of the Infant, Son of the Baron, held in Chivalry* &c. Per Hals, the Plea is double, one that he has *nothing but in Ward*, and the other that he *holds jointly*; and becauſe if he ſhould be compelled to hold to the one, he at another Time ſhould loſe the other, therefore for the *Miſchief* he ſhall have Plea; per tot. Cur. Br. Double, pl. 33. cites 9 H. 5. 4.

22. It is held, that *in Appeal of Death*, the Defendant may *plead that there is another Appeal pending, and Nul tiel Vill &c. alſo, and Miſnoſmer of himſelf, and Nul tiel Vill* &c. and pray Allowance of them &c. *and as to the Felony plead Not Guilty*. Thel. Dig. 215. lib. 15. cap. 3. S. 18. cites Hill. 4 H. 6. 15.

23. A *Rule* is laid down, that when a Man has two *Matters*, he may plead either of them, and if he *cannot come at one without alleging the other*, the alleging it will not make his Plea double; Arg. 12 Mod. 507. in Caſe of Pell v. Garlick, cites 5 H. 7. 38.

24. In *Scire Facias out of a Fine*, the Tenant *pleaded that it was once executed, and alſo that he is in by Tail made before this Fine*, and held that he ſhould have both. Thel. Dig. 214. lib. 15. cap. 3. S. 15. cites Paſch 32 E. 3. Scire Facias 102. 145. and 18 H. 6. 3.

25. *Aſſiſe by the Maſter and Confreres of the Fraternity of the* nine Orders of the Angels in B. in the County of Middleſex, the *Defendant ſaid that there is not any ſuch Corporation by the Name ut ſupra in the ſame County, and if* &c. *nul tort* &c. and was not ſuffered to have both, for the firſt Plea goes in Bar, and he *ſhall not have the Bar and alſo a general Iſſue*, Quod Nota, per Cur. Br. Barre, pl. 91. cites 22 E. 4. 34.

26. Where Double Plea is pleaded, and the *Demandant relies upon the one Article, and ſo to Iſſue*, there no Party ſhall have Advantage of the Doubleneſs afterwards. Br. Repleader, pl. 18. cites 22 H. 6. 14.

27. Where

27. Where there is *but one Tenant, and one Defendant,* he *cannot have two such Pleas as each of them do go to the whole*; *But where* there are *divers, each* of them *may plead ſeveral Pleas,* which extend to the whole. Co. Litt. 303. a.

28. The *Plea which contains Duplicity,* or Multiplicity *of diſtinct Matter to one and the ſame Thing whereunto ſeveral Anſwers* (admitting each of them to be good) *are required, is not allowable in Law*; And this Rule *extends* to Pleas Perpetual or Peremptory, and *not to Pleas Dilatory*; For in their Time and Place a Man may uſe divers of them. Co. Litt. 304 a.

29. Double or treble Pleas are allowable *in an Aſſiſe of Novel Diſſeiſin, Mortdanceſtor, Juris Utrum, Attaint,* or *Certificate of Aſſiſe,* which would have Juries returnable on the firſt Day before any Plea pleaded; For theſe are Feſtina Remedia; But Double Pleas are not allowable in other Actions; For there is an original Writ, Plea, and Iſſue, and upon this a Venire Facias &c. and a Trial. Jenk. 75. pl. 43. cites 3 H. 4 2.

30. *Preſcription* by Freeholders, *and Cuſtom by Copyholders,* may be joined in one Plea. Lev. 269. Trin. 21 Car. 2. B. R. Potter v. North.

31. Duplicity is not a good Exception to a Plea *in Abatement*; But in Plea *in Bar* Duplicity of Matter makes the whole void; admitted. But the Court took a *Difference* between a Plea of *Outlawry in Diſability,* and *other Pleas in Abatement,* and that a Plea of ten Outlawries is double, becauſe a Plaintiff is diſabled as well by one as by the other nine. Carth. 8. Trin. 3 Jac. 2. B.R. Trevilian v. Secomb. Ibid. cites Co Litt. 304. and 4 H. 6. 16. a.

32. One Defendant could not plead two Pleas that went to the whole, (but now by 4 & 5 *Annæ* for Amendment of the Law he may.) 1 Salk. 218. pl. 3. Mich 5 W. & M. in B. R. Combe v Talbott.

33. 4 & 5 *Annæ, cap.* 16. *S.* 4. Enacts, that *it ſhall be lawful for any Defendant or Tenant, or Plaintiff, in any Replevin, in any Court of Record, with Leave of the Court, to plead as many ſeveral Matters as are neceſſary.* Plaintiff brings a Writ of Error to reverſe a common Recovery. Defendant moved for Liberty to plead Double. The Motion was oppoſed, becauſe the Act for the Amendment of the Law, whereby a Defendant, by the Leave of the Court firſt obtained, may plead Double, was not to be underſtood of a Defendant in a *Writ of Error,* but a Defendant in an original Action i But it was inſiſted upon by the Counſel on the Side with the Motion, That this Act did extend to the Defendant in a Writ of Error, as well as in an original Action; that the one might have as great Occaſion of pleading double as the other; That it had lately been reſolved, that a Writ of Error did not abate by the Death of one of the Plaintiffs, whereas, as the Law ſtood before that Act of Parliament, it would; That by the ſame Reaſon by which the Word Plaintiff, in that Part of the Act of Parliament, was to be extended to a Plaintiff in Error, the Word Defendant ſhould likewiſe. It was further urged, that the pleading Double was at their own Peril; for if the Court had not Power by this Act of Parliament to grant them Leave to plead Double, the other Side may demur; And to this Opinion the Court inclined; But the Court made their Motion fruitleſs, by declaring, that one of the Things they deſigned to plead, did upon the Record appear to be falſe. 10 Mod. 326. Paſch. 2 Geo. B. R. Hurtſon v. Aglionby.

The Court was moved for Leave to plead and *demur,* but refuſed the ſame; For demurring is not pleading. 10 Mod. 280. Hill. 1 Geo B. R. Hayſon & al' (Aſſignees) v. Jeffreys.

An *Heir* ſhall not have Leave to plead *Riens per Deſcent* with another Plea, except he make *Affidavit* that he has Riens per Deſcent; nor ſhall an *Adminiſtrator* have Leave to plead *Plene Adminiſtravit, and No Aſſets,* without an Affidavit that he has no Aſſets. 10 Mod. 334. Trin. 2 Geo. B. R. Carrington v. Warren.

34. Upon a Writ of Error brought upon a *Judgment* in C. B. *in a Formedon in Remainder* for Lands in Lincolnſhire, the Caſe was this, viz. Sir Edward Huſſey the *Demandant counted of a Gift by Sir Thomas Huſſey* to J. B. R. M. and T. L. Eſq; *in Fee, to the Uſe of the ſaid Sir Thomas, and the Heirs Male of his Body begotten upon the Body of S. his Wife,* and for Default of ſuch Iſſue, *to the Uſe of the Heirs Male of the Body of the ſaid Sir Thomas,* and for Default of ſuch Iſſue, *to the* Comyns's Rep 260 pl. 143. S. C. but no Judgment.

Uſe of William Huſſey, Eſq; for Life, and after his Deceaſe *to the Uſe of the firſt and every other Son of the ſaid William in Tail Male*, and for Default of ſuch Iſſue, and if the ſaid Williams's Wife ſhould be with Child at the Time of his Deceaſe, and ſuch Child ſhould be a Son, *to the Uſe of* ſuch *poſthumous Son, and the Heirs Male of his Body*, and for Default of ſuch Iſſue, *to the Uſe of Sir Edward the Demandant*, and that the ſaid *William H. died in the Life-time of the ſaid Sir Thomas without Heir Male* of his Body, *and* that *there was not any poſthumous Son* of the ſaid William, and that afterwards the ſaid *Sir Thomas died without Heir Male of his Body*, ſo that the Right remained in the ſaid Sir Edward the Demandant &c.

The Tenants, having obtained Liberty to plead Double, *pleaded* 1ſt. *That* the ſaid *Sir Thomas being ſeiſed* of &c. *in Fee the 8th. Decemb.* 1682, *by Indenture of Bargain and Sale* between the ſaid Sir Thomas of the one Part, and the ſaid J. B. R. M. and T. L. by the Name of T. L. of London, Merchant, of the other Part, *bargained and ſold to the ſaid J. B. R. M. and T. L.* the &c. *for one Year*, from the Day next before the Date of the ſaid Indenture, by Virtue of which Indenture of Bargain and Sale &c, the ſaid J. B. &c. were poſſeſſed &c. *and that on the 9th of December* 1682, *by another Indenture made between the ſaid Sir Thomas and ſeveral others* (naming them) *of the one Part, and the ſaid J. B. R. M. and T. L.* by the Name of as above, *of the other Part*, the ſaid *Sir Thomas releaſed his Reverſion* of the &c. *to the ſaid J. B. R. M. and T. L. and their Heirs, to the Uſe of the ſaid Sir Thomas for Life without Impeachment of Waſte, and after his Deceaſe to the Intent that S. his Wife ſhould receive 600 l. per Annum for her Life*; and as to the ſaid &c. charged with the ſaid 600 l. per Ann. after the Deceaſe of the ſaid Sir Thomas, to the Uſe of the ſaid J. B. R. M. and T. L. for 500 Years, upon Truſt &c. And after the Determination of the ſaid Term, to the Uſe of the Heirs Male of the Body of the ſaid Sir Thomas, begotten upon the Body of his ſaid Wife, and for Default of ſuch Iſſue, to the Uſe of the Heirs Male of the Body of the ſaid Sir Thomas, and for Default of ſuch Iſſue, to the Uſe of William Huſſey of London, Merchant, Brother of the ſaid Sir Thomas, for Life, and after his Deceaſe to the Uſe of the firſt, and every other Son of the ſaid William in Tail Male, and for Default of ſuch Iſſue, and if the ſaid William's Wife ſhould be with Child at the Time of his Death, and ſuch Child ſhould be a Son, to the Uſe of ſuch poſthumous Son, and the Heirs Male of his Body, and for Default of ſuch Iſſue, to the Uſe of the ſaid Sir Edward the Demandant for Life, (with divers Uſes over by way of Remainder) and that *by the ſame Indenture of Releaſe it was provided, that the ſaid Sir Thomas might revoke, or alter all or any of the Uſes or Eſtates in the ſaid Releaſe, and declare and limit any other Uſes or Eſtates*, as to the ſaid Sir Thomas ſhould ſeem meet, and that *on the* 12 *Feb.* 1 *Jac.* 2. *the ſaid Sir Thomas, in Purſuance of the ſaid Power, by a Writing ſigned and ſealed &c. revoked the ſaid Uſe and Eſtate limited to the ſaid Sir Edward* the Demandant, *and that afterwards*, viz. 1 *May* 1701, *the ſaid Sir Thomas, by another Writing ſigned and ſealed &c. revoked all the Uſes and Eſtates limited by the ſaid Releaſe concerning the Lands in Queſtion, and limited the Uſe thereof to himſelf in Fee, and died ſo ſeiſed, upon whoſe Death the Lands deſcended to the Defendants as his Heirs* &c. *abſque hoc that the ſaid Sir Thomas gave the Lands* in Queſtion, *Modo & Forma as the Demandant has alleged &c.*

And the *ſaid Tenants for their ſecond Plea pleaded the ſame Matter in Bar, concluding with an hoc parat' verificare* &c.

The

The Demandant averred, that the ſaid William Huſſey, Eſq; and the ſaid William Huſſey of London, Merchant, Brother of the ſaid Sir Thomas, are the ſame Perſons, and demurred to the Pleas, and for Cauſe ſaid, that the ſeveral Matters pleaded by the Tenants were inconſiſtent and repugnant in themſelves, and every of the ſaid Pleas are either Contradictions to itſelf, or to the other, (viz.) the ſecond Plea was repugnant to the firſt in this, that the ſecond ſuppoſed and confeſſed the Gift of the Lands in Queſtion as the Demandant alleged, and upon that Suppoſition it was founded, otherwiſe it was ſuperfluous, and to no Purpoſe, and the Inducement to the Traverſe in the firſt Plea ſuppoſed the Gift to be made to the ſame Effect contained in the Writ and Count, though not in the ſame Words, and upon that Suppoſition the ſaid Power of Revocation, and the Revocation of the Uſe and Eſtate limited to the ſaid Sir Edward, were in both the Pleas (though inſufficiently) pleaded, yet the ſaid Gift, as alleged by the ſaid Sir Edward, was by the firſt Plea traverſed and denied, and ſo the firſt Plea repugnant to itſelf, and to the ſecond Plea; and where in the ſaid Pleas after the Pleading of the Indenture of Bargain and Sale it was ſaid, By Virtue of which Indenture of Bargain and Sale &c. whereas it ought to have been ſaid, By Virtue of which Bargain and Sale &c. and not By which Indenture &c. Alſo the Tenants did not produce nor allege to have produced the Writings mentioned to be ſealed with the Seal of the ſaid Sir Thomas, whereby the Uſes aforeſaid were alleged to be revoked. Moreover, if the firſt Plea was not repugnant as aforeſaid, it at the beſt only amounted to the General Iſſue, and ſo ought to have been pleaded Generally; and though it was lawful for the Tenants with Licence to plead ſeveral Matters, no one can plead ſeveral Matters which are inconſiſtent, or the ſame Matter ſeveral Ways.

Laſtly, that the Pleas were inſufficient, becauſe it did not appear whether William Huſſey named in them, and William Huſſey named in the Writ and Count, were the ſame Perſon or divers, nor whether the ſaid William, at the Time of the firſt Revocation, was dead without Heir Male of his Body, or leaving ſuch Iſſue, or was then alive. The Tenants joined in Demurrer, and in C. B. the Pleas were held good, and Judgment given for the Tenants.

The Demandant brought Writ of Error, and aſſigned the general Error, and alſo the ſaid Matters ſhewn for Cauſe of the Demurrer, and upon Argument the whole Court held the Pleas good, and as to the Repugnancy of the ſaid Pleas which was the chief Point inſiſted upon, held that the ſaid Pleas were conſiſtent; for both the Pleas conſiſted of the ſame Matter though it was pleaded with divers Views, and to divers Intents, the Reaſon whereof was, becauſe the Tenants doubted whether the Deed, being ſomething various in its Limitations from the Gift counted upon, would be adjudged the ſame Gift, and therefore got Leave to plead Double, to the End they might be ſafe, whether the Deed was adjudged the ſame, or not the ſame Gift whereupon the Demandant counted. Judgment affirmed. MS. Rep. Hill. 3 Geo. B. R. Huſſey v. Huſſey.

35. Double Plea was allowed on a Promiſe of Marriage, viz. *Non Aſſumpſit and Infancy.* Gibb. 175. pl. 23. Paſch. 3 Geo. 2. B. R. Holt v. Ward.

So *in Caſe upon ſeveral Promiſes*, viz. *Non Aſſumpſit and the Statute of Limitations.* Gibb. 189. pl. 1. Hill. 4 Geo. 2. B R. Decoſta v. Carteret.

36. A Motion was made for Liberty to *rejoin double*, as being within the Equity of the Act, which allows pleading double. But the Court ſaid, that they thought that this would be intirely inconvenient and

and out of the Reaſon of the Act, and therefore refuſed it. 2 Barnard. Rep. 6. Trin. 5 Geo. 2. Anon.

Caſes of Pract. in C. B. 154. S. C. accordingly.

37. A Rule to plead double, viz. *Non Aſſumpſit*, and a *General Releaſe* was diſcharged becauſe theſe Pleas are *contradictory*. Notes in C. B. 228. Hill 6 Geo. 2. Gibſon v. Cole.

Caſes of Pract. in C. B. 154. S. C. accordingly.

38. In *Treſpaſs* for entering of Plaintiff's Cloſe and pulliug down a Weare. Defendant moved to plead double, viz. *Liberum Tenementum* and a *Juſtification* of pulling down the Weare *as a Nuſance*, and a Rule Niſi was obtained; but was afterwards on hearing Counſel on Sides diſcharged by the Court, the Matters prayed to be pleaded being inconſiſtent. Notes in C. B. 229. Trin. 6 & 7 Geo. 2. Halſey v. Feltham.

Caſes of Pract. in C. B. 154. S. C. accordingly.

39. Defendant obtained a Rule Niſi to plead double, *Non Aſſumpſit* and *Non Aſſumpſit infra ſex annos*. Plaintiff ſhewed for Cauſe, that the Rule to plead was expired before the Motion to plead double was made; but Court held that Defendant was *proper to move to plead double any Time before Judgment ſigned*. Notes in C. B. 229. Mich. 7 Geo. 2. King v. Boſwell.

Caſes of Pract. in C. B. 154. S. C. and the Motion denied.

40. Action was brought *againſt an Innkeeper for detaining two Horſes* of the Plaintiff's. It was moved to plead double, viz. *Not Guilty*, and an *Accord and Satisfaction*, and would have compared it to Non Aſſumpſit and Non Aſſumpſit infra ſex annos. The Court denied to make any Rule, the Matters prayed to be pleaded being *contradictory*. Notes in C. B. 230. Hill. 7 Geo. 2. Durſley v. Cole.

41. A Rule was made for Plaintiff to ſhew Cauſe why Defendant ſhould not plead double, viz. *Non Aſſumpſit* and *Non Aſſumpſit infra ſex annos*. Plaintiff on ſhewing Cauſe, produced an Affidavit *that Defendant had not appeared*, and conſequently not being in Court was not proper to make the Motion, and the Rule was diſcharged. Notes in C. B. 233. Mich. 8 Geo. 2. Benn v. Geary.

Caſes of Pract. in C. B. 153. S. C. ſays that the Motion was granted. —— See the Note at the next Plea.

42. It was moved to plead double, *Non Aſſumpſit* and *Plene Adminiſtravit*, which was denied by the Court, *no Affidavit* being *produced that Defendant had fully adminiſtered*. Notes in C. B. 234. Mich. 8 Geo. 2. Heathfield v. Allen.

Caſes of Pract. in C. B. 153. S. C. and ſays that the Motion was granted. —— Ibid. 154. The Reporter adds a Note that Affidavit muſt be made by the Executor or Adminiſtrator that he hath fully adminiſtered and by the Heir that he has nothing by Deſcent, before Motion.

43. On Motion to plead double, *Solvit ad Diem* and *Riens per Deſcent*, it was objected that an *Affidavit of the Fact* as to Riens per Deſcent ought to be produced from the Heir, as from an Executor or Adminiſtrator in a Plene Adminiſtravit, and the Objection was held good. No Rule. Notes in C. B. 234. Mich. 8 Geo. 2. The Burgeſſes of Wisbetch v. Frier.

44. Defendant *Non Aſſumpſit infra ſex Annos*, and *Plaintiff demurred* to the Plea; The Matters in Queſtion *being Actions between Merchant and Merchant*; and *Defendant* thereupon *moved to add to his former Plea a general Non Aſſumpſit upon Payment of Coſts*; but this was *denied*. Notes in C. B. 234. Hill. 8 Geo. 2. Peirſon v. Ives.

45. Motion to plead double, viz. *Non Aſſumpſit*, and *ſeveral Matters ſet off againſt Plaintiff's Demand* was denied per Cur. as *contradictory*. The general Iſſue muſt be pleaded with Notice to ſet off purſuant to the Statute. Notes in C. B. 236. Paſch. 8 Geo. 2. Jarratt v. Robinſon.

46. A Motion to plead double, viz. *Nil debet* and *Nil habuit in Tenementis* was refuſed. Per Cur. The latter may be given in Evidence upon the former. Notes in C. B. 236. Trin. 8 & 9 Geo. 2. Marſhal v. Lawrence. Caſes of Pract. in C.B. 154. S.C. accordingly.

47. In a Prohibition it was moved to plead double, viz. *That J. C. &c. named in the Declaration at a Meeting &c. did not make up a true and juſt Account* &c. *and that the Account mentioned in the Declaration was not examined, allowed and approved by the Veſtry*; and the ſame was granted on hearing Counſel on both Sides. Caſes of Practice in C. B. 122. Mich. 9. Geo. 2. Coates v. Smith and Midgeley.

48. In Treſpaſs it was moved for Defendant for Leave to plead doubly, viz. *Non cul'* and *Liberum Tenementum* of the Liberty of St. Catherine's, and obtained a Rule to ſhew Cauſe, which was afterwards made abſolute upon an Affidavit of Service, no Cauſe being ſhewn. Notes in C. B. 241. 10 Geo 2 Stibbs v. Neeves. Caſes of Pract. in C. B. 153. S. C. the Motion was granted and not oppoſed.

49. In Replevin the Court gave Leave to plead doubly, viz. *That Plaintiff in Replevin had not Property*, and a *Juſtification as a Diſtreſs for Rent*. Notes in C. B. 244. Mich. 10 Geo. 2. Bird v. Spincks. Caſes of Pract. in C. B. 153. S. C. accordingly.

50. *After* a Judge's *Order for Time to plead, pleading an iſſuable Plea*, Defendant moved to plead double Matter, and the Queſtion was, Whether a Rule for that Purpoſe ought to be granted or not? The Court took Time to conſider, and after conferring with the Judges of the other Courts, gave Defendant Leave to plead doubly, pleading iſſuable Pleas, and taking ſhort Notice of Trial. Notes in C. B. 244. Mich. 10 Geo. 2. Leighton v. Leighton. Caſes of Pract. in C. B. 154. S. C. accordingly.

51. Defendant had *pleaded Non Aſſumpſit infrá ſex annos*, and moved to add to that Plea *Non Aſſumpſit generally*, which was denied. After Defendant hath pleaded a ſingle Plea, he cannot have Leave to plead doubly. Notes in C. B. 245. Hill. 10 Geo. 2. Nevil v. Fiſher. Caſes of Pract. in C. B. 154. S. C. accordingly, after a ſingle Plea of Non Aſſumpſit.

52. In Treſpaſs it was moved to plead doubly, *Not Guilty*, and a *Juſtification*, which was denied as contradictory. Notes in C. B. 245. Hill. 10 Geo. 2. Barnett v. Greaves. Caſes of Pract. in C. B. 154 S. C. accordingly.

53. Aſſumpſit. *Defendant paid* 10*l. on the Common Rule*, and afterwards obtained a Rule to plead double, *Non Aſſumpſit* and *Non Aſſumpſit infra ſex annos*. Plaintiff moved to ſet aſide the double Plea with Coſts, and had a Rule to ſhew Cauſe, which was made abſolute. Plaintiff by the Rule to pay Money into Court is confined to plead the General Iſſue, and no other Plea. The Motion afterwards to plead Double is an Impoſition on the Court. Notes in C. B. 245, 246. Eaſt. 10 Geo. 2. Buck v. Warren, Attorney, in Caſe. Caſes of Pract. in C. B. 154 S. C accordingly.

54. It was moved to plead double, viz. *Damage-Feaſant*, and under a *Demiſe from Defendant to Plaintiff*. Ch. J. ſaid he thought them inconſiſtent; but as Defendant obtained a Rule to ſhew Cauſe, and Plaintiff did not oppoſe it, it muſt be abſolute. Notes in C. B. 246. Eaſt. 11 Geo. 2. Church v. Fendall. Caſes of Pract. in C. B. 153. S. C. accordingly.

55. The Court gave Defendant Leave to plead doubly, viz. a *Diſtreſs for Damage-Feaſant and for Rent in arrear*. This is not ſtronger than Not Guilty and Liberum Tenementum, *ſolvit ad Diem* and a *mutual Debt*, which have been granted. Notes in C. B. 247. Trin. 11 & 12 Geo. 2. Baynes v. Lutwidge. Caſes of Pract. in C. B. 153. S. C. accordingly.

56. Defendant having obtain'd a *Rule to plead* doubly (*Non Aſſumpſit & Non Aſſumpſit infra ſex annos*) Plaintiff mov'd to diſcharge it, inſiſting

inſiſting that *Defendant* who *was a Priſoner in the Fleet at the Time of* his being charg'd with *the Declaration before this Rule obtained was diſcharged at the Seſſions of the Peace, by the* compulſory Clauſe in the *Inſolvent Debtors Act* 10 *Geo.* 2. *and being at large could not regularly apply for the Rule to plead doubly, withoutt firſt entering a common Appearance; which was not done.* The Queſtion was never determined, but by Conſent the Plaintiff had Leave to diſcontinue without Coſts. Notes in C. B. 274. Trin. 11 & 12 Geo. 2. Cock v. Kerredge.

Caſes of Pract. in C. B. 153. S. C. accordingly.

57. Rule made abſolute to plead double, *Non aſſumpſit*, and Defendant's *Diſcharge under the Inſolvent Debtors* Act. 10 Geo. 2. Notes in C. B. 252. Eaſt. 12 Geo. 2. Jones v. Body.

Caſes of Pract. in C. B. 153. S. C. accordingly.

58. A Rule the ſame Term in Caſe of **Liſle v. Jenyns**, had been made to ſhew Cauſe, and abſolute on Affidavit of Service (no Cauſe being ſhewn) to plead *Non eſt factum*, and *Defendant diſcharged* under the ſaid Act. Notes in C. B. 252. Jones v. Body.

(C) Allow'd in what Caſes, where there are ſeveral Defendants. And where the one pleads one Plea, and the other another.

1. IN *Writ againſt Ro. and W. Ro. made Default after Default*, and *W. was received to plead Sole Tenancy of Parcel, and Jointenancy of the Reſidue.* Thel. Dig. 214. Lib. 15. cap. 3. S. 3. cites Mich. 5 E. 3. 209. 229.

2. In a Writ of Error it was ſaid Arguendo that where *Præcipe* is brought *againſt two Jointenants, Parceners*, or ſuch like, *each may plead in Bar by himſelf of his Part*, and if *the one pleads a Plea which goes to all*, and it is *found for him and the Plea of the other is found againſt him*, yet *he ſhall looſe his Moiety.* Br. Deux plees, pl. 4. cites 9 H. 6. 46.

3. *But* Quære if *Baſtardy* be *pleaded by the one in Action Anceſtrel, and another Plea by the other*, and the *Baſtardy is found for him who pleads it, and the other Plea is found againſt the other* if this ſhall not ſerve both, But it was ſaid that all is one, and that each may loſe his Part; but Quære, becauſe it was not adjudg'd. Ibid.

4. *But* if the *one pleads to the Writ and the other to the Action*, there the *Plea to the Writ ſhall be firſt try'd*; For if it be found for him all the Writ ſhall abate, and this ſhall ſerve both. Ibid.

5. *But in Treſpaſs in Perſonal Action againſt two*, and the *one pleads one Plea, and the other another Plea which goes to all*, there *this ſhall ſerve both*; Quære in Action real. Ibid.

6. *And in Action* brought *againſt one* if he *pleads one Plea to Parcel, and the other Plea to the Reſt, which goes to all*, there *the Plea which goes to all ſhall be accepted only*, and not the other be it in Action Real or Perſonal, becauſe it is pleaded by one and the ſame Perſon. Ibid.

7. Quære where *two Pleas are pleaded by two in Præcipe quod* reddat *whether the one goes to all.* Ibid.

8. *Forger de Faits againſt three*, the *one made Default*, and *two appear'd*, and the *one pleaded the Death of the Third, who did not come, at D. in another County before the Writ purchaſed*, and the *other pleaded Not Guilty*, and *Ven. fac. iſſued upon both*, and after the *Plaintiff pray'd two Niſi Prius's upon thoſe two Iſſues, and triable in two Counties.* Per Moyle

Moyle he cannot have both, but if the Iſſue of the Death be try'd then the other Iſſue is void, though it be try'd alſo. But per Priſot the Plea of the Death goes to the Writ, therefore the other ſhall have thereof Advantage, *Quære of ſeveral Pleas to the Action*, and therefore here the one may make an End of all, and therefore this ſhall be firſt try'd, and if it be found againſt the Defendant, then the other Plea ſhall be try'd for the other, but if it be found for the Defendant who pleaded the Death, the Writ ſhall abate in all, by which *Niſi Prius was granted only of the County where the Death is alleg'd.* Br. Deux plees, pl. 20 cites 37 H. 6. 37.

9. *In Præcipe againſt two*, if the *one pleads Baſtardy* and the *other Releaſe of the Demandant*, both ſhall be tried, and if the *Baſtardy* be *found* the other Iſſue is void becauſe the Baſtardy goes to all; Per Moile. But Priſot denied it, for in Plea of Land every one may ſave or loſe his Moiety, therefore if Baſtardy be found for the one, and Releaſe againſt the other, the Demandant ſhall recover one Moiety and ſhall be barr'd of the other Moiety only, and of no more. Ibid.

(D) Allowed in what Caſes, where one ſhall be ſaid to go to the Whole.

1. IN Præcipe quod reddat the *Tenant as to Parcel ſaid, that he had nothing unleſs as Baron of his Feme not named in the Writ*; Judgment of the Writ, and as *to the reſt he pleaded Nontenure*; Per Birton, he has pleaded two Pleas where the one, ſcil. the Nontenure goes to all, and prayed to be diſcharged of the one; and per Cur. he ſhall anſwer to both, and ſo he did, that is to ſay, to the one Parcel that he is ſole Tenant, and the Feme has nothing, and to the reſt Tenant as the Writ ſuppoſes, Priſt &c. Br. Deux Plees, pl. 12. cites 21 E. 3. 28.

2. In Dower the *Tenant to Parcel pleaded Jointenancy*, and *to the reſt Ne unques Accouple* in lawful Matrimony; and per Wich, he ſhall not have both, becauſe the one and the laſt Plea goes to all; but Finch contra, for if he has a Joint-Feoffee it is no Reaſon that he ſhall render the entire Damages, and alſo he cannot vouch without his Companion; but Wich contra. Br. Deux Plees, pl. 7. cites 40 E. 3. 31.

3. *And* that he cannot plead *Releaſe to Part, and another Anſwer to the reſt*, for the Releaſe goes to all; Per Wich. Ibid.

4. *But* 43 E. 3. 39. it is adjudged that *a Meſne Tenant ſhall not plead one Plea which goes to all, and another Plea to the reſt.* Br. Deux Pleas, pl. 7. cites 40 E. 3. 31.

5. *But* it was ſaid 9 H. 6. that *where two are impleaded in a real Action the one may plead a Plea which goes to all for his Part, and the other another Plea to the reſt*, and each ſhall loſe or ſave his Part according to the Trial of the Plea &c. and ſee 15 E. 4. 25. a Diverſity of thoſe Matters between real Actions and perſonal. Ibid.

6. In Dower the *Tenant pleaded that the Demandant detained Evidences where he is Brother and Heir to the Baron*, and the *Demandant ſaid that ſhe detained two Deeds becauſe Eſtate was made by them to her and her Baron*, and *to the reſt that ſhe is Enſient by her Baron*; Per Cand. the laſt Plea goes to all, and yet ſhe had both. Br. Deux Plees, pl. 8. cites 41 E. 3. 11.

7. In Formedon the *Tenant pleaded Nontenure to Parcel and* that the Demandant is a *Baſtard to the reſt*, and could not have both the Pleas becauſe the laſt goes to all. Br. Deux Pleas, pl. 9. cites 43 E. 3. 29.

8. Debt

8. Debt *of* 20 *l. againſt Executors*, and *to* 10 *l. they pleaded Acquittance of the Plaintiff made to the Teſtator*, and *to the reſt fully adminiſtered*. Perſey ſaid the laſt Plea goes to all, but after he paſſed over. Br. Deux Plees, pl. 35. cites 48 E. 3. 18.

9. In Ward the Defendant *pleaded Nontenure to the Body*, *and* as *to the Land*, *that the Anceſtor did not die his Tenant*, and had the one and the other by Award, and yet the laſt might have been pleaded to both. Br. Deux Pleas, pl. 10. cites 7 H. 4. 12.

Br. Replication, pl. 14. cites S. C.

10. And per Hank. in Præcipe quod reddat the *Tenant pleaded to one Aere Nontenure*, and *to the reſt Releaſe of Actions real and perſonal*, *and had both*, and yet the laſt goes to all; the Reaſon ſeems to be inaſmuch as they are *pleaded to ſeveral Parcels*. Ibid.

11. Debt *upon an Obligation of* 20 *l. to pay* 10 *l. at two Days*, and the *Defendant for the firſt Day ſhewed Acquittance*, and *for the laſt Day that he has been always ready*, *and yet is*, *and brought the Money into Court*, and the *Plaintiff to the Acquittance demurred becauſe it had no Seal*, *and to the other Plea ſaid that he had not been always ready*, and was not ſuffered to have both by Replication becauſe if the Condition be broken in Part it is broke in all, and therefore he was compelled to hold to the one, and ſo he did, ſcil. That he has been always ready &c. Br. Deux Pleas, pl. 11. cites 14 H. 4. 30.

12. In Ward the *Defendant as to Body ſaid*, *that the Anceſtor of the Infant held Land of A. who held over of the Demandant Que Eſtate he has in the Ward*, *and* as *to the Land that he and the Anceſtor of the Infant held jointly*, *and he ſurvived*, and it was determined that he ſhould hold him to the Jointenancy, for this goes to all, by which he *ſaid that W. leas'd the Ward of the Body to the Defendant*, *and vouched him to Warranty*, and *as to the Land pleaded Jointenancy by Fine* as above, and it was awarded that he ſhall have both, by reaſon of excuſing the Damages and to put it upon the Voucher. Br. Deux Pleas, pl. 13. cites 7 H. 6. 14.

* Orig. (terre) but the other Editions are 3 s.

13. Debt *upon a Leaſe for* 10 *Years rendering Rent*, and *for Arrear of eight Years* &c. Fullthorp ſaid *Green Acre is Parcel* of the Premiſſes which was aſſeſſed to * 3 s. at the Time of the Demiſe, *into which the Plaintiff entered three Years after the Leaſe*, *before which Entry as Parcel nothing Arrear and as to the reſt he owes him nothing*, *Priſt*, where *one intire Rent was reſerved for all*, and the Opinion of the Court was, that the Entry into Parcel goes to all the Writ. Br. Deux Plees, pl. 14. cites 7 H. 6. 26.

14. In Waſt the *Defendant pleaded to Part that the Plaintiff had an elder Brother who ſurvived the Father and died*, *after whoſe Death no Waſt done*, and *to the reſt that the Plaintiff had another Coparcener in full Life not named*; Judgment of the Writ, and by ſome the firſt Plea goes to all, but by the beſt Opinion the laſt Plea goes to all clearly. Br. Deux Plees, pl. 3. cites 9 H. 6. 11.

15. *Forger de Faits of Land in four Vills* &c. the *Defendant as to three Vills ſaid that the Plaintiff never any Thing had*, and *to the Reſt conveyed Eſtate to himſelf*, *abſque hoc that he forg'd Modo et Forma*. Per Newton this laſt Plea goes to all, but the Court was againſt him. Br. Br. Deux plees, pl. 29. cites 10 H. 6. 24.

16. *And* per Cur. if *in Præcipe quod* reddat the *Tenant pleads Releaſe to Parcel*, *and Baſtardy in the Demandant to the Reſt* this ſhall not be ſuffer'd; For the laſt Plea goes there to all; note the Diverſity. Ibid.

17. In *Annuity* the *Defendant pleaded Acquittance of two Years*, and *to the Reſt that he offer'd to the Plaintiff a competent Benefice which was the Condition of the Grant*, *and he refus'd*, and becauſe this Plea goes to all, the firſt Plea was ouſted; For Debt ſhall lie of the Arrears before. Br. Deux plees, pl. 15. cites 19 H. 6. 54.

18. *In*

19. *In Treſpaſs of a Villein in his Service being taken*, Frank and *Frank-Eſtate goes to all*, without anſwering to the Service; Quære by others. Br. Deux plees, pl. 16. cites 22 H. 6. 30. Br. Repleader, pl. 22. cites S. C.

20. *And in Treſpaſs de Muliere abducta cum bonis viri*, Never his Feme is a good Plea to all, per Fulthorp, but Aſcue contra; For he ſhall anſwer to the Goods alſo. Ibid.

21. *Treſpaſs of Trees cut and carried away*, the *Defendant as to the Trees pleaded Gift of the Plaintiff before the Treſpaſs*, and *to the cutting and carring away Not Guilty*; And per Littleton the laſt Plea goes to all, but Priſot ſaid No, but in Treſpaſs againſt two if the one pleads Releaſe, and the other another Plea, there the Releaſe goes to all if it be firſt try'd. Br. Deux plees, pl. 5 cites 33 H. 6. 12.

22 If *Baron and Feme plead Miſnoſmer of the Feme*, it goes to all the Writ if it be found, and yet the Baron ſhall plead another Plea for himſelf alſo; and ſo he did, quod nota, and ſo two Pleas, and yet the one goes to all. Br. Deux plees, pl. 6. cites 33 H. 6. 22. Br. Miſnoſmer, pl. 8. cites S. C.

23. In *Dower*, the *Tenant pleaded Nontenure to Parcel*, and *to the Reſt that the Demandant detain'd from him certain Evidences which concern'd the ſame Land*, and had both; For the laſt Plea goes but to this Parcel of which the Tenant takes the Tenancy. Br. Deux plees, pl. 36. cites 33 H. 6. 51.

24. *Treſpaſs in three Acres* of Land, the *Defendant juſtified for the third Part by one Title*, and *in the other two Parts by another Title*, and well; For it may be that it is in Severalty, the third Part from the two Parts; For otherwiſe, the one Plea goes to all. Br. Deux plees, pl. 30 cites 37 H. 6 39.

25. In *Debt upon arrears of Annuity granted pro Concilio impenſo* &c. againſt the Succeſſor of an Abbot, the *Defendant*; *as to the Arrears between ſuch a Feaſt and ſuch a Feaſt, ſaid, that the Predeceſſor requir'd Counſel in ſuch a Matter at D. and he there refus'd to give Counſel; and to the Arrears before, that he did not give Counſel* &c. and had both Pleas; For though the Annuity was determin'd by the Refuſal, yet Debt lies of the Arrears before, and this Action is Debt, but in Action of Annuity, there the Refuſal goes to all of this Nature of Action. Note the Difference in Annuity, and e contra in Debt upon arrears of Annuity. Br. Annuity, pl. 28. cites 39 H. 6. 22. Br. Deux plees, pl 22. cites 39 H. 6. 21. S. C.

26. *Action of divers Treſpaſſes*, the *Defendant to ſome pleaded Not Guilty*, and *to the Reſt Arbitrement of all Treſpaſſes*, and were at Iſſue of this, and *found for the Plaintiff*, and by ſome this laſt Plea goes to all, and by ſeveral none ſhall have Advantage of the laſt Plea but the Party, but any as Amicus Curiæ may ſhew to the Court that the one Plea goes to all, and the Court ex Officio ſhall diſcharge all but that; and after it was ſaid per Cur. that it is better for the Plaintiff to releaſe Part of his Damages and to have Judgment of the Reſt; For where diverſe Treſpaſſes are, and divers Pleas pleaded, and found for the Plaintiff, and the Damages are ſever'd, the Plaintiff may releaſe his Damages for Part, and pray Judgment for the Reſt; and ſo is ſure. Br. Deux plees, pl. 23. cites 5 E. 4. 124. Br. Office, del &c. pl. 23. cites S. C.

27. In *Aſſiſe by B. and S.* the *Defendant pleaded againſt B. that he is an Alien born*, and *againſt S. that he had never ſuch Office of which the Aſſiſe is brought*, and *it was held that the laſt Plea goes to all againſt both*; For if there be no ſuch Office, no Aſſiſe lies. Br. Deux plees, pl. 24. cites 7 E. 4. 29.

28. A Man *ſhall not have two Pleas where the firſt goes to all.* Br. Deux plees, pl. 25. cites 12 E. 4. 10. Br. Treſpaſs, pl. 329. cites S. C.

For more of Double Pleas in General, See other Proper Titles.

Dower.

What it is, and the ſeveral Sorts and Incidents.

At this Day Dower is not taken by the Profeſſors of the Common Law, either for the *Land which the Wife brings with her in Marriage* to her Husband, for then it is either called in Frank-Marriage or in Marriage, *nor* for the *Portion of Money or* other *Goods* or Chattels which ſhe brings with her in Marriage, for that is called her Marriage-Portion. And yet *of antient Time Dos Mulieris*, the Dower or Dowry of the Woman was alſo applied to them; but it is now commonly taken for her *third Part* which ſhe hath *of her Husbands Lands* or Tenements. Co. Litt. 31.

1. DOWER is Propter onus Matrimonii & ad ſuſtentationem Uxoris & Educationem liberorum cum fuerint procreati, ſi Vir præmoriatur. Et hoc proprie dicitur Dos Mulieris ſecundum Conſuetudinem Anglicanam. Co. Litt. 30. b.

2. Littleton divides Dower into 5 Parts, viz. Dower by the *Common Law*. By *Cuſtom*. *Ad Oſtium Eccleſiæ*. *Ex Aſſenſu Patris*. And *De la pluis Beale*.

3. Three Things *belong* to Dower, viz. *Marriage*. *Seiſin*. *Death of the Husband*.

4. Concerning *Seiſin*, it is *not neceſſary* that the ſame ſhould *continue* during the Coverture; For albeit the Husband aliens the Lands and Tenements, or extinguiſhes the Rents or Commons &c. yet the Woman ſhall be endowed. Co. Litt. 32.

(A) *What Woman* ſhall be endowed.

Fol. 675.

Br. Dower, pl. 36. cites 12 H. 4. 1. —— Co. Litt. 40 a. S. P. cites 12 H. 4. 2. and 7 H. 6. 11, 12.

1. IF a Man marries a Woman of an hundred Years of Age, yet ſhe ſhall have Dower, though by Poſſibility of Nature ſhe cannot have Iſſue. 12 H. 4. 2. b.

Feme of the Age of ſeven Years ſhall not have Dower. Br. Dower, pl. 36. cites 12 H 4. 1. —— And if *ſhe is of nine Years, and the Baron is not of ſeven* Years of Age, ſhe ſhall not have Dower; Contra *if he is ſeven at the Time of his Death*. Br Dower, pl. 88. cites Doct. and Stud. lib. 1. cap. 7. fol. 13. and Parva Na. Br. fol. 7. —— If ſhe be nine Years old at her Husband's Death, ſhe ſhall have Dower. 2 Inſt. 234. —— See (E) infra.

2. If the Husband dies before his Wife is of the Age of 9 Years, ſhe ſhall not be endowed. Litt. 8. 12 H. 4. 3.

3. Rot. Parliamenti 8 H. 5. Numero 15. the Commons prayed, That all Manner of Women Aliens that ſhould be married to Engliſhmen by the Royal Licence, ſhould be endowed &c.

(B)

(B) ANSWER.

[4] Let it be done as desired by the Petition.

This is Printed as in the Original.

1. [5.] Rot. Parliamenti, 9 H. 5. Numero . A Petition was delivered to the King in this Parliament for Beatrice, who was the Wife of Thomas, late Earl of Arundel, shewing, That whereas she was born in Portugal, and took to Husband the said Earl, who was seised in Fee, and Fee-Tail, of divers Castles, Lands &c. The Heirs and Tertenants now disturbed her of her reasonable Dower, because she was born and begotten in the said Land of Portugal, that it would please him to declare and ordain by Authority of Parliament, that she should have her Dower.

(C) ANSWER.

1. [6.] The King, of the Assent of the Lords in this Parliament, hath declared openly, and ordained in the same Parliament, as she hath desired.

2. [7.] In some Cases a Woman shall be endowed, though there is a Divorce between her and her Husband. 39 E. 3. 33. But quære.

8. In 28 Eliz. in Case of one Serle, it was argued by the Justices of C. B. if the *Issues of Priests* were legitimate, and Popham Attorney says, when he was Serjeant, it was adjudged that the *Wife of a Priest* should have *Dower*. D. 185. pl. 65. Marg.

9. The Policy of the *Common Law* may make a Quoad, as in 22 El. D. 274. a *Marriage infra Annos nubiles* is *perfect* Quoad Dotem, but as to other Purposes it is only Inchoatum & Imperfectum. 6 Rep. 40. b. Mich. 3 Jac. B. R. Mildmay's Case.

10. If a Freeman took a *Nief* to Wife, she should have been endowed; but the Wife of an *Ideot*, *Non Compos*, *outlawed*, or *attainted* of Felony or Trespass, attainted of Heresy, Præmunire, or the like, shall be endowed. Co. Litt. 31. a.

11. *But* if the Husband be attainted *of Treason*, though it be for Treason done after the Title of Dower, she shall not be endowed. Co. Litt. 31. b.

12. If a *common Person* takes an *Alien to Wife*, and dies, she shall not be endowed; But if the *King marries an Alien*, she shall be endowed by the Law of the Crown. Edmond, the Brother of King E 1. married the Queen of Navarre and died, and it was resolved by all the Judges, that she should be endowed of the third Part of all the Lands whereof her Husband was seised in Fee. Co. Litt. 31. b.

13. It is necessary that the *Marriage* do *continue*, for if that be *dissolved* the Dower ceaseth, *Ubi* nullum Matrimonium ibi nulla Dos; but this is to be understood when the Husband and Wife are divorced *a vinculo Matrimonii*, as in Case of Pre-contract, Consanguinity, Affinity &c. and *not a Mensa & Thoro* only as for Adultery. Co. Litt. 32. a.

14. If a Jew born in England take to Wife a *Jew* born also in England, and the *Husband is converted to the Christian Faith*, and purchases Lands, and infeoffs another, the Wife shall not be endowed. Co. Litt. 31. b. 32. a.

15. If

15. If a *Marriage de Facto* be *voidable by Divorce in reſpect of Conſanguinity* &c. whereby the Marriage might have been diſſolved, and the Parties freed a Vinculo Matrimonii, yet if the *Husband dies before any Divorce* then for that it cannot now be avoided, this Wife in Facto ſhall be endowed, for this is legitimum Matrimonium; and ſo in a Writ of Dower the Biſhop ought to certify that they were Legitimo Matrimonio copulati, according to the Words of the Writ. Co. Litt. 32. a. and ſays that herewith agrees 10 E. 3. 35.

16. If a Man takes a *Wife of the Age of ſeven Years*, and after *aliens his Land*, and after this Alienation the Wife attains to the Age of nine Years, and after the Husband dies, the Wife ſhall be endowed; for although ſhe was not abſolutely dowable at the Time of the Marriage, yet ſhe was conditionally dowable, viz. If ſhe attained to the Age of nine Years before the Death of her Husband; For ſo Littleton here ſays, ſo that ſhe paſs the Age of nine Years at the Death of her Husband; for by his Death the Poſſibility of Dower is conſummate. Co. Litt. 33. a

17. If the Wife be *paſt the Age of nine Years at the Death of her Husband* ſhe ſhall be endowed, of what Age ſoever the Husband be, although he were but four Years old. Quia junior non poteſt dotem promereri neque virum ſuſtinere, nec obſtabit Mulieri potenti Minor ætas viri, wherein it is to be obſerved that though Conſenſus non Concubitus facit Matrimonium, and that a Woman cannot conſent before twelve, nor a Man before fourteen, yet this inchoate and imperfect Marriage (from the which either of the Parties may diſagree) after the Death of the Husband ſhall give Dower to the Wife, and therefore it is accounted in Law after the Death of the Husband Legitimum Matrimonium, a lawful Marriage, quoad dotem. Co. Litt. 33. a.

18. The *Wife of a Man who is baniſhed* ſhall have Dower in his Life-time if ſhe has not a Jointure; if ſhe has a Jointure ſhe ſhall enjoy it in the Life-time of her Husband. Baniſhment is by Abjuration or by Parliament. Jenk. 4. pl. 4. Weyland's Caſe.

19. If a Man take an *Alien* to Wife, and then ſells his Land, and his Wife is made a *Denizen*, ſhe ſhall not be endowed by Virtue of the Denization; but it is otherwiſe if ſhe be *naturalized* by Act of Parliament. Co. Litt. 33. a.

(D) *Of what Things* ſhe ſhall be endowed.

Br. Dower, pl. 31. cites S. C. 1. **SHE ſhall not be endowed of the** Goods **of her Husband.** 7 H. 4. 13. b. **Vetus Nat. Brevium** 7. b.

Br. Dower, pl. 31. cites S. C. but 2. But by the Civil Law ſhe ſhall **be endowed of the Goods.** 7 H. 4. 14.

that the Laws of England is contrary; aud that the Civil Law does not give it of the Land.

3. **She ſhall be endowed of** Villeins regardant. 2 H. 6. 11. b.

S. P. and *ſo of Villein appendant*, and 4. So **ſhe ſhall be endomed of Villeins** in Groſs, **for this is an Inheritance.** 2 H. 6. 11. b. **Vet. Nat. Br.** 7. b.

the *Writ ſhall be De Libero Tenemento.* Br. Dower, pl. 91. cites 2 H. 6. 11. ——— She ſhall be indowed of a Villein, either the third Day's Work, or every third Week or Month Co. Litt. 32. a. —— —— Ibid 164 b. S. P. ——— Ibid. 307. a. S. P. for in him a Man may have an Eſtate in Fee, or Fee Tail, or for Life or Years.

5. She

5. She shall not be endowed of a Common sans Number, because then the Land would be doubly charged. Co. 11. *Rich. Godfry* 45. *Perkins*, S. 341. Ver. Nat. B. R. 7. b. P. 9 Car. B. R. between * *Prewett and Drake*, per Curiam agreed in a Writ of Error upon a Judgment in Dower, but Judgment affirmed, because it shall not there be intended to be Common sans Number, but appendant.

Co. Litt. 32. a. S P. but of a Common certain she shall be endowed. — * Cro. C. 300. pl. 3. S. C. the Demand was of Dower in a Messuage, Land, Meadow, Pasture, and of Common of Pasture, pro omnibus Averiis cum Pertinentiis in G. and the Judgment being after a Verdict which finds that the Husband was seised, quod Dower &c. and by Intendment it appeared upon the Evidence that it was such a Common as went with the Land whereof she was dowable; and if it had been Common in Gross without Number the Judge before whom the Trial passed would have directed it to be found against the Defendant. ——— Jo. 315. pl. 2. Breewood v. Drake. S. C. adjudged. And a Nota is added that a Precedent was shewn of 4 Jac. where a Demand was of Dower inter alia of Common Generally, and Judgment given for the Plaintiff.

6. She shall be endowed of the Office of Marshalsea de B. R. 21. E. 3. 57. b. admitted.

Fol. 676.

Co Litt. 32. a. S. P. and so as to the Profits arising from the Custody of the Gaol of Weltminster-Abbey, and says that therewith agrees reverend Antiquity. ——— Thelcal Dig. 67. lib. 8. cap. 5. S. 2. cites Trin. 21 E. 3. 35. S. P. ——— F. N. B. 8. (K) in the new Notes there (b) cites S. C.

7. The Queen shall not be endowed of the Crown. Liber Successionis. 92. b.

8. A Woman shall not be endowed of the Castles of her Husband which are de Guerra. 1 E. 1. Rot. Patentium Membrana 17. fol. 3. resolv'd as it appears by a Writ to the Steward of Ireland to reform such Endowments there. Otherwise of the Queen. 2 E. 1. Rot. Pat. M. 3. Dorso.

A Man *seised of Half an Acre of Land made a Feoffment*, and the *Feoffee made there a Castle or House*, the *Feme of the Feoffor* brought Dower and *recovered in Value* by Award, *but not the third Part*. Br. Dower, pl. 81. cites 30 E. 1. ——— Co. Litt. 31. b. S. P. ——— But where they are not for the necessary Defence of the Realm the Wife may be endowed thereof. Co. Litt 165 a. at the bottom —— 2 Inst. 17. S. P. accordingly in the Exposition of the Word Castrum in the Statute of Magna Charta. cap. 7.

9. A Woman shall not be endowed de Homagiis of her Husband quæ sunt de Guerra. 1 E. 1. Rot. Pat. M. 17. resolved.

10. The Wife shall not be endowed of the capital Messuage. The Law of Scotland agrees with this. Skene Regiam Majestatem 41. b. Vers. 62.

Of the principal Mansion or capital Messuage a Woman shall be endowed, si non sit Caput Comitatus vel Baroniæ, for the Honour of the Realm. Co. Litt. 31. b.

11. Writ of Dower was maintain'd of the *Profits of a Market*. Thel. Dig. 68. Lib. 8. cap. 7. S. 2. cites Hill. 12 E. 2. Dower 157.

12. It was said that a Feme might bring Writ of Dower of *Common of Pasture* with a certain Number of Beasts. Thel. Dig. 67. Lib. 8. cap 5. S. 15. cites Trin. 4 E. 3. 146. and that so it is said by Littleton Pasch. 4 E. 4. 2. and says see 12 E. 2. Dower 161. accordingly.

F. N. B. 148. (C) S. P.

13. And of *Stallage* arising from a Fair, making the Demand de tertia Parte Stallagii avenant &c. and not of Profits arising from the Stallage &c. Thel. Dig. 68. Lib. 8. cap. 7. S. 2. cites Mich. 11 E. 3. Dower 85.

Co. Litt. 32. a. S. P. — F. N. B. 8. (K) in the new Notes there (b) cites S. C. For the Stallage is the Profits.

As of the Office of Bailiff, Parker &c. withour

14. Dower of the *Profits of an Office* was maintain'd without demanding of the Office itſelf. Thel. Dig. 67. Lib. 8. cap. 5. S. 3. cites 12 E. 3. Dower 90.

demanding the third Part of the Office of it, which cannot be, becauſe the Office is intire. But Quære of the Office of Tentury F. N. B. 8. (K) in the new Notes there (b.) cites S. C.

15. A Man ſhall not have Aſſiſe of the *Farm of a Fair*; for it *is not in loco certo capiendo*, as in the Statute, and yet the Feme was thereof endow'd. Br. Aſſiſe, pl. 471. cites 14 E. 3. Fitzh. Sci. Fa. 122.

* Co. Litt. 32. a. S. P. — F. N. B. 8. (K) in the new Notes there.

16. And Dower was maintained of the *Profits ariſing from a* * *Fair and from a Market*, and from the *Court of the ſame Market* &c. But the Demand was not of the third Part of the Fair or Market. Thel. Dig. 68. Lib. 8. cap. 7. S. 2. Mich. 15 E. 3. Dower 81.

(b.) cites S. C. —— And Ibid. cites Lib. Intrat. 234. de tertia Parte Exituum & Proficuorum de quolibet Mercato quolibet Die Martis & Unius Feriæ quolibet Anno in Feſto &c

S. P. 8 Mod. 355. Arg. cites S. C.

17. Writ of Dower lies of a *Garden*, *Croft*, or *Cottage*, by the Opinion of the Court. So Aſſiſe lies of it, but Præcipe quod reddat does not lie of it. Br. Dower, pl. 92. cites 8 H. 6. 3.

* S. P. and yet the Heir ſhall have it; For it is incident

18. A Man *leaſed for* * *Life rendering Rent*, *and took Feme and died*, the *Feme ſhall not be endowed of this Rent*. *Contra of a Rent reſerved upon a Gift in Tail*; Per June. Br. Dower, pl. 44. cites 7 H. 6. 3.

to the Reverſion; For *the Rent is no Inheritance, and is determinable by the Death of the Leſſee.* Br. Dower, pl. 89. cites M. 1 E. 6.

19. If A holds Lands of B. by Homage, Fealty and 10 s. Rent, and B. dies, B's Wife ſhall not be endowed *of the Homage and Fealty*, but ſhall have a *third Part of the Rent as a Rent Seck.* Kelw. 126. a. b. pl. 87. Caſus incerti Temporis.

20. A Writ of Right of Dower lieth of that *Thing* which is *appendant purtenant unto the ſaid Land which a Woman holdeth in Dower.* As of ſo many Loaves of Bread, of ſo many Flagons of Ale &c. a Day or a Week &c. which ſhe claims to pertain to her Tenement which ſhe holds in Dower &c. F. N. B. 8 (K) and 9 (A).

21. A Wife ſhall be endowed of *Advowſons*, *Villeins*, *Common of Paſor apture*, and of other *Profits or Liberties* of which her Husband had any Eſtate of Inheritance; which Eſtate the Iſſue betwixt them by Poſſibility may inherit &c. F. N. B. 148. (C).

22. Dower may be of *Rent-Corn.* Per Curiam. Ow. 32. Paſch. 7 Eliz. in an Anonimous Caſe.

Gouldsb. 37. pl. 11. Brook's Caſe. S. C. & S. P. held accordingly. —Ow. 4. Bragg v. Brooks. S. C. reſolv'd clearly.

23. Dower may be of a *third Part of the Manor.* But then it *muſt be claimed by the Name of* the third Part of the Manor and not of certain Meſſuages certain Acres of Land and certain Rents, for in the laſt Caſe it is only a Demand as of a Thing in Groſs, and a Recovery in ſuch Caſe is not of the third Part of the Manor. Godb. 135. pl. 156. Mich. 29 Eliz. C. B. Bragg's Caſe.

* F. N. B. 149. (K) S. P. admitted. —F. N. B. 8. (K) in the new Notes there

24. A Woman may be endow'd of the third Part of the Profits of a * *Mill*; And of the Profits of keeping a Park; And of the Profits of a *Dove-houſe*; and of a *Piſchary*; And of the † *third Preſentation* to an Advowſon; So of the *Profits of Courts*, Fines and Heriots; And of *Tithes.* Co. Litt. 32. a.

(b) S. P. cites 45 E. 3. Fitzh. Dower, pl. 50. and that ſhe had thereby the Freehold of the third Part of the Mill veſted in her.

† F. N. B. 150. (G) S. P. cites 1 E. 1. Dower 176. —— Ibid. 148. (C) S. P.

25. Wives

25. Wives ſhall be endowed of *Tithes* or other *Eccleſiaſtical Duties that came to the Crown by the Statute* 27 *H.* 8. 31 H. 8. cap. 13. 37 H. 8. 4. and 1 E. 6. cap. 14. Co. Litt. 159. a.

26. Of *Franchiſes Parcel of an Honour* Dower may be aſſigned, and they may be Parcel and appendant to the Honour though they are not belonging to a Manor which is of an inferior Nature. Cro. J. 622. pl. 12. Mich. 18 Jac. B. R. in Caſe of Howard v. Cavendiſh.

26. Of an *Advowſon*, whether it be *in Groſs or Appendant*, the Feme is dowable; Per Cur. Cro. J. 621. in pl. 12. Mich. 18 Jac. B. R.

27. Of a *Rent-Service*, *Rent-Charge*, and *Rent-Seck*, ſhe ſhall be endowed; but of an *Annuity that charges only the Perſon*, and iſſues not out of any Lands or Tenements, ſhe ſhall not be endowed. Co. Litt. 32. a.

28. *But if the Freehold* of the Rents, Common &c. *were ſuſpended before the Coverture, and ſo continue* during the Coverture, ſhe ſhall not be endowed of them. If after the Coverture the Husband does extinguiſh them by Releaſe or otherwiſe, yet ſhe ſhall be endowed of them, for as to her Dower they, in the Eye of the Law, have Continuance. Co. Litt. 32. a.

29. The Widow of the Lord was decreed at the Rolls to be endowed of the third Part of the *improved Values of the Copyhold*, but reverſed by Ld. Keeper as to that. Chan. Caſes 247. Hill. 26 & 27 Car. 2. Holland v. Blandy.

30. Dower; The Tenant pleads, that Sir Thomas Gerrard was *ſeiſed of the Meſſuage* now in Demand, *called B. in his Demeſne as of Fee*, and being ſo ſeiſed, *Jac.* 1. *by his Letters Patents under the Great Seal of England, created the ſaid Sir Thomas Gerrard Baron of B. and ſo the Meſſuage in Demand became Caput Baroniæ*, and he prays Judgment, if the Demandant ought to be endowed thereof. The Demandant demurred, and Judgment was given for her in C. B. Tenant aſſigns for Error, that the Demandant ought not to have Dower of this Meſſuage, being Caput Baroniæ; That it would tend to the Diſhonour of the Dignity, to have the capital Meſſuage divided and diſmembered, but it would be more for the Honour of the Realm that it be kept intire; and for Authority cited Co. Litt. 31. b. Fitzh. Dower 180. Bract. lib. 2. 170. b. Paſch. 4 H. 3. Rot. 7. But Serjeant Wright and Mr. Northy contra, of which Opinion was the whole Court; For theſe Authorities muſt be intended of Feodal Baronies, of which there are none at this Day except Arundel; and this Privilege was allowed to them, becauſe they ought upon Neceſſity to defend the Realm, to which they are bound by Tenure; For the King at the Creation of the Barony gave to the Baron Lands and Rents, to hold of him by the Defence of the Realm; But then this cannot be a Feodal Barony, for it was in the Seiſin of the Gerrards before, and therefore was not given to the Gerrards by the King at the Creation of the Barony, to hold of him; and Rokeby J. ſaid, that this was the reaſon of the Judgment in C. B. Ld. Raym. Rep. 72. Hill. 7 W. 3. C. B. Gerrard v. Gerrard.

1 Salk. 253. pl. 3. S. C. and Judgment affirm'd in Error in B. R. per tot Cur. —— Skinn 592. pl. 6. Lady Gerrard's Caſe, S. C. and Judgment affirmed, per tot. Cur. —— 5 Mod. 64. Ld. Gerrard's Caſe, S. C and Judgment affirmed in B. R. —— Comb. 352. S. C and Judgment affirmed in B. R. —— 3 Lev. 401. S. C. and Judgment affirmed in

B. R. upon which Error was brought in Domo Procerum, (which Levins ſays was the Thing deſigned at firſt) but afterwards the Parties agreed, as the Reporter ſays he heard, without having the Judgment of the Houſe of Peers.

31. Dower does not lie of a *Tenement*, it being a Word of an uncertain Signification, and therefore the Sheriff cannot give Seiſin of it; And ſo a Judgment was reverſed. 2 Ld. Raym. Rep. 1384. Paſch. 11 Geo. B. R. Kerry v. Kent.

8 Mod. 355. Kent v. Kerry, S. C. held accordingly, and ſo a Judgment reverſed

(E) Dower ad Oſtium Eccleſiæ.

Of what Things he may endow her.

[And How.]

1. **A MAN cannot endow his Wife ad Oſtium Eccleſiæ of his** Capital Houſe **having other Lands ſufficient for her Dower.**

2. **With this agrees the Law of Scotland. Skene Leges Burgorum, cap.** 3.

3. In Ejectione Cuſtodiæ by the beſt Opinion, and in a Manner per tot. Cur. that if a Man *endows his Feme at the Church-Door of H. in the County of E. of Land in the County of L.* this is a good Aſſignment of the Dower, though it was in another County than where the Land lies, and *without Deed*, but contra of Aſſignment of Dower Ex aſſenſu Patris, this ſhall be by Deed; For otherwiſe the Franktenement of the Father cannot paſs, and Aſſent does not lie in Averment but in Specialty, and *in both theſe Dowers Franktenement paſſes without Livery of Seiſin*; Quod Nota. Br. Dower, pl. 7. cites 40 E. 3. 43.

4. If a Man *marries a Woman in a Chamber*, Dowment *ad Oſtium Cameræ* is not good. F. N. B. 150. (M).

5. *The youngeſt Son* cannot aſſign Dower Ex aſſenſu Patris, becauſe he is not Heir apparent. F. N. B. 150. (E.)

If a Man ſeiſed in Fee Simple, being within Age, endows his Wife at the Monaſtery or Church Door, and dies, and his Wife enters,

6. *None may endow his Feme ad Oſtium Eccleſiæ unleſs he be of full Age at the Time* &c. and then *ſhe may enter after the Death of her Husband*, and in this Caſe Franktenement paſſes without Livery; but if the Baron was within Age at the Time of Dower, the Heir may enter and ouſt the Feme, and *contra* where one within Age endows his Feme Ex *aſſenſu Patris, the Father then of full Age*; this is a good Dowment. Br. Dower, pl. 80. cites Litt. fol. 8, 9.

in this Caſe the Heir of the Husband may ouſt her. Litt. S. 47.

7. It ſeems that Dowers made Ex aſſenſſu Patris, or Ad Oſtium Eccleſiæ, are good, though the Wife be *within nine Years of Age*; For Conſenſus tollit Errorem. Co. Litt. 37. a.

8. Dowment ad Oſtium Eccleſiæ *is where a Man of full Age ſeiſed in Fee-Simple*, who ſhall be married to a Woman, and when he *comes to the Church-Door* to be married, there, after Affiance and Troth plighted between them, he *endows the Woman of his own Land, or of the Half, or other Leſſer Part* thereof, *and there openly does declare the Quantity* and Certainty of the Land which ſhe ſhall have for her Dower, in this Caſe the Wife, after the Death of her Husband, may enter into the ſaid Quantity of Land, of which her Husband endowed her, without other Aſſignment of any. Litt. S. 39.

9. Dower is ever after Marriage ſolemnized, and therefore this Dower is *good without Deed*; becauſe he cannot make a Deed to his Wife; For *no Aſſignment of Dower Ad Oſtium Eccleſiæ can be made before Marriage*; for that before Marriage the Woman is not intitled to have Dower. Co. Litt 34. a.

10. An

10. An Aſſigment of Dower either Ad *Oſtium Eccleſiæ, or Ex Aſſenſu Patris* may be made *of more than a third Part.* But it was the ancient Law, That no greater Aſſignment could be made in thoſe Caſes but of a third Part, but leſs he might, as appears in Glanvill. Co. Litt 36. a. F. N. B. 150. (M) S. P.

11. Dower *Ad Oſtium Caſtri* ſive *Meſuagii* is not good; But ought to be made Ad Oſtium Eccleſiæ; Non enim Valet facta *in Lecto mortali*, vel in *Camera*, vel alibi ubi Clandeſtina fuere Conjugia. For the Law requires that this and like Matters be done *publickly and ſolemnly.* Co. Litt. 34 a.

12. If *Tenant in Tail endows his Wife Ad Oſtium Eccleſiæ*, this ſhall little or nothing at all avail the Wife, becauſe after the Deceaſe of her Husband, the Iſſue in Tail may enter upon her Poſſeſſion, and ſo may he in the Reverſion, if there be no Iſſue in Tail then alive. Litt. S. 46. The Reaſon of this is for that Tenant in Tail is reſtrained by the ſaid Statute of 13 E. 1. de donis Conditionalibus. Co. Litt. 38. a.

(F) Of what Eſtate ſhe ſhall be endow'd.

1. IF A. ſeiſed in Fee of Lands, Covenants to ſtand ſeiſed thereof to the Uſe of himſelf and his Heirs, till C. his middle Son takes a Wife, and after to the Uſe of C. and his Heirs, and after A. dies, by which it deſcends to B. the Elder Son of A. who has a Wife and dies, and after C. takes a Wife, it ſeems the Wife of B. the Elder Son ſhall not be endow'd of the ſaid Eſtate of her Husband; becauſe his Eſtate is ended by an expreſs Limitation, and therefore the Eſtate of the Wife being deriv'd out of it this cannot continue longer than the original Eſtate. P. 10 Ja. B. between *Flavill and Ventrice*, dubitatur upon a Special Verdict; For upon Argument the Court was divided, Scilicet, Crawley and Vernon that ſhe ſhall not be endow'd, and Hutton and Heath e contra. Intratur. Trin. 8 Car. Rot. 1343. S. C. cited by Twiſden J. Vent. 377 and ſaid that the ſame Point came afterwards in Queſtion in Tape's Caſe of Norfolk, and it was adjudged to be the ancient Uſe.—2 Sid. 66.

cites S. C. —— If a Feoffment be made to the Uſe of J. S. and his Heirs until J D. has done ſuch a Thing, and then to the Uſe of J. D. and his Heirs, and afterwards the Thing is done, and J. S. dies, his Wife ſhall be endow'd; Per Anderſon. Le. 168. in pl. 233. Mich. 31 & 32 Eliz. C. B.

2. If *Land* is *granted to a Man and his Heirs for the Life of J. S.* his Wife after his Death ſhall not be endow'd; Arg. Bulſt. 135. cites 22 E. 3. fol. 19. pl. 6.

3. In Dower it was agreed that where the *Baron before the Coverture acknowledges by Fine come ceo* &c. and the *Conuſee grants and renders to the Baron for Life*, the *Remainder to W. in Tail*, the *Remainder to the Baron in Fee*, and *he takes Feme the now Demandant and dies*; and becauſe the Fee is only expendant, and not executed in his Life by Reaſon of the *meſne Remainder*, therefore ſhe is not dowable. Br. Dower, pl. 6. cites 40 E. 3. 15.

4. Memorandum that in *Feoffments to make Eſtate over or to re-infeoff the Feoffer*, this ſhall be made *to a Man Sole*, or to a Chaplain who has no Feme; For if it be to a Man who has a Feme, and ſhe ſurvives, ſhe will or may have *Dower.* Br. Aſſurances, pl. 3.

F. N. B. 150. (C) S. P.

5. If there be *Lord, Meſne and Tenant*, and the Tenant holds of the Meſne by Fealty and 3 s. Rent, and the Meſne takes a Wife, and the *Tenant brings a Writ of Meſne againſt the Meſne and forejudges him*, and the Meſne dies, the *Wife of that Meſne ſhall have Dower* of the Rent by which the Tenant held, and ſhall not be Attendant unto the Tenant; cauſa patet. Perk. S. 432.

6. If there be *Lord and Tenant by Fealty and* 12 *d.* and the *Tenant leaſes the Terancy for Life* unto a Stranger, and the Lord takes a Wife, and the *Tenant dies without Heir*, and afterwards the *Lord dies before the Leſſee for Life*, the *Lord's Wife ſhall not have Dower of the Tenancy*; *but* ſhe ſhall be endowed *of the Rent of the Seigniory* &c. Perk. S. 339.

7. If *Grantee of a Rent charge in Fee takes a Wife*, and the *Grantor leaſes the Land* out of which the Rent is iſſuing *unto a Stranger for Life*; And the *Grantee of the Rent purchaſes the Reverſion* of the ſame Land, and the *Tenant for Life atturns*, and the *Grantee of the Rent dies, living the Tenant for Life*, his *Wife ſhall be endowed of the Rent but not of the Land*, becauſe the Freehold and Inheritance were not in the Husband Simul & Semel during the Coverture &c. Perk. S. 340.

8. If a Man make a *Gift in Tail reſerving Rent to him and his Heirs*, and afterwards the *Donor has a Wife*, and the *Tenant in Tail dies without Iſſue*, the Wife of the Donor ſhall not be endowed of the Rent, becauſe the *Rent is extinct*, for it was reſerved upon the Eſtate Tail, which is ended. F. N. B. 149. (G).

The Determination of the Eſtate of the Baron is by the Act of God, and the Feme ſhall be endow'd.

9. *But* although that the *Tenant in Tail dies without Iſſue*, yet his Wife ſhall be endowed, becauſe *the Land continues, and is not determined as the Rent is.* F. N. B. 149. (G).

Br. Dower, pl. 86. cites Old Nat. Bre. fol. 144. —— Co. Litt. 31. b. S. P. —— 3 Rep. 84. b. S. P. in a Nota by the Reporter, and cites 24 E. 3. 28. b. —— 10 Rep. 96. a. S. C. cited per Cur. —— Perk S 317. S. P. cites Mich. 44 E. 3. 31.

Of an *Eſtate Tail* in Lands *determined* a Woman ſhall be endowed in the like Manner and Form as a Man ſhall be Tenant by the Curteſy, mutatis mutandis. Co. Litt. 31. b.

S. C, cited by Holt Ch. J. in delivering the Opinion of the Court. 2 Mod. 24. Trin. 1 Ann. B. R.

10. *Tenant in Tail bargain'd and ſold Land to H. and his Heirs.* H. has an Eſtate deſcendable and determinable upon the Death of the Tenant in Tail, and his *Wife ſhall be endowed determinable on the Death of Tenant in Tail.* 10 Rep. 96. a. 98. a. Mich. 10 Jac. reſolv'd in Seymour's Caſe.

(G) Of

(G) *Of what Eſtates* the Wife ſhall have Dower.

1. IF a Man leaſes for Life rendring Rent, his Wife ſhall not be endow'd of this Rent; For this is but an Eſtate for Life in the Rent though it deſcends to the Heir. 7 H. 6. 3. b. 17 E. 2. 12. 28 Aſſ. 3 adjudg'd. S. P. per Thorp J. For *it is only incident to the Reverſion for Term of Life, and by the Incidency the Heir ſhall have it, but* the Father nor the Heir *ſhall not have Eſtate of Inheritance in it.* Br. Dower, pl. 60. cites 26 Aſſ. 38.

2. If Leſſee to him and the Heirs of his Body, or to him and his Heirs for the Life of J. S. dies, his Wife ſhall not be endow'd, becauſe this is but an Eſtate for Life. 18 E. 3. 44. b. 22 E. 19. b.

3. If Leſſee for Life leaſes for the Life of another, his Wife ſhall not be endowed; for he gains this Fee in an Inſtant. 3 H. 4 6. So if *Tenant for Life makes a Feoffment in Fee*, and dies, the Feme of him ſhall not have Dower; For though the Baron gave Fee Simple by Alienation, yet he never was ſeiſed in Fee ſo as ſhe might have Dower; quod non negatur. Br. Dower, pl. 30. cites S. C.

4. If the Baron and another are jointly ſeiſed in Fee, and the Baron makes Feoffment of his Moiety his Wife ſhall not be endowed of this, for the Baron had an Eſtate dowable, Scilicet, a ſole Eſtate but for an Inſtant. 14 H. 4. 13. b. Co. Litt. 31. b. S. P. —— F. N. B. 150. (K) S. P. cites 34 E. 1. Dower 179. —— Jenk. 105. pl. 1 S. P.

5. If Tenant in ſpecial Tail takes a ſecond Wife that is not dowable of the Tail and after makes Feoffment in Fee, and dies, his Wife ſhall not be endowed becauſe he gains the Fee but in an Inſtant. Co. 8 *Whit.* 43. b. will prove this; For there it is that if the Baron be within Age at the Feoffment * his collateral Heir ſhall not avoid it, becauſe he is not inheritable of the Right, for ſuch Right ſo gained does not deſcend. Husband and Wife *Tenants in ſpecial Tail,* * Fol. 677. *had Iſſue a Son*, the *Wife died*, then the *Husband made a Feoffment to the Uſe of himſelf for Life, Remainder to the Uſe of his Son in Tail, with a Letter of Attorney to make Livery*, but *before that was made he married a ſecond Wife, and then Livery was made* according to the Uſes in the Feoffment, then the Husband died; and the Queſtion was, Whether this ſecond Wife was dowable; and adjudged that ſhe was not, becauſe before the Feoffment made, the Husband was ſuch a Tenant in ſpecial Tail, that the Iſſue by his ſecond Wife could not inherit, and by the Feoffment before, and Livery after the Coverture, he did not gain any new Eſtate or Seiſin of which the Wife might be endowed; for what was done by that Feoffment was immediately drawn out again by Virtue of the ſpecial Entail. Cro. J. 615. pl. 5. Paſch. 18 Jac. in Scacc. Amcots v. Catherick.

6. If there be Leſſee for Life the Reverſion to the Husband in Fee, and the Leſſee leaſes the Land to the Husband for the Life of the Husband, and after the Husband dies, and the Leſſee dies the Wife ſhall not be endowed thereof; becauſe there was a Poſſibility of a Reverſion during the Coverture as to the Freehold. 1 E. 3. 16. per Cond.

7. If the Baron be Tenant in ſpecial Tail the Remainder to his own right Heirs, and takes a ſecond Wife, and then becomes Tenant after Poſſibility, and dies, his Wife ſhall be endowed. 46 E. 3. 24 b. 22 E. 3. 3.

1. So

If the *firſt Feme dies without Iſſue*

8. So if the Remainder had been limited to him in general Tail. 50 E. 3. 5. adjudg'd. 7 H. 4. 25. b.

the ſecond Feme ſhall be endowed; for the *Remainder in Tail veſts in the Baron*, by reaſon that the Baron was only Tenant for Life in Effect after the Death of his Feme without Iſſue. Br. Dower, pl. 25. cites 50 E. 3. 4.

9. The Husband ought to have a Fee or Tail and Freehold in Poſſeſſion, otherwiſe the Wife is not dowable. 46 E. 3. 16.

So where the Eſtate was to the Baron for Life, Remainder to

10. If the Baron hath an Eſtate for Life, Remainder to B. in Tail, Remainder to the right Heirs of the Baron, and dies during the Life of B. the Wife ſhall not be endowed; for it is not a Fee in Poſſeſſion. 40 E. 3. 15. b. 46 E. 3. 16. b.

firſt Son in Tail, and ſo to the ſecond, Remainder to the Heirs of the Body of the Baron, it was reſolved that the Eſtate Tail was not executed for the Poſſibility of the Meſne Eſtate that might interpoſe, and therefore it was always disjoined during the Life of the Baron, ſo that of that Eſtate his Wife could not be endowed. Cro. E. 315. 316. pl. 10. Hill. 36 Eliz. B. R. Cordal's Caſe.

11. But if Tenant for Life ſurrenders to the Remainder-man in Tail or Fee his Wife ſhall be endowed; for the Eſtates are united. 44 E. 3. 31. b.

12. The ſame Law if the Tenant for Life grants his Eſtate upon Condition, if the Condition be not broke. 44 E. 3. 31. b. 45 E. 3. 13. b. adjudg'd.

13. If Leſſee for Life leaſes the Land to the Leſſor and the Heirs of his Body for the Life of the Leſſee, and after the Leſſor dies, living the Leſſee, the Wife of the Leſſor ſhall be endow'd, for he had the Fee and Freehold in him. 18 E. 3. 45. adjudg'd.

S. P. As if Tenant in Tail bargains and ſells by Deed indented and inrolled to another and his Heirs, the Wife of the Bargainee ſhall be endowed as long as the Tenant in Tail lives; Reſolved. 10 Rep. 96. a. Mich. 10 Ja. B. R. Seymour's Caſe. ——— See (H) pl. 1. S. C.

14. If the Husband hath a Fee and Freehold defeaſible yet his Wife ſhall be endow'd till it is defeated. 45 E. 3. 13. b.

See (H) pl. 2. S. C.

15. If Baron and Feme Leſſees for Life ſurrenders to him in Reverſion, this is defeaſible by the Feme after the Death of the Baron, yet in the mean Time if he in the Reverſion dies his Wife ſhall be endowed. 45 E. 3. 13. b.

The Wife of the Father ſhall not be indowed of the third Part. F.N.B. 149 (H)

16. If the Grandfather dies ſeiſed, and the Son endows the Grandmother who dies, yet the Wife of the Father ſhall not be endowed. 45 E. 3. 32. For by Relation the Father had but the Reverſion. 43 E. 3. 13. 18 E. 3. 44. b. M. 11 E. 1. B. Rot. 46. adjudged, Dos de Dote peti non debet.

——— If there be a Grandfather, Father and Son, and Grandfather is ſeiſed of three Acres of Land in Fee, and takes Wife and dies, this Land deſcends to the Father, who dies either before or after Entry, now is the Wife of the Father dowable. The Father dies, and the Wife of the Grandfather is endowed of one Acre and dies, the Wife of the Father ſhall be endowed of the two Acres Reſidue; for the Dower of the Grandfather is Paramount the Title of the Wife of the Father and the Seiſin of the Father, which deſcended to him, (be it in Law or actual) is defeated, and now upon the Matter, the Father had but a Reverſion expectant upon a Freehold, and in that Caſe Dos de Dote peti non debet; though the Wife of the Grandfather dies living the Father's Wife; but there is a Diverſity between a Deſcent and a Purchaſe. Co. Litt. 31. a. ——— 4 Rep. 122. a. b. S. P. cites 5 E. 3. tit. Voucher, 249 the Caſe of Paris v. Paris, S. P. and is the Caſe whence this is taken. ——— Perk. S. 315. S. P. becauſe a Woman ſhall not be endowed of a Reverſion expectant upon a Freehold, and the Poſſeſſion of the Freehold by the Endowment is veſted in the Grandmother by a Title before the Title of the Father unto the Freehold; but if the Grandfather had enfeoffed the Father of the ſame Land during the Marriage betwixt the Father and his Wife, in that Caſe, after the Death of the Grandmother, the Wife of the Father ſhould have Dower of the ſame Land of which the Grandmother was endowed, becauſe the Poſſeſſion of the Father which gave Title to his Wife to have Dower was in the Life of the Grandfather, at which Time the Plaintiff could not demand the Dower, ſo that by the Endowment of the Grandmother the

the Poſſeſſion of the Father is not avoided, for the Grandmother had Right unto the Poſſeſſion but from the Time of the Death of the Grandfather &c —— Co. Litt. 31. a. b. S. P. —— 4 Rep. 122. a. b. cites 5 E. 3. tit. Voucher 249. Paris v. Paris, S. P. & S. C.

17. There is another Diverſity, As *where the Wife of the Father is firſt endowed, and where the Wife of the Grandfather*; For in the ſame Caſe, after the Deceaſe of his Grandfather and Father, the Son enters and endows his Mother of a third Part, againſt whom the Grandmother recovers a third Part and dies. The Mother ſhall enter again into the Land recovered by the Grandmother, becauſe ſhe had in it an Eſtate for Term of her Life, and the Eſtate for the Life of the Grandmother is leſs in the Eye of the Law, as to her, than her own Life. Co. Litt. 31. b. 4 Rep. 122. a. b. cites Paris v. Paris. 5 E. 3. tit. Voucher 249. S. P.

18. *The Heir took Feme* and entered, *and endowed his Mother*, and after *aliened the Reverſion*, and then *the Tenant in Dower died*, and after *the Heir who endowed her died*, and yet the Feme of the Heir was not endowed of this Land allotted in Dower, and ſo ſee that the *Endowment* cuts off and *deſtroy the Seiſin of the Heir*; Quod Nota. Br. Deſcent, pl. 19. cites 19 E. 2.

19. T. was ſeiſed and had *Iſſue Robert the Eldeſt, and Richard the Youngeſt*, and died, and *Robert entered* and took Feme, *and had Iſſue Alice*. The Feme died, and he *took another Feme and died, the Feme privement enſeint with a Son*, and the *Lord ſeiſed the Ward* of the Land, and *of Alice*, for the Nonage of Alice, and leaſed the Ward to T. who *endowed the Feme* of Robert, and after the *Feme is delivered of W. a Son*, by which the *Lord re-ſeiſed the Ward of W.* and *W. lived* 10 *Years, and died without Iſſue*, by which H. the Plaintiff entered as Heir of Richard the youngeſt Son of J. and Alice ouſted him, and he brought Aſſiſe, and prayed the Diſcretion of the Juſtices; and becauſe W. to whom Alice was of half Blood was ſeiſed, it was awarded that Henry ſhould recover; And ſo note that the *Seiſin of the Guardian* makes the Heir of the Infant of the intire Blood to be Heir, and the Siſter of half Blood was barred of the Land, but by the Opinion of the Court, the *Dower* of the Feme *ſhall revert to* Alice, becauſe W. was not ſeiſed of it; Quære. Br. Deſcent, pl. 19. cites 8 Aſſ. 6.

20. If the *Iſſue* be *remitted to a ſpecial Tail*, the Feme of the Father, who is not his Mother, ſhall not be endowed. 2 Roll Remitter (K) pl. 4. cites 44 E. 3. 26. b.

21. In Dowet; *Baron and Feme Tenants in Tail had Iſſue two Sons*, and the *Baron died*. The *Feme leaſed to the eldeſt Son for Years, and after releaſed to him and his Heirs with Warranty*; He *took Feme and died without Iſſue*, and after *the Mother died*, and the youngeſt Son entered, and the Feme of the eldeſt Son brought Writ of *Dower*, and recovered by Judgment, and therefore it ſeems that a Releaſe with Warranty is a Diſcontinuance; nevertheleſs, this Judgment was contrary to the Opinion of ſeveral. Br. Diſcont. de Poſſeſſion, pl. 7. cites 24 E. 3. 28. S. P. but Brook ſays, *it ſeems that the Releaſe with Warranty of the Tenant in Tail is only a Grant of his Eſtate*, and though ſhe gave Fee, yet the *younger Son is remitted to the Tail*, which is elder than the Title of the Feme now Demandant. Br. Dower, pl. 50. cites S. C.

22. If *two exchange, and* afterwards *one aliens*, and the other vouches him being impleaded, he ſhall recover in Value the Land given in Exchange, and ſo it ſhall relate before the Recovery. 2 Roll Voucher (R. b) pl. 4. cites Perk. S. and ſays the *Feme of the Alienee* ſhall not be endowed. Perk. S. 309. cites 4 E. 3. 52. Trin. 15 E. 3. Dower 128. —— A Woman ſhall not be endowed both of the Land given in *Exchange*, and of the Land taken in Exchange, yet the Husband was ſeiſed of both; but ſhe may have her Election and be endowed of which ſhe will. Co. Litt. 31. b.

23. In Dower; the *Tenant ſaid that B. Baron of the Demandant, was ſeiſed* &c. *and infeoffed W. who regave to the Baron and his firſt Feme, and to the Heirs of their two Bodies, who had Iſſue this Tenant, and the firſt Feme died*, and the *Baron took the Demandant to Feme and died*; Judgment if Dower; The *Feme ſaid, that before B. her Baron had any thing, C. was ſeiſed &c. and gave to the Father of the ſaid B. in Tail, and* that the *Father of B. died, and ſo is the Tenant remitted as Heir to the firſt Tail, which is general Tail*, of which ſhe is dowable, and yet becauſe her *Baron during the Coverture had nothing but by the ſecond Tail*, of which ſhe is not dowable, therefore the Opinion of the Court was againſt her. Br. Dower, pl. 18. cites 40 E. 3. 24.

24. And there it is ſaid, that if *Donee in Tail takes Feme*, and *dies without Iſſue*, ſo that the *Land reverts*, yet the Feme ſhall be endowed. Br. Dower, pl. 18. cites 40 E. 3. 24

25. And it was ſaid in the Caſe ſupra, that *the Heir in Tail may claim in by the one Tail or the other.* Br. Dower, pl. 18. cites 40 E. 3. 24.

26. In Dower, the *Tenant ſaid, that the Land was given to the Baron of the Demandant, and to his firſt Feme in Tail*, the *Remainder to W. in Tail*, the *Remainder to the Baron in Fee*, and the *firſt Feme died without Iſſue*, and the *Baron died, living him in Remainder in Tail*; Judgment &c. and a good Plea; by which the Demandant averred, that her Baron ſurvived him in Remainder, who died without Iſſue, and ſo ſeiſie que Dower la poit. Br. Dower, pl. 19. cites 46 E. 3. 16.

Br. Eſtoppel, pl. 30. citea S. C.

27. *Quod ei deforceat*; the Caſe was, that *a Man was ſeiſed in General Tail by Fine*, and *made Feoffment, and retook in ſpecial Tail to him and his firſt Feme*, and *had Iſſue.* The *Feme died*, and he *took another Feme and died*; The *King ſeiſed by Tenure in Capite*, and *endowed the Feme*; The *Iſſue came and ſhewed the ſpecial Tail, and had Scire Facias* againſt the Feme, *and recovered* againſt him *by Default*, and *ſhe took another Baron*, and *ſhe and the ſecond Baron brought Quod ei deforceat* againſt the Heir, and *he pleaded the ſpecial Tail*, and *ſhe would have remitted the Heir by the Elder Tail, and ſo concluded him to ſay but her Baron was always ſeiſed in General Tail*; & non allocatur; For by Thorp clearly, the *Baron was not remitted*, and then he was not ſeiſed of ſuch Eſtate of which the Feme may be endowed; For of ſuch ſpecial Eſtate his Iſſue is not inheritable, nor his Feme dowable, by which ſhe averred Continuance of Poſſeſſion by the firſt Tail, and ſo to Iſſue; Quod Nota. Br. Dower, pl. 9. cites 41 E. 3. 30.

28. In Dower it was *found by Verdict that W. infeoffed R. upon Condition of Payment and Nonpayment of the Part of W. by one Day*, and *W. died*, and his *Feme took another Baron*, and *the ſecond Baron tendered the Money to R. and he received it and died*, and the *Feme of R. brought Dower and recovered*; For he who paid was not privy to the Condition. Br. Dower, pl. 11. cites 42 E. 3. 1.

29. Scire Facias to execute a Fine was *ſued by the Heir of S.* becauſe the *Fine was levied to A. for Life*, the *Remainder to J. in Tail*, the *Remainder to S. in Fee*, and that *all are dead, and J.* [*is dead*] *without Iſſue*, and the Tenant ſaid that *A. ſurrendered his Eſtate to J. and after S. died, and J.* [*died*] *without Iſſue*, and that *A. entered as Brother and Heir to S.* whoſe Eſtate he has; Judgment if Execution; And the other ſaid that A. by his Entry after the Death of S. had only his firſt Eſtate for Life, which is a great Error, for it is a Surrender, and then *after the Deaths of J. and S.—A. is in in Fee, and* then *the Fine executed of the Fee*, and never ſhall be executed again; and per Finch, becauſe the *Eſtate for Life merged in the Seiſin of J. add he in in Tail*, and not for Life of A. the Feme of J. ſhall be endowed. Br. Sci. Fa. pl. 21. cites 42 E. 3. 9.

30. Dower *of the Seiſin of N. her Baron againſt the Heir of her Baron*, who *ſhewed how the Land was intailed by Fine to his Father Baron of the Demandant and his Feme Mother of the Tenant in ſpecial Tail*, and that after his *Father and Mother diſcontinued the Tail by Fine to a Stranger, and retook Eſtate by Grant and Render in general Tail, and had Iſſue the Tenant*, and the *firſt Feme, Mother of the Tenant died*, and the *Baron took the Demandant to Feme*, and after died, and ſo he is in by the one Tail and the other, and adjudged in his Elder Right by *Remitter*; Judgment ſi Actio; And the Opinion of the Court was clearly that the Feme ſhall be barred; Quod Nota; By which ſhe paſſed over to the other Anſwer. Br. Dower, pl. 14. cites 44 E. 3. 26.

31. A Man *leaſed to A. for Life*, the *Remainder to B. in Fee*, and after the *Tenant for Life leaſed to the ſaid B. for* Term of *B's Life*, and *B. died*, and his Feme was barred of Dower, and ſo ſee that B. was not ſeiſed in Fee, nor it was not a Surrender; for if A. ſurvived B. then A. ſhall re-have the Land. Br. Eſtates, pl. 67. cites H. 13 R. 2. Br. Forfeiture de Terres, pl. 91. cites S. C.

32. Dower of the Dowment of J. M. late her Baron; The *Tenant ſaid that the Land was tailed in Remainder by Fine to J. M. his Father, Baron of the Demandant, and to his Heirs of the Body of E. his firſt Feme begotten, and that J. M. and E. had Iſſue this Tenant, and E. died, and J. M. married the ſaid Demandant*, and died; Judgment if Dower; and by the beſt Opinion ſhe ſhall not have Dower. Br. Dower, pl. 36. cites 12 H. 4. 1.

33. The Feme ſhall not be endow'd of Lands or Tenements which her Baron *held Jointly* with another at the Time of his Death. But where he held in Common it is otherwiſe. Litt. S. 45. The Reaſon of the Diverſity is, For that the Jointenant which ſurvives claims the Land by the Feoffment and by Survivorſhip, which is above the Title of Dower, and may plead the Feoffment made to himſelf without naming of his Companion that died. But Tenants in Common have ſeveral Freeholds and Inheritances, and their Moieties ſhall deſcend to their ſeveral Heirs, and therefore their Wives ſhall be endowed. Co. Litt. 37. b.

34. *Where the Eſtate which the Husband has during the Marriage is ended* there the Wife ſhall loſe her Dower. As if Tenant in Tail diſcontinues in Fee, and afterwards takes a Wife and diſſeiſes the Diſcontinuee, or the Diſcontinuee does inſeoff him, and afterwards the Tenant in Tail dies ſeiſed, his Heir is remitted, and the Wife ſhall loſe her Dower, becauſe the Heir is in of another Eſtate of Inheritance than the Husband had during the Coverture. F. N. B. 149. (F).

35. If a *Man has Title of Action to recover any Land*, and afterwards he *enters and diſſeiſes the Tenant* of the Land *and dies ſeiſed*, and his *Heir enters*, the *Heir is remitted* unto the Title which his Anceſtor had, and the Husband's Wife ſhall loſe her Dower; for that Eſtate which the Husband had is determined, for that was an Eſtate in Fee by Wrong, and the Heir has the Eſtate in Fee which his Anceſtor had by Right. F. N. B. 149. (F).

36. If there be *two Jointenants* of certain Lands *in Fee* and the *one aliens* that which belongs to him to another in Fee, who takes a Wife and after dies. In this Caſe the Wife for her Dower ſhall have the third Part of the Moiety which her Husband purchaſed to hold in Common, (as her Part amounts) with the Heir of her Husband, and with the other Jointenants which did not Alien. For that in this Caſe her Dower cannot be aſſigned by Metes and Bounds. Litt. S. 44.

37. A. devis'd Lands to *B. and the Heirs of his Body*, and adds, *Item will that after B's Death my Land ſhall remain to C. the Son of B.* B. died, and adjudg'd that the Wife of B. ſhall have Dower; For that B. had an Eſtate Tail. Mo. 593. pl. 801. Hill. 35 Eliz. Atkins v. Atkins. Cro. E. 248. pl. 9. S. C. and a former Judgment affirm'd.

38. *A.*

38. *A. Leſſee for Life*, the *Remainder to B. in Fee. A. ſurrenders upon Condition to B. and enters for the Condition broken.* B. dies, and his Wife brought Dower againſt A. and Iſſue is join'd upon *Ne unques Seiſie que Dower &c.* That ſhall be found againſt A Noy. 66. Paſch. 37 Eliz. Oſmond and his Wife.

And. 192. in pl. 227. S. P —— Le. 16. Cham v. Dover, pl. 19. Paſch. 26 Eliz. B. R. Copyholder in by the Cuſtom is paramount the Title of Dower, and the Seiſin of the Lord, ſo that ſhe ſhall not be endow'd though he keeps the Lands in his Hands for a Time after the Marriage, and then grants them again by Copy. Per Wray Ch. J. —— Per Doderidge J. 2 Bulſt. 337. S. P. and per Coke Ch. J. Ibid.

39. There is no Tenancy in Dower of a *Copyhold* but by an Eſpecial *Cuſtom.* Arg. Cro E. 391. pl. 14. Paſch. 37 Eliz. B. R. in Caſe of Clun v. Peaſe and Turner.

2 And. 147. in Corbet's Caſe. S. P.— But before the Statute ſhe was not dowable of Land convey'd to Uſes. 4 Rep. 1. b. —— No Dower or Tenancy by the Curteſy of an Uſe. Arg. Hard. 492. cites Perk 69. 89. Lane. 104. Doctor and Stud. 98.

40. *Since* the Statute 27 *H.* 8. the Feme ſhall have Dower of an *Uſe.* 2 And. 75. Mich. 39 & 40 Eliz. in Caſe of Cromwell v. Andrews.

For the Law requires *Sole Seiſin* to entitle the Wife to Dower. Jenk 105. pl. 1. —— And the Sole Seiſin which was in the Jointenant that made the Feoffment was in Law *only for an Inſtant.* Jenk. 105. pl. 1.— Co. Litt. 31. b.

41. If there be two *Jointenants in Fee*, and *one makes a Feoffment* in Fee, his Wife ſhall not be endow'd Co. Litt. 31. b.

For the Seiſin of the Conuſee was *Seiſin for an Inſtant* only.

42. *So* if the *Conuſee of a Fine* does *grant and render* the Land to *the Conuſor*, the Wife of the Conuſee ſhall not be endow'd. Co. Litt. 31. b.

Jenk. 105. pl. 1.

But if the Donee in Tail dies without Iſſue the Wife of the Donor ſhall not be endow'd of the Rent becauſe it is extinct, the State Tail, on which it was reſerv'd, being ended; But the Donee's Wife ſhall be endow'd; For the Land continues and is not determin'd as the Rent is. F. N. B. 149. (G) ——— The Donee's Wife ſhall be endow'd. Perk. S. 317.

43. *But* if the Husband makes a *Giſt in Tail, reſerving a Rent* to him and to his Heirs, and after the Donor takes Wife and dies, the Wife ſhall be endowed of this *Rent*, *becauſe* it is a Rent *in Fee*, and by Poſſibility may continue for ever. Co. Litt. 32. a

But had he limited the Uſe *to himſelf for his Life*, by which Means he could not limit any Remainder over in ſuch Caſe the Wife ſhould not be endowed. Arg. Godb. 442. cites 35 Eliz. 2 Rep. 52 Blithman's Caſe. —— But in this ſame Caſe, and for the ſame Reaſon it was adjudged, that ſuch Wife ſhould be endow'd. And. 291. Blytheman v. Blithman. —— 2 Rep. 52. cites S. C. accordingly. —— Cro. E 279. pl. 8. S. C & S. P. reſolved accordingly. —— Mo. 345. S. C. as adjudg'd accordingly. —— Yelv. 51. S. C. and S. P. agreed by all the Juſtices. —— Noy. 46. Heigham v. Bedingfield. S. P. agreed.

44. Tenant in Tail, in *Conſideration of Marriage intended between A. his Son, and M. Daughter of B. covenanted to ſtand ſeiſed* to the Uſe of himſelf &c. till the Marriage, and after to himſelf for Life, and then to the Uſe of A. and M. and the Heirs of their Bodies, and ſuffered a Recovery to the ſame Uſes. The Father dies. A. dies without Iſſue. If after ſuch Covenant the Father had married, his Wife would have been endowed; But if the Conſideration had been *for the eſtabliſhing the Land in his Name and Blood*, then an Uſe had been raiſed, and it would have been otherwiſe. Brownl. 193. Mich. 2 Jac. Freſhwater v. Rois.

45. No

45. No Dower ſhall be of *Lands bargained and ſold* if the Husband *dies before Inrolment.* Ow. 150. Paſch. 5 Jac. in the Court of Wards, Sir Henry Dimmock's Caſe.

So if a Man *after Bargain and Sale by him takes Wife and dies*, and afterwards the Deed is *inrolled* within ſix Months, the Wife ſhall not have Dower. Cro. C. 569. pl. 6. Hill. 15 Car. B. R. Parker v. Bleeke.

46. If A. *bargains and ſells* Lands to B. and his Heirs by Deed indented and inrolled, with *Proviſo* if ſuch Act be done, that the Bargain and Sale ſhall *be void*, and afterwards A. takes Wife, and after the Proviſo is broken *A. dies before Entry*, and adjudged that the Wife ſhall not be endowed; For though the Eſtate of the Bargainee veſts by the Statute of 27 H. 8. by Execution of the Eſtate of the Land to the Uſe raiſed by the Bargain and Sale, yet inaſmuch as the Baron did not re-enter, he had not any Eſtate in the Land whereof the Feme may be endowed; cited per Cur. as ſo adjudged. 6 Rep. 34. a. Trin. 7 Jac. B. R. in Fitz-Williams's Caſe.

47. *A. Tenant in Tail, Remainder to B. in Tail. A. bargains and ſells the Lands to J. S. by Deed indented and enroll'd.* J. S. has an Eſtate deſcendible to him and his Heirs determinable on the Death of A. and his Wife ſhall be indow'd; but ſuch *Dower ſhall be determinable by the Death of A.* Reſolv'd. 10 Rep. 96. a. Mich. 10 Jac. Seymor's Caſe.

48. The *Dutchy of Cornwall* by an Act of Parliament made the 11 E. 3. is eſtabliſhed to the King's Eldeſt Son, habendum ſibi & ipſius & Hæredum ſuorum Regum Angliæ filiis Primogenitis in Regno Angliæ Hæreditario Succeſſuris: Reſolved by all the Judges of England, that this is an Eſtate of Fee-Simple in the Prince, and his Wife is Dowable of it by Force of this Act. But ſuch a Charter granted by the King to a Subject is a void Grant. Jenk. 280. pl. 5.

49. *Tenant in Tail makes Leaſe for Years, and* then *releaſes to Leſſee and his Heirs.* The Wife of this Leſſee is Dowable of this Eſtate, and this Dower ſhall continue till the Entry of the Iſſue in Tail. Jenk. 274. pl. 96.

So if he makes a *Feoffment* or *Bargain and Sale* for the Tenant in Tail has more than an Eſtate for Life in him, he has an Inheritance, and conſequently ſuch Bargainee has a *deſcendible Eſtate*, and does not determine by the Death of Tenant in Tail but only by the Entry of the Iſſue. 11 Mod 20. Trin. B. R. in Caſe of Machil v. Clerk.

50. If *Tenant for Life makes a Leaſe* by or without Deed *to him in the Remainder or Reverſion in Tail or in Fee, for the Term of the Life of him in the Reverſion or Remainder*, and after he in the *Remainder takes Wife and dies*, his Wife ſhall not be endowed, for Tenant for Life ſhall enjoy the Land again, for a Forfeiture it cannot be, for he in the Remainder was Party, and a Surrender it cannot be, for his whole Eſtate was not given. Co. Litt. 42. a.

51. J S. *Tenant in Fee Simple by Indenture inrolled, bargained, and ſold* the Lands *to B. for* 120 *l. in Conſideration that B. ſhall redemiſe to him and his Wife for their Lives, rendering a Pepper-Corn, and with a Condition that if J. S. paid the* 120 *l. at the End of* 20 *Years, then the Bargain and Sale to be void*; *B. redemiſed it* accordingly and died; *B.'s Wife brought a Writ of Dower* and held good, becauſe by the Bargain and Sale the Land was veſted in her Husband, and thereby the Wife entitled to Dower; and when he redemiſes it according to the Agreement, yet thoſe to whom the Redemiſe was made ſhall hold it ſubject to Dower; and it was his Folly not to join another with the Bargainee as is the antient Courſe on Mortgages; and when ſhe is dowable by Act or Rule in Law a Court of Equity ſhall not bar her to claim her Dower; for it is againſt the Rule of Law, where no Fraud or Covin is

S. C. cited Show. Parl. Caſes, 72 — A Bill was to be relieved againſt the Defendant's Dower, her Husband being only a *Truſtee*; and it appearing that the Husband was but a

Truſtee, the Defendant was barred of her Dower contrary to the Opinion of

is a Court of Equity will not relieve; and this was certified by Jones and Crooke J. upon a Conference with the other Juſtices at Serjeant's Inn to the Chancery that the Wife of B. was to have Dower, and that a Court of Equity ought not to preclude her thereof. Cro. C. 190. pl. 11. Paſch. 6 Car. Naſh v. Preſton.

Naſh v. Preſton, 1 Cro. 191. and ſo it was ſaid is the conſtant Cuſtom of the Court now. 2 Freem. Rep 43. pl. 48. Mich. 1678. Noel v. Jevon.

52. If *Rent* be granted *to A and his Heirs* to commence *after the Death of B.* and Grantee dies before B. yet his Wife ſhall be endowed. Arg. 2. Sid. 110. Mich. 1658.

S. C. cited by the Maſter of

53. No Dower out of an Eſtate in *Truſt*. Bill diſmiſſed. 16 Car. 2. fol. 749. Chan. Rep. 254. 2 Colt v. Colt.

the Rolls, who ſaid it was 15 Car. 2. fol. 794. and that the Truſt was created by the Husband. 2 Wms.'s Rep. 640. Hill 1732. in Caſe of Sutton v. Sutton, and ſaid that where a Truſt of Inheritance is *created by the Husband himſelf*, he took it to be ſettled that the Wife ſhall not have Dower, even againſt the Heir, nor againſt a Deviſee, the Caſes in Reaſon being the ſame. Ibid 640. —— If a Man before Marriage conveys an Eſtate to Truſtees and their Heirs, ſo as to put the legal Eſtate out of him though the *Truſt is limited to him and his Heirs*, the Wife ſhall not be endowed of this Eſtate. Chan. Prec 336. Paſch. 1712 Bottomly v. Fairfax. —— S.C. cited and approved by the Maſter of the Rolls. 2 Wms.'s Rep. 640, 641. Hill 1732 in the Caſe of Sutton v. Sutton. —— S. C. cited by Ld. C. Talbot, Caſes in Equ. in Ld. Talbot's Time 138. Mich. 9 Geo. 2. and ſays that if a Woman ſhould be endowed of a Truſt, the received Practice of inſerting to bar Dower would be of no Signification. —— The *Wife of Ceſty que Truſt* is not intitled to Dower; per Ld. Talbot. 3 Wms.'s Rep. 229 pl 53. Hill. 1733. Chaplin v. Chaplin. —— No Man will ſay that ever any Woman was endow'd in Equity of a Truſt-Eſtate Arg. Parl. Caſes 72. in Caſe of the Counteſs of Radnor v Vandebendy. —— Per Ld. Sommers, Chan. Prec. 65. S.C.

54. The Husband *purchaſed* Lands of Tenant for Life, and *took a collateral Security of him for a Conveyance of the Fee* by his Son and Heir, the Remainder-man in Fee, when of Age, but the Husband died before ſuch Conveyance was made; the Wife is not intitled to Dower. Fin. Rep. 368. Trin. 30 Car. 2. Exton v. St. John.

55. In Dower againſt the Heir of her Husband, the Tenant pleaded, that *A. was ſeiſed and deviſed the Tenements to the Husband and to two more equally to be divided*, and ſo demands Judgment of the Writ, ſuppoſing that ſhe could not ſue *Dower before Partition* againſt Tenants in common; but upon Demurrer adjudged that the Writ well lies. 3 Lev. 84. Mich. 34 Car. 2. C. B. Sutton v. Rolfe.

Ibid. 166. S. P. cited as in the Caſe of Rockley v. Burdett.

56. After a Decree for a perſonal Duty a *Sequeſtration* iſſues, and then the Defendant marries and dies; this ſhall not bind the Feme who comes in for her Dower; Per North K. Vern. 118. pl. 106. Hill. 1682. Anon.

57. Eſtate to *A. for Life*, Remainder to *B and his Heirs for the Life of A.* Remainder to the *Heirs of the Body of A.* Remainder over. The Wife of A. ſhall not be endowed, for the Eſtate for Life of A. does *not merge*. Adjudged ſuddenly on the firſt Argument, though it was urged that the Remainder to B. was only for preſerving the Remainders during A.'s Life againſt any Forfeiture, but that in the mean Time the Eſtate was executed in A. 3 Lev. 437. Hill. 7 W. 3. C.B. Duncomb v. Duncomb.

Lutw. 719. S. C. accordingly.— Ld. Raym. Rep. 326.

58. A. Tenant for Life, *Remainder for Years*, Remainder to A. in Tail. A's Wife ſhall be endowed, otherwiſe if the *Remainder* had been *for Life*. 1 Salk. 254. Hill. 9 W. 3. C. B. Bates's Caſe.

327. Bates v. Life it had Purpoſe.

Bates, S. C. adjudged accordingly; but had the intervening Term been an Eſtate for been otherwiſe according to Perk. 336. the only Authority in the Books for the

59.

59. A. *deviſed Lands to his Executors till Debts paid, Remainder to B. in Tail*, B. marries and dies before the Debts paid. Per Cur. The Eſtate in the Executors is only a † Chattel Intereſt, and will not hinder B.'s Wife of Dower, and that Intereſt determines at Law when the Truſt is ſatisfied; but her Dower cannot *commence in Poſſeſſion*, nor Damages be recovered for detaining it, but from the Time of the Debts being paid. 2 Vern. 403. pl. 373. Mich. 1700. Hilchins v. Hilchins.

2 Freem. Rep. 311. Hitchins v. Hitchins, S. C. and a ſatisfied Mortgage being kept on Foot and ſet up to keep the Widow out of Poſſeſſion was decreed to be ſet aſide and not to ſtand in her Way, and the Court thought the Caſe of Radnor v. Vandebendie a hard Caſe. — Chan. Prec. 133. S. C.

† 9 Mod. 152. in Caſe of Charles v. Andrews.

60. The Queſtion was, If *Aſſignees of Commiſſioners of Bankrupt* by *taking an Aſſignment of a Mortgage Term prior to the Title of Dower* ſhall protect their Eſtate from Dower?

It was inſiſted that Creditors and Aſſignees of Commiſſioners of Bankrupt ſtand only in the Place of the Bankrupt, and ſince ſuch an Aſſignment to the Bankrupt himſelf or his Heir would not protect the Eſtate from Title of Dower in the Hands of the Heir, neither will it protect the Eſtate in the Hands of the Creditors of the Bankrupt or the Aſſignee of the Commiſſioners, and this differs the p eſent Caſe from the Caſe of Lady Radnor and Vandebendy in Dom. Proc. where it was held that ſuch a prior Term ſhould protect the Eſtate from Dower in the Hands of a Purchaſer, ——— Nota Differentiam. Decree that the Plaintiff be let into her Dower, keeping down the Intereſt of a third Part of the Mortgage. M.S. Rep. 156. Paſch. 10 Geo. Canc. Squire v. Compton.

61. All *Eſtates Tail* are Eſtates of Inheritance, to which Dower is incident, and muſt be within the Statute De Donis. 3 Wms.'s Rep. 263. Paſch. 1734. Low v. Burron

62. A Limitation *of Eſtate pur auter Vie to A. and the Heirs of his Body* makes no Eſtate Tail in A. and there can be no Dower of it, it being no Inheritance but only a deſcendible Freehold. 3 Wms.'s Rep. 263. pl. 65. Paſch. 1734. in Caſe of Low v. Burron.

63. If a *Rent de Novo* be granted *in Tail without any Remainder over*, and Tenant in Tail takes Wife and dies without Iſſue the Wife ſhall not be endowed, becauſe the Thing out of which the Dower is to ariſe is not in Being; Secus if the Rent were granted in Tail, *Remainder over*. 3 Wms.'s Rep. 230. Hill. 1733. in Caſe of Chaplin v. Chaplin.

For though the Objection is, that there can be no Remainder of that whereof there is no Reverſion, yet the Intent of the Party gives the Rent de Novo firſt a Being for the Whole, and then the leſſer Eſtates are carved out of it. By Holt Ch. J. 3 Wms's Rep. 230. at the Bottom of the Page in a Note of the Reporter cites Salk. 577. Weeks v. Peach.

49. An Eſtate was conveyed *to J. S. and his Heirs, to the Uſe of him and his Heirs in Truſt, to permit A. and B. to receive the Rents and Profits during their Lives, and the Life of the Survivor of them*, with Power to A. to charge it with 400 l. and ſubject to ſuch Power *J. S. to ſtand ſeiſed to the Uſe of the Survivor of them. A. died* in 1713. *B.* died in 1723, and by his Will *deviſed this Eſtate to C. and his Heirs, who long before had taken M. to Wife.* C mortgaged the Eſtate. The Queſtion was, If M. would upon the Death of C. be intitled to Dower ſo as to affect the Mortgagee? Ld. C. Talbot decreed that M. would not be intitled to Dower of this Truſt Eſtate. Caſes in Equ. in Ld. Talbot's Time 138. Mich. 1735. 9 Geo. 2 Attorney-General v. Scott.

(G. 2) Of what Seiſin.

1. IN *Aſſiſe J. N. was ſeiſed in Fee, and had Iſſue two Sons, R. and T. and died. R. entered and had Iſſue a Daughter*, and *his* Feme *died*, and *he took another Feme and died, ſhe privement enſeint with a Son.* The *Daughter of R. entered*, and the *Lord ſeiſed the Ward, and endowed the Mother of R. who was the Feme of J. N. the Grandfather.* The *Son of the ſecond Feme of R. is born*, and the *Lord ſeiſes the Ward of him*, and *he dies without Iſſue within Age*, and the *Son of T. the Uncle entered upon the Daughter of R into two Parts*, and *ſhe ouſted him*, and *he recovered the two Parts by Aſſiſe*; and ſo ſee that by the *Seiſin of the Guardian* by the Ward of the Son, the two Parts ſhall go to the Heir of this Son, and not to the Daughter of R. who was of the half Blood; but the Opinion of the Court was, that the *Dower ſhall go to the Daughter of R.* for this is in Reverſion, and ſhe may claim it as Heir of her Father or Grandfather; *For the Tenant in Dower is in by her Baron, and not by him who endowed her*, and the *Daughter of the eldeſt Son is Heir to the Grandfather.* Br. Dower, pl. 87. cites 8 Aſſ. 6.

2. In Aſſiſe, the *Tenant of the King died ſeiſed of Lands held of the King* &c. and *the Heir was in Ward*, and the *Feme ſued for Dower, and Writ iſſued to the Sheriff of N. to deliver her* 10 *Marks per Annum for Dower in Land and Rent*, and *he delivered to her* 5 *Marks Land*, and 5 *Marks Rent iſſuing out of the Land of which ſhe was dowable*, and *ſhe was ſeiſed and diſſeiſed of the Rent*, and *brought Aſſiſe and recovered*; For it is a good Endowment, and yet her *Baron was never ſeiſed of the Rent.* Br. Dower, pl. 61. cites 26 Aſſ. 41.

3. *The ſame* Law *of ſuch Aſſignment of the Heir if the Feme accepts it.* Br. Dower, pl. 61. cites 26 Aſſ. 41.

4. *Contra* it is ſaid elſewhere, *if* it was *aſſigned out of Land of which the Feme is not dowable.* Br. Dower, pl. 61. cites 26 Aſſ. 41.

5. *Dower* was brought by a Feme, and it does not appear what the Iſſue was; But it ſeems that *the Iſſue* was *Ne unques ſeiſie que Dower la* poiet; the *Jury ſaid, that W. borrowed* 40 *l. of R. Baron of the Demandant, which W. infeoffed R. upon Condition, that if he repaid the* 40 *l. by ſuch a Day that he ſhould re-enter, and at the Day W. did not pay but died, and the Feme of W. married B. and by Accord between R. Baron of the Plaintiff, and B. and his Feme, B. paid the Money to R. by which B. and his Feme had the Land, and this Feme Demandant demanded Dower*, and prayed the Diſcretion of the Juſtices &c. by which the Demandant recovered her Dower; the Reaſon ſeems to be, inaſmuch as by the Nonpayment at the Day the Baron of the Demandant was ſeiſed Simpliciter and without Condition, and then the Acceptance by R. after cannot prejudice his Feme of her Dower. Br. Verdict, pl. 85. cites 42 E. 3. 1.

6. In Dower, the *Tenant ſaid, that the Baron of the Demandant had nothing but by Diſſeiſin made to him*; Judgment ſi Actio; and the *Feme ſaid, that the Father of her Baron had two Sons, and leaſed the Land to the Eldeſt and his Feme for their Lives, and the Youngeſt took the Demandant to Feme, and the eldeſt Son died, and his Feme took the Tenant to Baron, and the Father of the two Sons died, and the Reverſion deſcended to her Baron, and after the Feme of the eldeſt Son died, and the Tenant held himſelf in, and our Baron ouſted him, and prayed Seiſin* &c. Quære if ſhe ought not to *traverſe the Seiſin alleged in the Baron*, and it ſeems that the

ſhe ſhould; For if the Baron of the Demandant had not entered after the Death of the Feme of the eldeſt Son, ſhe ſhould not have Dower; For the Baron of the Feme of the eldeſt Son had Franktenement in Jure Uxoris, which is not defeated without Entry, as it ſeems; Quære; and Quære if there ſhall not be Seiſin in him without Entry. Br. Dower, pl. 29. cites 2 H. 4 22.

7. In Dower, the *Baron purchaſed Rent*, and *died before the Day of Payment*, yet the Feme ſhall be endowed. Br. Dower, pl. 35. cites 11 H. 4. 88.

8. If a Man *grants a Rent to J. S. in Fee*, and he *dies before Seiſin of it*, the Feme ſhall be endowed; Per Heidon; Quod non negatur. Br. Dower, pl. 71. cites 5 E. 4. 2.

9. A Feme ſhall be endowed of *Seiſin* and Poſſeſſion *in Law* without Seiſin in Fact; As where the Father of the Baron died ſeiſed, and Baron after died before Entry; Quod Nota; For otherwiſe it is of Tenant by the Curteſy, and the reaſon ſeems to be, *inaſmuch as the Baron may enter in Jure Uxoris, but* the *Feme cannot compel her Baron to enter into his own Land.* Br. Dower, pl. 75. cites 21 E. 4. 60. F. N. B. 149. (D) S. P. and in the new Edition cites 7 E. 3. 66. 21 E. 3. 31. and 3 H. 7. 103. S. P.

and ibid. Marg. cites 3 H. 7. 5. and 21 E. 3. 21. —— Perk. S. 457 and 464.

10. In Dower, where there were *Grandfather, Father, and Son*, and the *Grandfather held of the King*, The *Father took Feme*. The *Grandfather died*. The *Father had Iſſue and died before Office found, and before any Entry*; and after an *Office was found for the King, that the Grandfather was ſeiſed and died ſeiſed, and held of the King, and that he had Iſſue, who had Iſſue him who now is Heir and within Age*, by which the *King ſeiſed and committed the Ward durante minore ætate*, and the *Feme of the Father, Son of the Grandfather, brought Writ of Dower againſt the Committee*, and the Committee demurred in Law upon the Matter. Br. Dower, pl. 66. cites 1 H. 7. 17.

11. *But* in Anno 4 H. 7. 1. the Caſe is put, that the *Father entered and died before any Office*, and therefore by all the Juſtices the Feme is dowable. Br. Dower, pl. 66.

12. Where a *Stranger abates* upon Tenant of the King, and the *Heir has a Feme and does not enter*, the Feme ſhall not have Dower upon this Poſſeſſion, per Wood; and he vouch'd 21 E. 4. 60. which Fiſher and Davers agreed; For after Patent made to the Committee, the Committee takes the Profits, and not the King, though Livery be ſued out of the King's Hands. Br. Dower, pl. 66. cites 1 H. 7. 17.

13. *But* per Huſſey, if the *Tenant of the King dies ſeiſed*, and *his Heir has Feme*, and after *Office is found for the King*, there is no Doubt but the *Feme ſhall be endowed for the Poſſeſſion in Fact which was before in her Baron by his Entry before the Office*; *For* it was agreed per tot. Cur. that the *Heir by his Entry is no Intruder* before Office be found for the King. Br. Dower, pl. 66. cites 1 H. 7. 17.

14. *And* if a *Rent deſcends to the Baron, who dies before the Day of Payment*, yet the Feme ſhall be endowed. Br. Dower, pl. 66. cites 1 H. 7. 17.

15. *For* ſuch *Seiſin upon which Præcipe quod reddat lies is as ſufficient to have Dower* as thoſe which are Seiſins in Law, of which Aſſiſe lies not; For ſuch Seiſin of which Aſſiſe lies, is not always requiſite where Dowment ſhall be, but Seiſin in Law ſuffices. Br. Dower, pl. 66. cites 1 H. 7. 17.

16. *And* per Brian, where the *King has Ward*, and the *Ward dies within Age*, his *Heir has a Feme*, and the *Baron dies before it comes to him*, there the Feme ſhall not have Dower. Br. Dower, pl. 66. cites 1 H. 7. 17.

17. Where the *Heir of the King's Tenant has a Feme*, and *Office is found for the King, and after the Heir enters and intrudes*, and *dies*, yet the Feme ſhall have Dower by reaſon of the Poſſeſſion which he had before the Office; Per Davers; For by him the *Statute de Prærogativa* 13. *quod nullum accreſcat ei liberum Tenementum is intended where Office is found, and after he takes Feme, intrudes and dies*; but divers good Students denied it. But Brian and Huſſey agreed with Davers. Br. Dower, pl. 66. cites 1 H. 7. 17.

18. *And if he had not entered, yet ſhe had been dowable*; for there was *Seiſin in Law in the Baron, and he was not an Intruder*, becauſe Office was not found for the King, and it lies as well againſt the Committee of the King as againſt another Guardian. Br. Dower, pl. 66. cites 4 H. 7. 1.

Of a Seiſin for an Inſtant a Woman ſhall *not* be endow'd *as* if *Ceſtuy que Uſe after* the Statute of 1 *R.* 3. *and before* the Statute of 27 *H.* 8. had *made a Feoffment* in Fee his Wife ſhould not be endow'd. Co Litt. 31. b. ——— Of an Inſtantaneous Seiſin *by Fine and Render* no Dower ſhall be. Cited per Tanfield J. as adjudged. Cro J. 615. ——— Co. Litt. 31 b. S. P. ——— *Baron and Feme Tenants in Special Tail.* The Feme dies leaving Iſſue. The Baron makes Feoffment to the Uſe of himſelf for Life and after to B. his Son in Tail, and *marries a ſecond Wife* and then makes Livery. Reſolved that ſhe is not dowable, for before the Feoffment ſhe was not, he being ſuch Tenant in Tail that the Iſſue by her could not inherit, and the Inſtantaneous Seiſin by the Livery will not intitle her. Cro. J. 615. pl. 5. Paſch. 18 Jac. in Scacc. Amcots v. Catherich.

19. Of an *Inſtantaneous Seiſin* gotten by Diſſeiſin ſhe may be endow'd. See Jo. 317. cites 34 Eliz. C. B. Mathew Taylor's Caſe.

Cro. E. 502, 503. S C. upon a Different Point, but in a Note added at the End it is ſtated thus, viz. The Title of the Feme to recover Dower was, That the Father and

20. *Father Tenant for Life*, the *Remainder to his Son in Tail*, the *Remainder to the right Heirs of the Father*. After the Father and Son at a certain Time were *attainted of Felony, and executed likewiſe* at one Time, the Son not having any Iſſue of his Body. If now the Father ſhall be ſaid to be ſeiſed of an Eſtate in Fee, that Dower &c. was the Matter. And there becauſe it was proved by Witneſſes that *the Father moved his Feet after the Death of the Son*; It was found by the Jury Seiſie que Dower &c. And upon that the Wife of the Father had Judgment to recover. Note after Error was brought, and the Error aſſigned in the Proceſs. See Trin. 38 Eliz. Rot. 876. Noy. 64. Broughton v. Randal.

were Jointenants to them and the Heirs of the Son; and they were both hang'd in one Cart; but becauſe the Son (as was depoſed by Witneſſes) ſurviv'd, as appear'd by ſome Tokens, viz. his ſhaking his Legs, his Feme thereupon demanded Dower, and upon Iſſue Ne Unques Seiſie que Dower this Iſſue was found for the Demandant. ——— Mo. 528. pl. 698. S. C. but S. P. does not appear.

A Woman ſhall be endowed of a Seiſin in Law, as *where Lands* and Tenements *deſcend to the Husband before Entry* he has but a Seiſin in Law, and yet the Wife ſhall be endow'd, albeit it be not reduc'd to an actual Poſſeſſion; for it lies not in the Power of the Wife to bring it to be an actual Seiſin, as the Husband may do of his Wife's Land, when he is to be Tenant by Curteſy. Co. Litt. 31. a. ——— Litt. S. 448. S. P.

21. Dower may be of a *Poſſeſſion in Law.* Jo. 361. Trin. 11 Car. B. R. in Caſe of Reeve v. Malſter.

(G. 3) In what Caſes Dower may be Out of Dower.

1. IN Dower a Cuſtom was pleaded that *if the Baron aliens the Land, and expends the Monies between him and his Feme*, that ſhe ſhall be barr'd of Dower, and adjudg'd a good Cuſtom. Br. Cuſtoms, pl. 78. cites 3 E. 3.

So if ſhe receives Part of the Money for which the Land was ſold. Br. Cuſtoms, pl. 53. cites 20 E. 3. and Fitzh. Preſcription. 30.

2. *Feme of the Father is endowed*, and the *Grand-mother brought Writ of Dower againſt her* and *ſhe vouch'd the Heir by Reverſion*, and the *Demandant recover'd againſt the Tenant, and ſhe over againſt the Heir, the third Part of the two Parts reſidue*, and *not in Value*, and well. *And* if the *Feme of the Grandfather dies*, the *Feme of the Father may enter*; For the Grandmother was Attendant to him by Tender; and from hence it ſeems that the Heir may enter then into the ſecond Dower; For ſhe ſhall not have both. Br. Dower, pl. 79. cites M. 5 E. 3. and Fitzh. Voucher 249.

Dower *of 20 Acres of Land belonging to T. B. her Baron*, the *Tenant ſaid that P. B. Father of T. B. her Baron was ſeiſed of the Premiſſes among other Lands and Tenements and died, and T. B. aſſign'd to her the Land in demand in Dower, in Allowance of all the Lands of which her Baron was ſeiſed; and ſo was ſhe in of elder Dower to her reſerved*; Judgment &c. The *Demandant ſaid that the ſame P. B. was ſeiſed of the Manor of B. and 20 Acres of which Dower is demanded and died, and the Tenant enter'd into the Manor of B. and enfeoffed the ſaid T. B. before the Aſſignment of Dower made by T. B. to the Tenant by which the 20 Acres were not Parcel of the Manor, and that P. B. was never ſeiſed of other Land, but of the Manor and of 20 Acres, and prayed Dower.* Cand. ſaid that now it appears that the Demandant ought to have demanded but only the third Part of the two Parts of the Land of which Dower is demanded. Per Godred, you are in of all the Land which belonged to your Baron, which is againſt common Right, and therefore we ought to have the third Part of the Whole. And ſo the Queſtion is becauſe the Tenant is dowable againſt common Right of the Whole, if the Demandant ſhall have the third Part of the Whole, or the third Part of two Parts only; and adjornatur. Br. Dower, pl. 52. cites 4 H. 6. 25.

3. Where *Heir takes Feme and enters and endows his Mother*, and *aliens the Reverſion*, and the *Mother dies*, and after the *Heir dies* the *Feme of the Heir ſhall not have Dower of the Land of which the Mother was endow'd.* For the Seiſin of the Heir who was her Baron was determed by the Endowment, and the Feme in by her Baron and not by the Heir; For if the Heir had charged ſhe ſhould hold diſcharged, quod nota. Br. Seiſin, pl. 18. cites 8 Aſſ. 6.

4. In Dower, the *Tenant in Dower leaſed her Eſtate to the Heir, rendring Rent for Term of his Life*, and the *Heir died*, and *his Feme was endowed by Award*; For this is a Surrender notwithſtanding the eldeſt Endowment, and ſo the Heir in in Fee, though the firſt Tenant in Dower who leaſed, was alive. Br. Dower, pl. 17. cites 45 E. 3. 13.

5. If a Man makes a *Feoffment with Warranty* and dies, and the *Feme of the Feoffor brings Writ of Dower againſt the Feme of the Feoffee*, and *ſhe vouches the Heir of the Feoffor*, and *pending the Action the Feme of the Feoffee brings Writ of Dower of the whole Land, and not of two Parts, ſhe* cannot recover Dower till the firſt Dower be determined. Br. Dower, pl. 80 cites Litt. ſol. 11.

6. The Cuſtom of a Manor was for the Widow to be *endowed of a Moiety* of the Copyholds of which her Husband died ſeiſed; the Husband died, and his Wife was endow'd of 100 l. per Ann. and 100 l. per Ann. deſcended to his Heir, who afterwards died, leaving a Widow. This ſecond Widow ſhall be endow'd of a *Moiety of the Moiety*,

Lev. 154. S. C. but S. P. does not appear. —Sid. 76. pl. 9. S. C.

but S. P. does not appear.—— *Moiety*, and ſo ſhall have 50 l. per Ann. Adjudged. Raym. 58. Mich. 14 Car. 2. B. R. Baker v. Berisford.

2 Sid 1. S. C & S. P. but no Reſolution. —— Ibid. 9. S. C. and it was held by Glyn Ch. J. that the ſecond Widow was intitled to a Moiety. —— Keb. 356. pl. 46. S. C. & S. P. per tot. Cur. præter Mallet.

Co. Litt. 31. a. b. 7. *The Rule* of Dos de Dote peti non debet *is thus to be underſtood*, Where the Grandfather dies ſeiſed of three Acres, and the Father enters and endows the Grandfather's Wife of one Acre and dies, the Father's Wife ſhall be endow'd only of the third Part of the other two Acres; For inaſmuch as the Grandfater died ſeiſed there was no Meſne Seiſin in Judgment of Law betwixt him and his Wife. But if the Father had claimed the ſaid three Acres by Purchaſe from the Grandfather, his Wife ſhould after the Death of the Grandfather's Wife be endowed of the third Part of that Acre whereof the Grandfather's Wife was endow'd; Or in the firſt Caſe, if the Son after the Death of the Grandfather and Father had endow'd his Mother firſt, and then the Grandmother had recovered a third Part againſt her, the Mother after her Death might have entred again; For her Eſtate in the Part ſo recovered was defeated by the Grandmother's Life. Hawk. Co. Litt. 44.

(H) Of what Eſtates *for a collateral Reſpect* ſhe ſhall be endow'd.

See (G) pl. 14. S. C. and the Notes there. 1. IF the Baron had a Fee and Freehold though it be defeaſable, yet his Wife ſhall be endow'd till it is defeated. 45 E. 3. 13. b.

(G) pl. 15. S. C. 2. As if the Baron and Feme Leſſees for Life ſurrender to him in Reverſion this is defeaſible by the Feme; yet in the mean Time if he in Reverſion dies, his Wife ſhall be endow'd. 45 E. 3. 13. b. 18 E. 3. 45.

3. If a Diſſeiſor dies ſeiſed, and after the Diſſeiſee abates, the Wife of the Diſſeiſor ſhall have Dower againſt him, ſo long as the Deſcent is in Force. 17 E. 3. 24. admitted by the Iſſue.

4. If A. endows his Wife Ad Oſtium Eccleſiæ, and after makes a Feoffment of the Land to B. who makes a Feoffment thereof to C. the Wife of B. ſhall be endow'd againſt C. till the Wife of A. recovers her Dower. Temp. E. 1. 66. b. admitted.

5. But in this Caſe after the Endowment of the Wife of B. if the Wife of A. brings a Writ of Dower againſt the Wife of B. and ſhe vouches C. to * Warranty, this Endowment of the Wife of A. ad Oſtium Eccleſiæ ſhall be a good Counter-plea of the Warranty, quia Dos de Dote peti non debet. Temp. E. 1. 66. b. adjudg'd.

* Fol. 678.

6. If A. ſeiſed of the Manor of D. takes B. to Wife, and after aliens to C. who takes E. to Wife, and after aliens to F. and dies, and after E. is endowed, and after B. is aſſigned Dower of a third Part of the Manor, and ſhe brings a Precipe thereof againſt the Wife of C. ſcilicet, E. who vouches to warranty F. who counterpleads it by this Matter, and ſays that the Wife of C. cannot be endowed eo quod non poteſt habere Dotem de Dote, et ſic per Conſiderationem Curiæ Adjudicatum fuit, quod eſſet inconveniens, ideo F. ſit quietus de Warrantia et B. recuperet ſeiſinam et Defendens in Miſericordia. M. 11. E. 4. B. Rot. 46.

7. If

7. If a Woman recovers Dower of a Reverſion expectant upon a Leaſe for Years upon which a Rent is reſerved, ſhe ſhall have a third Part of the Reverſion, and the Rent preſently as incident to the Reverſion, and the Execution ſhall not ceaſe till the Leaſe expires; for the Sheriff ſhall put her in Execution of the Freehold, and the Termor ſhall continue his Term. Tr. 7. Ja. per Curiam. P. 8. Ja. B. per Curiam. Hill. 10 Ja. B. per Curiam.

S. P. And ſhe ſhall have the third Part of the Reverſion by Metes and Bounds. Co. Litt. 32 a. ——

Where a Man *ſeiſed in Fee leaſed for Years rendering Rent, and* after *takes a Feme and dies*, the Feme ſhall have Dower, but ſhall not have Execution during the Term of Years; for the Rent is incident to the Reverſion, and is no Inheritance, but is determinable by the Death of the Leſſee, and therefore ſhe cannot be endowed of the Rent. Br. Dower, pl 89. cites M. 1 E. 6 ——— In ſome Caſes of Lands and Tenements which are deviſeable, and which the Heir of the Husband ſhall inherit, yet the Wife ſhall not be endowed, As If the Husband make a *Leaſe for Life* of certain Lands, *reſerving a Rent* to him and his Heirs, and he takes Wife and dies, the Wife ſhall not be endowed, neither of the Reverſion, (albeit it is within theſe Words Tenements) becauſe there was no Seiſin in Deed or in Law of the Freehold, nor of the Rent, becauſe the Husband had but a particular Eſtate therein and no Fee Simple. Co. Litt. 32. a.

But if the Husband make a *Leaſe for Years reſerving a Rent*, and takes Wife, and the Husband dies, the Wife ſhall be endowed of the third Part of the Reverſion by Metes and Bounds, together with the third Part of the Rent, and Execution ſhall not ceaſe during the Years. If the Husband make a *Gift in Tail*, reſerving a Rent to him and his Heirs, and after the Donor takes a Wife and dies, the Wife ſhall not be endowed of this Rent, becauſe it is a Rent in Fee, and by Poſſibility may continue for ever. Co. Litt. 32. a.

In Dower it was agreed clearly, That if the Tenant ſhews, that before the Husband any Thing had, A was ſeiſed of the ſame Land in Fee, and let that for Years rendering Rent, and granted the Reverſion to the Husband of the Plaintiff, who died ſeiſed of the ſaid Reverſion, and ſo demanded Judgment if the Demandant ſhall have Dower &c. This is no Plea in bar of Dower, but proves ſhe had Title of Dower, but this ſaves the Leaſe for Years, and ſhe ſhall have Judgment only of the Reverſion, and of the Rent; and alſo ſhe does ſave to the Tenant Damages, and the Demandant ſhall be endowed of the Reverſion. Win. 80. Paſch. 22 Jac. C. B. Anon.

8. But if no Rent be reſerved upon the Leaſe for Years, then the Execution ſhall ceaſe till the Term expires. Trin. 7 Jac. B. per Curiam. Co. Litt. 32. a. S. P.

9. A *Rent de novo* was granted *to a Man and his Heirs*, with a *Proviſo that if the Grantee died, his Heirs being within Age*, that *then the Rent ſhould ceaſe during his Minority*, and he died, his Heir being within Age, and the Wife of the Grantee brought a Writ of Dower againſt the Tenretenant, and held it lay, and that the Demandant ſhould have *Execution againſt the Heir when he came of full Age*. 1 Rep. 7. a. in a Nota of the Reporter cites 5 E. 2.

Fitzh. Dower, pl. 143 cites Paſch. 5 E. 2. where there were Differences of Opinions, and therefore bid the Parties ſue a Bill in Parliament, which they did, where it was ordered that the Demandant ſhould recover her Dower againſt the Grantor, viz. Tertiam Partem prædicti Redditus percipiend' according to the Form of the ſaid Grant, when the Heir ſhall come to his full Age; and ſo the Queſtion was determined. ——— Jenk. 4. pl. 6. S. C. reſolved in Parliament ——— Vent 96. Mich. 22 Car. 2. B. R. per Cur. S. P. Obiter, ſhe ſhall have Judgment but Ceſſet Executio.

10. Where *Father and Son* are; the *Father dies*, the *Son takes Feme and enters, and endows his Mother, and* after *grants the Reverſion*, and the *Mother dies*, and the *Son dies*, the Feme cannot have Dower; And Brook ſays it ſeems to be good Law; for it is ſaid elſewhere that where the Heir enters and endows his Mother, and ſhe dies, and J. N. bates, he ſhall not have Aſſiſe but Mortdanceſtor or Intruſion; for the *firſt Poſſeſſion is defeated by the Dower*. Br. Dower, pl. 87. cites 9 E. 2.

11. If a *Man leaſes Land for Term of* 10 *Years upon Condition that if the Leſſee pays* 100 *l. at the End of the Term, that he ſhall have Fee*, and not, that he ſhall have but a Term; if he pays 100 l. at the End of the Term he by this has Fee for all the Term, and the Feme ſhall be endowed; Quære inde; for this Word Tunc has no Relation to

give Fee Niſi de Tempore Solutionis, as it ſeems. Br. Dower, pl. 45. cites 7 H. 6. 11.

12. If Lands *are given to the Baron and Feme and to the Heirs of their two Bodies, or to their Heirs*, and after the *Baron dies*, now if the *Feme* will waive and *refuſe the Joint-Eſtate* ſhe may bring Writ of Dower, and by this, in Judgment of Law, the Baron ſhall be ſaid ſole ſeiſed Ab Initio; for otherwiſe ſhe cannot be endowed, and yet in Truth the Baron and Feme were Jointenants during the Coverture. 3 Rep. 27. b. per Cur. Mich. 33 & 34 Eliz. B. R. in Caſe of Butler v. Baker.

13. If *a Man gives in Tail to Baron and Feme*, and after grants *the Reverſion* of thoſe Lands to *J. S.* and then the *Baron dies*, and the *Feme waives*, and diſagrees to the Eſtate Tail, and claims her Dower; Now as to her there is a Nullity of Eſtate Ab Initio, and to ſuch Intent the Law holds it as an Eſtate made to the Baron only; Per Cur. 3 Rep. 28. b. Mich. 33 & 34 Eliz. in Caſe of Butler v. Baker.

14. In a Writ of Dower the Tenant pleads Ne unques Seiſie que Dower, and in Truth the Husband of the Demandant had an *Eſtate by Diſſeiſin which was avoided by the Entry of the Diſſeiſee*, and who had a Title Paramount; It was agreed clearly that this is no Title by which ſhe may have Dower. Win. 77. Paſch. 22 Jac. C. B. Berkſhire (Counteſs of) v. Sir Peter Vanlore.

So if the *Conuſee of a Fine grant and render to the Conuſee* &c. the Wife of the Conuſee cannot be endowed. Co. Litt. 31. a.

15. If there are *two Jointenants in Fee*, and *one of them makes a Feoffment in Fee*, his Wife ſhall not be endowed. Co. Litt. 31. b.

16. Tenant in Dower ſhall not have *Execution of a Reverſion after a Term on which no Rent was reſerved*; for in ſuch Caſe it would be in vain to have Execution before the Term be ended; Per tot. Cur. and Judgment accordingly. Comyns's Rep. 185. Mich. 8 Ann. C. B. Bodmyn (Lady) v. Child (Sir Richard)

(I) Of what Eſtate for a Collateral Reſpect ſhe ſhall be endowed.

For *Collateral Qualities.*

[Conditions &c.]

Br. Dower, pl. 62. cites S. C. and ſtates it as here in pl. 1. and ſays that per Cur. the Feme recovered, quod nota; and

1. IF a Man makes a Feoffment to the Husband upon Condition that he ſhall enfeoff his Wife and Son, and he makes a Feoffment accordingly and dies, the Wife ſhall be endowed of this; For the Feoffment to her by her Husband was void, but it appears the Intent of the firſt Feoffor was that ſhe ſhould have an Eſtate in the Land, and inaſmuch as ſhe could not have the Eſtate according to his Intention, ſhe ſhall have the Eſtate which the Law gives her. 28 Aſſ. 4. Curia. Brooke Dower 62.

that it ſeems the Feoffment is void as to the Wife, and good only as to the Son, and therefore ſhe is dowable againſt him; and ſo it appears in Littleton in his [tit.] Eſtates upon Condition. [But nothing more is at that Plea in Brooke.]

2. So

2. So it ſeems if a Feoffment be made to a Husband upon Condition to infeoff J. S. and he does it accordingly and dies, the Wife ſhall be indomed; For his Intent does not appear to exclude the Wife of her Dower; and if this had appeared, yet it ſeems it would not have ſtood with Law. It ſeems as it this was the Reaſon of the Caſe in 28 Aſſ. 4. Brooke Dower 62.

3. In Dower the *Tenant ſaid that Tenant by the Curteſy granted his Eſtate to him in Reverſion, (who was Baron to the Feme now Demandant) rendering Rent, and for Default of Payment to re-enter*; he in *Reverſion married the Demandant*, and *for the Rent-Arrear the Tenant by the Curteſy entered*; he in *Reverſion died*, and his Feme was barred of Dower by the Re-entry; for Surrender may well be upon Condition. Br. Dower, pl. 74. cites 14 E. 4. 6.

4. If a Man be *Tenant in Fee Tail general*, and makes a *Feoffment in Fee*, and *takes back an Eſtate to him and his Wife, and to the Heirs of their two Bodies*, and they *have Iſſue*, and the Wife dies, and the *Husband takes another Wife* and dies, the Wife ſhall not be endowed; For during the Coverture he was ſeiſed of an Eſtate Tail ſpecial, and yet the Iſſue, which the ſecond Wife may have, by Poſſibility may inherit. Co. Litt. 31. b.

5. The ſame Law it is, if he had *taken back an Eſtate in Fee-Simple*, and after had taken Wife, and had Iſſue by her, yet ſhe ſhall not be endowed; For that the Fee-Simple is vaniſhed by the *Remitter*, and her Iſſue has the Land by Force of the Intail; But in that Caſe the Tenant cannot plead that the Husband was never ſeiſed of ſuch an Eſtate, whereof the Demandant might be endowed, but he muſt plead the ſpecial Matter. Co. Litt. 31. b.

(K) At what *Time* ſhe ſhall be endowed.

1. IF the Husband enters into Religion, though it is a Civil Death, inaſmuch as he is dead as to the World, for his Heirs ſhall have his Land, and a Writ of Mortdanceſtor, yet his Wife ſhall not be endowed during his natural Life, becauſe he entered into Religion with her Conſent, otherwiſe ſhe might deraign him; and ſo by her own Aſſent ſhe in a Manner vows Chaſtity as well as her Husband. 32 E. 1. Dower 176. Perk. S. 307 S. P. the French Edition, cites Mich. 31 E. 1. Dower 176. — F. N. B. 150. (E) S. P. ——

Co. Litt. 33. b. —— Co. Litt. 132. b. S. P. —— Jenk. 4. pl. 4. S. P.

2. The Death of Baron was ſuggeſted, becauſe *of his Abſence ſeven Years*, and upon circumſtantial Proof, (none being offered to the contrary) ſhe recovered. D. 185. a. pl. 65. Paſch. 2 Eliz. Thorn v. Rolf. And. 20. pl. 42. S. C. —Mo. 14. 15. pl. 35. S. C. but the Point of Abſence is not particularly mentioned in either And. or Mo. —— Bendl. 89. pl. 131. S. C. & S. P. and ſhe recovered her Dower.

3. Proof by 4 of the Death of Baron, and at the Eſſoign Day Proof by 12 de Vita Viri, all agreeing in the ſame Points. *Qui melius probat, melius habet.* D. 185. a. pl. 65. Paſch. 2 Eliz. in Caſe of Thorn v. Rolf, cites Cui in Vita, Mich. 2 E. 2. Fitzh. Trial, pl. 46. cites S. C. — Winch. 82. Over v. Tucker, Paſch 22 Jac. C. B. S. P.

(L) By

Fol. 679.

(L) By what Act or Thing a Woman may *delay herſelf* of her Dower.

Detainment of Charters, or of the Heir.

What Charters or Heir.

Perk. S. 355; 356. S. P. —— The Charters ought to concern the Land whereof Dower is demanded, and not other Lands deſcended to the Heir. 9 Rep. 17. a. the firſt Reſolution in Bedingfield's Caſe.

1. DEtaining of Charters concerning the ſame Land of which ſhe demands Dower, is a good Plea in Delay of her Dower. 14 H. 4. 13. b. 14 H. 6. 4. 21 E. 3. 8. b.

2. [So] detaining of a Fine concerning the Land &c. is a good Plea in Delay of Dower, though the Fine may be had again in the Treaſury. 1 E. 3. 12. b.

Hob. 199. S. P. admitted, per Cur —— See (M) pl. 2. and the Notes there.

3. Detaining the Heir is a good Plea in Delay of Dower brought againſt the Guardian in Chivalry. 17 E. 3. 58. b.

Co. Litt 39. a. S P. and ſo of Eloigning the Body of the Ward; becauſe his Marriage appertains to him; And if the Heir comes in as Vouchee he ſhall plead the ſame Plea; But he ſhall not plead Detainment of Charters, becauſe ſuch as concern the Inheritance of the Heir belong not to the Guardian.

4. [So] if a Woman be endowed Ad Oſtium Eccleſiæ, and after the Death of the Baron ſhe brings a Writ of Dower againſt the Guardian in Chivalry of the Heir of her Husband, it is a good Plea in Delay of this Dower, that the Demandant detains the Heir from him. 11 H. 3. Rot. 6. inter Idoneam *Burdett and Willielmum Burdett*, admitted per Iſſue, and agreed by Plea. 11 H. 3 Dower 187. the ſame Caſe, as it ſeems, but in *Burdett's Caſe* it is not expreſſed what Dower this was, but ſhe claims it as Land of which ſhe was nominatim dotata by her Husband.

5. The ſame in a Writ of Dower Ex aſſenſu Patris, or Matris 11 H. 3. Dower 186.

The Plea of Detainment of Charters is *not good for more Lands than the Charters concern.* D. 230. a. pl. 52. Trin. 6 Eliz. Anon. cites 22 H. 6.

6. In Dower, the *Tenant ſaid that the Demandant detained from him certain Charters concerning his Franktenement, and in Caſe ſhe would deliver them; he is ready to render Dower, and at all Times has been ready*; And it was agreed, that this *Detainer is no Plea, but of Charters concerning the Inheritance, and not of Land purchaſed*; And ſo it ſeems there, that *if it concerns the Inheritance, though it be other Land than of which the Dower is demanded*, yet it is a good Plea; and there the Defendant was *compelled to ſhew what Charters ſhe detained.* Br. Dower, pl. 47. cites 22 H. 6. 16.

S. C. cited per Cur. 9 Rep 17. b. 18. a. that upon Delivery of the Charters ſhe

7. Dower *of four Acres*; As *to one Acre the Tenant vouched to Warranty*, and as *to the reſt that the Demandant detained Evidences from him concerning the ſame Land*, and *ſhewed one ſpecially, by which T. infeoffed J. W. and R. his Father, habend' to them and to the Heirs of R. and if ſhe would deliver them, he is ready to render Dower*; Pool ſaid his Plea goes

goes to all; for if ſhe detains Charters which concern any Part of the Land in Demand, it is a good Bar ro the whole Dower, and the *Detinue ſhall be of Land deſcended to the Tenant, and not of the Land purchaſed*; Per Newton, the Plea does not go to all. Br. Dower, pl. 48. cites 22 H. 6. 42.

ſhall have her Judgment immediately.

8. In Dower, the *Tenant ſaid that the Demandant detained certain Charters concerning this Land* &c. *and if ſhe will render* &c. *then ready to render Dower* &c. The *Demandant produced* the Deed, and prayed Dower, and the Deed was read, ſo that the Court perceived it was the ſame Deed, by which the Demandant recovered. Br. Dower, pl. 53. cites 9 E. 4. 47.

9. Dower againſt the *Heir*, who *ſaid that the Demandant detained from him a Bag ſealed, with certain Evidences concerning the ſame Land, and if ſhe will deliver it &c. he is ready to render Dower*, and a good Plea, per tot. Cur. except Engleſield, *without ſhewing the Certainty of the Evidences*; *Quære if it had not been in a Bag ſealed.* Br. Dower, pl. 1. cites 18 H. 8. 1.

10. In Dower, if the Tenant pleads that the Demandant detains Evidence, the *Demandant delivering in the Evidence may have Judgment immediately*; But if ſhe *denies the Detainer* of the Evidence, *and that be found againſt her, ſhe ſhall loſe her Dower*; Per Cur. Obiter. Hob. 199. Mich. 15 Jac. in Caſe of Brickhead v. York (Archbiſhop.)

11. *So* in the Caſe of Dower brought againſt *a Guardian in Chivalry who pleads the Detainer of the Heir his Ward.* Ibid.

(M) Detinue of *Charters.* [Or *Heir.*]

Who may plead it. [And How.]

1. If a Wife be with Child, the Heir for the Time being cannot plead Detinue of Charters; For ſhe may keep them for the Infant. 41 E. 3. 11. b.

In Dower, the *Tenant ſaid that ſhe detained certain Evidences concerning his Inheritance, and declared what, and that he has been at all Times ready to render Dower if ſhe had delivered them.* The *Feme, as to two of the Deeds, intitled herſelf by Gift to her and her Baron, and to the reſt, where the Tenant intitles himſelf as Brother and Heir of the Baron, ſhe ſaid that ſhe is enſeint by her Baron, and keeps the Deeds to the Uſe of the ſame Infant who ſhall be Heir*, if God give him birth; Judgment &c. and *Iſſue was taken that ſhe was not enſeint the Day of his Death*, and *not if ſhe was enſeint by her Baron the Day &c.* Br. Dower, pl. 8. cites S. C. —— Br. Iſſues joines, pl 6. cites S. C. & S. P. accordingly.

2. In a Writ of Dower againſt the Guardian in Chivalry, he may plead in Delay of Dower, that the Plaintiff detains the Heir from him. 17 E. 3. 58. b. admitted.

S. P. but he ſhall ſhew his Name, viz. J. Son and Heir of

Y. T. Br. Dower, pl. 47. cites 22 H 6. 16. —— S. P. and ſhall ſhew whether Male or Female, or otherwiſe Eloignment by the Demandant is no Plea Br. Dower, pl. 67. cites 2 H. 7. 6. —— S. P. but he cannot plead Detainment of Charters; For he cannot conclude his Plea thus, viz. "And if the Demandant will deliver to him the Charters &c" For the Charters which concern the Inheritance of the Heir ſhall not be delivered to the Guardian. 9 Rep. 19. reſolved in Bedingfield's Caſe, and cites it ſo adjudged in 10 E. 3. 49. a.

S. C. cited per Cur. 9 Rep. 18. b. in Bedingfield's Caſe.

3. In a Writ of Dower, if the Tenant vouches the Heir in Ward, the Guardian may plead in Delay of Dower, that ſhe detains the Heir from him, though the Guardian could not have rendered to her Dower before this Time; For he may render it now. 17 E. 3. 58. b. Curia.

4. A Man having *a Charter which concerns four Acres of Socage Land*, he *deviſed three to his youngeſt Son, and four to his Wife for Life*, the *Remainder to a Stranger*, and died. The *Wife* entered in the Acre, and *happened upon the Charter*, and brought a Dower of three Acres againſt the youngeſt Son, who pleaded Detinue of Charters in Bar, and that *if ſhe would deliver, he was ready to render Dower*; But in the Concluſion he ſaid, *yet ready to render*, leaving out the Condition, *if* &c. which is a Confeſſion, and adjudged for the Complainant. D. 230. pl. 52. Trin. 6 Eliz. Anon.

A Feoffee cannot plead Detainment of Charters; agreed per Cur. Cro. E. 367. pl. 2. Hill. 37 Eliz. B. R. in Caſe of Stokes v. Annesby.

5. No *Stranger*, though he is Tenant of the Land, and has the Evidences conveyed to him, can in a Writ of Dower plead Detainment of Charters, but this Plea lies only in Privity, viz. for the Heir of the Baron. 9 Rep. 18. a. Hill. 28 Eliz. the third Reſolution in Bedingfield's Caſe.

6. Detainment of Charters is not pleadable by *Tenant by Reſceipt*, who has a Reverſion after Tenant for Life, becauſe he cannot render her Demand, and is a Stranger, and therefore Seiſin was awarded to the Demandant. 9 Rep. 18. b. 19. a. per Cur. cites 8 E. 3. 55. a. [pl. 3.]

7. The *Heir in ſeveral Caſes ſtands in the Degree of a Stranger*, and ſhall not have this Plea. 9 Rep. 18. a. Hill. 28 Eliz. in Bedingfield's Caſe.

8. *As* if the Heir hath the Lands *by Purchaſe*. 9 Rep. 18. a.

9. If the *Heir* has *delivered the Charters to the Woman*, he ſhall not plead the Detainment of them, for he has them with his Conſent. 9 Rep. 18. a.

10. So if the *Heir* is *not immediately vouched* by the Tenant, but the Tenant vouches one who vouches the Heir. 9 Rep. 18. a.

11. So if the *Heir coming in as Vouchee, has no Land in the ſame County*. 9 Rep. 18. a.

(N) [Detinue of Charters in Bar of Dower.]

How to be *pleaded*.

Dower *againſt the Heir*, who *ſaid that he was ready to render*

1. If Detinue of Charters is pleaded in Delay of Dower, he that pleads it ought to allege what Charters they are ſo certainly as in a Declaration of Detinue for them. 14 H. 6. 4. 1 E. 3. 12. b.

Dower if ſhe would render to him certain Charters concerning his Inheritance, which ſhe detained from him Per Cur. you *ſhall ſhew what in certain*, and this is reaſonable, *by reaſon of the Verdict to the Jury, and that it appear to the Court to whom they belong*; For if they belong to the Defendant by Purchaſe, and not by Inheritance, he is put to Writ of Detinue; but if they are in a *Box ſealed* &c. he ſhall not declare in certain. Br. Dower, pl. 67. cites 2 H. 7. 6. ——— 9 Rep. 18. a. S. P. reſolved in Bedingfield's Caſe, ſo that a certain Iſſue may be taken, and cites 22 H. 6. 16. a. 2 H. 7. 6. a. 14 H. 6. 4. and 18 H. 8. 1. a.

The Certainty of the Charters *ought to be alleged, unleſs* they are *in a Cheſt, Box, or Bag ſealed* &c. D. 250. a pl. 52. Trin. 6 Eliz.

2. Dower *againſt two Femes, who ſaid that the Feme Demandant was Feme of their Father, and that all the Land of the Baron deſcended to them as Heir* &c. *and Partition was made between them, ſo that certain Land was allotted to the one, and certain to the other, and for the one he ſaid, that the Demandant detained a certain Box full of Muniments touching the Inheritance of the Feme Tenant, and if ſhe will deliver the Box ſhe is ready to render Dower, and at all Times has been*, and demanded Judgment if ſhe may demand Dower before the Delivery of the Box; And *for the other Daughter* it was *ſaid, that the Demandant detained the ſame Box and two Indentures, and that in the one it is contained, that A. infeoffed the Father of this Feme of the Tenements to her aſſigned in Partition, and in the other Indenture it is contained, as the Father of the Tenant granted to B. a Rent-Charge, that if the Father performed certain Conditions, that the Rent ſhould ceaſe, and that the Box and thoſe Indentures came to the Hands of the Demandant after the Death of her Husband*, and demanded Judgment if before the Delivery of thoſe ſhe may demand Dower; And the *Demandant as to the Box ſaid that ſhe is ready, and at all Times has been*; by which, as to this it was adjudged, that the Demandant recover Dower, and no Party amerced; and ſo as to her who firſt pleaded the Detinue of the Box, and to the other ſhe *ſaid, that as to the firſt Indenture ſhe never took it*, and the other e contra; and *as to the other Indenture ſhe ſaid that ſhe had delivered it to the other Parcener*; And it was awarded that ſhe deliver the Box to her who rendered the Dower for her Part, and *as to the Delivery to the one Parcener of the Indenture which concerned the Purparty of the other, ſhe demurred* &c. et adjornatur, therefore quære. Br. Dower, pl. 41. cites 21 E. 3. 8.

3. In Dower, the *Tenant ſaid that Actio non*; For *his Father was poſſeſſed of a Cheſt and Charters, and of two Fines in Special, and divers other Charters which concerned the Land which is deſcended to him from his Father, which come to the Demandant, and he is, and at all Times has been, ready to render Dower in Caſe ſhe would deliver the Cheſt and Charters*; And the *Demandant ſaid, as to all the Charters except the two Fines, ſhe has been always ready to deliver them, and offered them to the Court, and to the two Fines, that they came not to her Hands*; Per Martin J. *where the Cheſt is open, you ought to declare every Charter ſpecially*, and the ſame in Detinue of a Cheſt open with Charters, quod Curia conceſſit, quod nota bene. Br. Dower, pl. 57. cites 14 H. 6. 4.

4. He that pleads Detainment of Charters ought to plead *that he has been always ready to render Dower, and yet is* if the Demandant would deliver to him the Charters. 9 Rep. 18. a. 19. b. Hill. 28 Eliz. in Bedingfield's Caſe.

5. *Detainer of Charters* is no Plea after Imparlance; for per Cur. He that pleads this Plea muſt plead that from the Time of the Death of his Anceſtor *paratus fuit & adhuc paratus exiſtit* to aſſign her Dower if ſhe would deliver the Charters. 1 Salk. 252. pl. 2. Paſch. 3 W. & M. in B. R. Burdon v. Burdon.

Cumb. 183. S. C. —— Show 271. and Judgment affirm'd in B R. —— Comb. 183.

S. C. the Plea goes only in Abatement, and Judgment affirmed Niſi &c.

(O) *What*

(O) *What Act of the Baron* may *bar* the Wife of her Dower.

1. IF Land be mortgaged to the Baron, and the Condition is broke, and afterwards upon the Agreement the Mortgagor hath the Lands again by Payment, yet the Wife of the Mortgagee shall be endowed after the Heir of the Baron hath recovered, and so it seems before; but this is a Quære. 41 E. 3. 1. b.

Co. Litt. 32. a. S. P. — But otherwise if she were naturalized by Act of Parliament.

2. If a Man *takes an Alien to Wife, and afterwards he aliens his Lands*, and afterwards *she is made a Denizen*, she shall not be endowed; for she was absolutely disabled by the Law, and by her Birth not capable of Dower, but her Capacity and Ability began only by her Denization. 13 Rep. 23. Hill. 27 Eliz. in Chancery in Menavill's Case.

Ibid.

Co. Litt. 33. a. S. P.

3. If a Man seised seised of Lands in Fee *takes a Wife of eight Years of Age, and aliens his Lands*, and afterwards the *Wife attains to the Age of nine Years*, and afterwards the Husband dies, the Wife shall be endowed; For although at the Time of the Alienation the Wife was not dowable, yet for as much as the Marriage, and Seisin in Fee, was before the Alienation, and the Title of Dower is not consummate until the Death of her Husband, so as now there was Marriage, Seisin in Fee, Age of nine Years during the Coverture, and the Death of the Husband, for that Cause she shall be endowed, ; for it is not requisite that the Marriage, Seisin, and Age, concur together all at one Time, but it is sufficient if they happen during Coverture. 13 Rep. 22, 23. Hill. 27 Eliz. in Chancery in Menavill's Case.

4. Though the *Husband aliens* the Lands or Tenements, or extinguishes the Rents or Commons &c. yet the Woman shall be endowed. Co. Litt. 32. a.

Fol. 680.

(P) *What Act of the Feme will bar* her of her Dower.

Elopement.

* Br. Dower pl. 12. cites S. C. — Co. Litt. 32. a. b. S. P. — F. N B. 150. (H) S. P. —

1. IF she elopes from her Husband with another Man, and continues in Adultery with him without being reconciled to her Husband before the Death of her Husband, she shall lose her Dower. * 43 E. 3. 19. 19 E. 4. 30. Perkins S. 354. 47 E. 3. 27. vide Statutum Roberti Primi, cap. 13. apud Scotos according. West. 2. cap. † 38. according.

† This seems misprinted for 34.

Co. Litt. 32. a. b. S. P. — 2 Inst. 436. S. P.

2. The same Law if she elopes with the Adulterer and is not reconciled, though she does not stay with the Adulterer. Perkins S. 354.

Co. Litt. 32. a. b. S. P.

3. The same Law if she be reconciled to her Husband by the Coertion of Holy Church. Perkins S. 354. and not of her Good-will.

4. So

4. So if **the Wife elopes with her good Will, and** ſtays with the Adulterer againſt her Will, **ſhe ſhall loſe her Dower. Perkins** S. 354. F. N. B. 150. (H) if ſhe remains with the Adul-

terer ſhe ſhall loſe her Dower; but if ſhe remains in Adultery upon the Husband's Lands or Tenements ſhe ſhall have Dower; becauſe the ſame is not an Elopement. ——— Co. Litt. 32. b. ——— 2 Inſt. 436. S. P. and ſo if afterwards the Adulterer turns her away, yet ſhe ſhall be ſaid morari cum Adultero within this Act.

5. So if **ſhe be** raviſhed and ſtays with the Adulterer **during the Life of the Husband** willingly without Reconcilement, **ſhe ſhall loſe her Dower.** 43 E. 3. 19. b. See the Notes at pl. 17.

6. But if **the Wife be** raviſhed and ſtays **with the Adulterer** againſt her Will **ſhe ſhall not loſe her Dower.** 43 E. 3. 19. b. Br. Dower, pl. 12 cites S. C. ———

Perk. S. 354. S. P. ——— See tit. Rape, pl. 4. and the Notes.

7. So if **after Elopement the Wife be** reconciled **to her Husband** of his Free Will **without Coertion of Holy Church, ſhe ſhall have Dower. Perkins** S. 354. D. 1, 2. Ma. 107. 23. See pl. 18. and the Notes there.

8. **If a** Man grants his Wife with her Goods to another, **by Force of which the** Wife lives with the Grantee afterwards all the Life of her Husband, **this ſhall loſe her Dower, becauſe ſhe lived in Adultery with the Grantee notwithſtanding the Grant of the Baron.** 30 E. 1. **Libro Parliamentorum Fol.** 96. *Willielmus Paynell* **and** *Margery* **his Wife's Caſe. Adjudged in Parliament.** S. C. cited 2 Inſt. 435, 436. with with the Deed at Large de Verbo in Verbum

which Ld. Coke ſays he cites for the Strangeneſs thereof.

9. **If the** Friends of the Husband eſloin him from his Wife, **ſo that the** Wife does not know what is become of him, **and the** Friends of the Husband publiſh that the Husband is dead, and **after they** procure the Wife to releaſe all **Marriages and** Intereſts, **which ſhe can have in him as her Husband,** and **after the Wife** by the Perſwaſion of the Friends of the Husband marries with another that dies, and ſhe takes another Husband, **to whom Notice is given that the firſt is living, but no Notice was given thereof to the Wife, though the Wife lives in Adultery, and though the Husband was not out of the Realm or beyond Sea, ſo that the Wife ought to take Notice that he was living, yet inaſmuch as ſhe** non reliquit Virum Sponte, **as the Statute ſays, but by the Perſwaſion of the Friends of the Husband that he was dead, and it does not appear that ſhe ever knew that he was living, this is not any ſuch Elopement as to bar her of her Dower. Mich.** 12 Ja. **between** *Green and Harvy.* **Per Curiam.**

10. **If the Wife** elopes from her Husband, and after lives with her Husband Years and Days till the Death of her Husband, with the Good-will and Aſſent of the Husband **without Coerſion of Holy Church, this ſhall not bar her of her Dower, though it is not aver'd that ſhe was reconcil'd to her Husband.** 19 E. 3. **Elopement** 94. To prove a Reconcilement it was given in Evidence that they lay together ſeveral

Nights in ſeveral Places after the Departure and Separation, and demean'd themſelves as Husband and Wife. It was objected that they never dwelt together in the ſame Houſe, but liv'd aſunder; and that ſhe continued in Adultery with one or another all along during her Husband's Life, ſed non Allocatur; For there might be ſeveral Elopements and ſeveral Reconciliations, and the Tenant at his Peril ought to take Iſſue upon one. D. 106. b. 107. pl. 22, 23. Haworth v. Lady Powis.

But though ſhe does cohabit and is reconciled, yet if it be by the Coercion of the Church ſhe ſhall looſe her Dower. 2 Inſt. 436.

But if a Man seised of two Manors in Fee, taketh a Wife, and when the Husband is

11. **If a Woman** elopes into another County, and lives in Adultery in a Manor that is of the joint Purchase of the Baron and Feme, without being reconcil'd, **yet this shall not bar her of her Dower, because the Baron is to see that none such live within his Land. 8 E. 2. Dower 153. adjudged.**

dwelling at one Manor, the Wife goes unto the other Manor, and when she is there she liveth in Adultery, it is said that by doing so she shall not lose her Dower, because it cannot be intended a running away from her Husband, when the Law cannot intend that she can dwell upon the Manor of her Husband without the Agreement of her Husband, tamen quære. Perk. S 355.

If the Wife doth elope from her Husband's House of Habitation, and commit Adultery in any other the Lands or Manors of her Husband, this without the free Reconciliation of her Husband is within the Purview of this Statute. 2 Inst 436.

It was said by Daniel that an *Elopement* is not Bar of Dower *Ad Ostium Ecclesiæ*. Noy. 108.

2 Inst. 436. S. P. Contra. though Ld. Coke says, it has been held otherwise.

12. **The** same **Law, though the** Wife lives in an House of the free Tenant of the Manor. **8 E. 2. Dower 153. adjudged.**

Noy. 108. * Fol. 681. Trin. 2 Jac. C. B. Powell v. Weeks resolv'd e Contra. because it is not † a vinculo Matrimonii. —— Godb. 145. pl. 182. 2 Jac. C. B. adjudg'd that she shall have her Dower. Lady Stowell's Case and seems to be S. C.

13. **If the Wife be** divorced for Adultery, **(which does not dissolve the Bond of Marriage by the Canon Law, nor of our Church in this * Realm, but is only** a Mensa & Thoro) † **yet this shall bar her of her Dower.**

Co. Litt. 33. b. contra.

14. **With this agrees the Law of** Scotland. Skene Regiam Majestatem 43. **b. Perl. 5.**

15. **With this agrees the Civil Law.** Reynolds of Divorces 86.

16. **So the Canon Law is according.** Reynolds of Divorces 86.

If she goes willingly with or to the Adulterer, this

17. 13 *E.* 1. *W.* 2. *cap.* 34. *If a Woman willingly leaves her Husband, and goes away and continues with her Advowterer, she shall be barred for ever of Action to demand her Dower;*

is a Departure and a Tarrying, though she remains not continually with the Adulterer she shall *lose her Dower*. Co. Litt. 32. b. in Principio.

In this Case of Elopement, and remaining with the Adulterer &c. the Wife could not be barred of her Dower by the Common Law, though a Divorce were sued and had for the said Adultery. 2 Inst. 435.

Although the Words of this Branch be in the Conjunctive, yet if the Woman be taken away not Sponte, but against her Will, and after consents and remains with the Adulterer without being reconciled &c. she shall lose her Dower; for the cause of the Bar of her Dower is not the Manner of the going away, but the remaining with the Adulterer in Adultery without Reconciliation, that is the Bar of the Dower. 2 Inst. 435.

If the Wife goes away with the Husband's Agreement, and consent with A. B. if after A. B. commit Adultery with her, and she remains with him without Reconciliation, she shall be barred of her Dower by this Branch; 2 Inst 435.

But the Husband may give Licence to a Man to carry his Wife to his House, and this shall be a good Bar in Action brought de Muliere abducta cum bonis viri. 2 Inst. 436.

Note, that Cohabitation is not sufficient without Reconciliation made by the Husband Sponte, so as Cohabitation only in the same House with the Husband avails her not; a Fortiori though she remain with the Avowterer in any of the Lands or Manors of her Husband, yet she shall be barred of her Dower by this Branch, without the Husband's free Reconciliation, although it has been otherwise holden; and the Reason that they yielded is, because it is no Elopement; whereas it appears before that the Words of Reliquerit & Abierit are not of the Substance of the Bar of Dower, but the Adultery, and the remaining with the Adulterer, as is abovesaid; and although she and the Adulterer remain within any of the Lands or Manors of the Husband, yet (the Words being Si uxor sponte Reliquerit & Abierit) she has left

18. *Unless her Husband willingly, and without Coercion of the Church, reconciles her and suffers her to dwell with him.*

eft and gone from her Husband in that Caſe, which is a Perſonal Offence; See the firſt Part of the Inſtitutes, Sect. 36. for bars of Dower, whereunto you may add a Caſe in Tr. 9 E. 2. Fol. 65. in libro meo, That if a Woman ſay ſhe is conceived with Child by her Husband whilſt he lived, and in Truth is not, whereby the next Heir is diſturbed, ſhe ſhall loſe her Dower, if ſhe acknowledge the ſame before the Juſtices. 2 Inſt. 436.

19. In Dower Defendant pleaded Elopement in the Wife; Wife replied that her Husband had *bargained and ſold her* to the Adulterer; and held bad. 12 Mod. 232. Mich. 10 W. 3. Coot v. Berty.

20. *Articles to ſettle Lands in Jointure*, are in Nature of an actual Jointure, which is not forfeited by an Elopement like Dower. 2 Wms's Rep. 276. Paſch. 1734. in Caſe of Sidney againſt Sidney.

(P. 2) Barr'd or not. By Act of After-Husband.

1. A Wife is intitled to Dower of the Lands of her firſt Husband; her *ſecond Husband accepts for* this *Dower leſs than her third Part*; after the Death of this ſecond Husband *ſhe may waive* it, and have her full third Part. Jenk. 79. pl. 56.

(P. 3) Delayed or ſuſpended. In what Caſes.

1. IN Dower *Rent* was granted by Fine, *with Condition that when any Heir is within Age the Rent ſhall ceaſe during the Nonage*, and the *Feme recovered Dower during Nonage, & Ceſſet executio till the full Age of the Heir*, nota. Br. Judgment, pl. 41. cites 24 E. 3. 61.

2. In Dower it was agreed per Cur. that where the *Tenant vouches the Heir in Ward of the King in the ſame County, where the Writ is brought*, the Demandant *ſhall not recover till the Warranty be determined.* Br. Dower, pl. 2. cites 3 H. 6. 17.

3. The *Heir of the Husband makes a Leaſe* for Years of the Land *to the Wife after the Husband's Death*, now during this Leaſe Dower is ſuſpended. *But not* ſo *if ſhe has taken another Baron, and during the Coverture the Heir of ſuch Baron makes to him and the Feme ſuch Leaſe* for Years and ſecond Baron dies; If ſhe waves this Leaſe Dower is not ſuſpended. Jenk. 73. pl. 38.

4. A. an *Husband ſeiſed* of Land held of the King *by Knight's Service* dies, his Heir within Age and in Ward to the King; the King by Patent *grants to the Widow* of A. *the Wardſhip of the Body and Land* of the Heir during his Minority; this Patent ſuſpends the Widow's Dower during the Nonage, for her Dower and ſuch a Patent are inconſiſtent. Jenk. 73. pl. 38.

5. A. *ſeiſed of Lands in Fee makes a Leaſe* for Years rendring Rent, *and takes Wife*; after the Death of A. the Wife ſhall have Judgment to have the third Part of this Land for her Dower, and *ſhall have* a *third Part of the Rent*; but ceſſabit executio for the Poſſeſſion of the Land during the Leaſe. Jenk. 73. pl. 38.

6. Contra

6 *Contra if he* had *vouched* him *and prayed that he ſhould be ſummoned in another County*; For there the Demandant *ſhall* recover immediately; quod nota Diverſity. Br. Dower, pl. 2. cites 3 H. 6. 17.

Roll Rep. Arg. 326. S. P. But if great *Default be in the Wife*, Age ſhall be allowed As if ſhe *does not bring Action in a long Time* after the Title accrued, there if the Infant be in by Deſcent, after her Title accrued, *Age lies.* Arg. in Caſe of Harvey v. Wyatt, cites Fleta lib. 6. cap. 43. and Bract. 252. and Britt. cap. 111. fol. 217.

7. Dower is demandable againſt an *Infant*, and he ſhall not have his Age. Cro. J. 111. pl. 8. Hill. 3 Jac. B. R. Smith v. Smith.

(Q) What *Act of the Baron* ſhall *bar the Feme* of her Dower.

Recoveries at the Common Law.

[And other Alienations by him.]

1. AT the Common Law if the Baron was once ſo ſeiſed that the Wife was entitled to Dower, if he after aliened the Land, and a Recovery was after had in a real Action upon another Poſſeſſion, yet his Wife ſhould have had Dower. 47 E. 3. 13. b. 14 H. 4. 33. admitted per Iſſue.

2. If a *Man recovers in Value againſt the Husband by a Warranty Auncеſtrel*; yet the Wife ſhall be endowed, becauſe the ſame is by Force of the Warranty made, and not by Reaſon of Eigne Title to the Land. F. N. B. 150. (D)

It appears by the Preamble of this Statute, that if a Recovery had been in a real Action againſt the Husband, and the Husband did render the Land to the Demandant, that notwithſtanding this Recovery the Wife ſhould recover her Dower. But if the Husband had loſt by Default, it was a Queſtion and a Doubt whether in that Caſe ſhe ſhould recover or no; and ſome Judges would give Judgment for the Woman, and ſome were in a contrary Opinion. Here is to be noted, that a Recovery by Reddition of the Husband, is not of ſo great Account in Law as a Recovery againſt the Husband by Default; but therein before this Act this Diverſity was holden for Law, that if in a Writ of Dower the Tenant did plead the Recovery in Bar, the Demandant might reply, Que ceo fuit per Fraud, ou per Colluſion, ou per gree le Baron, as Britton ſays, who wrote before this Statute; but if it were by Default without Covin, then the greater Opinion was that it barred the Feme. 2 Inſt. 349.

3. *Weſt.* 2. *cap.* 4. 13 E. 1. *The Wife ſhall be endowable as well where Land was recovered againſt her Husband by Default as by Covin; ſo that although the Land was loſt by the Husband's Default, yet there ſhall be no good Allegation for the Tenant, but he muſt then proceed and ſhew his Right, otherwiſe the Wife ſhall recover.*

But the Reddition of the Husband was holden for clear Law, as it was adjudged the Year before the making of this Act, ſo that the Wife was ready to maintain the Title of her Husband. 2 Inſt. 349.

All this is to be underſtood, where he that recovers has no Right, for where he that recovers either by Reddition or Default had Right, there neither the common Law nor this Statute extended thereunto. 2 Inſt. 350

If the Recovery be had by Verdict, the Feme ſhall not falſify in the Point tried, but ſhe may ſay, that he might have pleaded a better Plea, or confeſs and avoid the Recovery. 2 Inſt. 350.

4. In Dower the *Tenant vouched himſelf to ſave the Tail*, upon which *he entered into the Warranty, and ſaid, that at another Time his Father brought Writ of Right againſt the Baron, who vouched himſelf to ſave the Tail*, upon which the *Father of the Tenant ſaid, that the Baron had nothing of the Gift of him whom he ſuppoſed gave, and upon this*

they were at Iſſue, and found for the Father of this Tenant, then Demandant, that the Donor did not give &c. upon which the Father of this Tenant recovered Judgment. Haſtings ſaid, You have not denied the Seiſin of our Baron, nor have you averred that your Father had ſuch Title as you allege, and ſo recovered upon Dilatory, and prayed Dower. Parſhe ſaid, Your Baron and his Heirs ſhall be bound by the Recovery, and put to Attaint. And *by the Common Law every Recovery binds the Feme unleſs it was upon Render, and the Statute does not aid againſt any Recovery but Recovery by Default*, in which Caſe the Title, which was not tried againſt the Baron, ſhall be tried at the Suit of the Feme; but Recovery by Action, tried againſt the Baron, is not aided by any Law, and prayed that ſhe be barred; and adjornatur. But by the Book Parkins fol. 73, 74. the Feme may falſify Recovery had againſt her Baron by Action tried. But Brook ſays, this is not Law in the ſame Point which was tried &c. And the like was held Mich. 47 E. 3. fol. 13. that the *Recovery againſt the Baron by Action tried remained at the Common Law*, and therefore the Feme ſhall not falſify. And by 36 H. 6. Fitzh. Faux. Recov. 15. *a Feme may falſify Recovery by Action tried againſt her Baron in another Point, but not in the Point* which was tried. Br. Dower, pl. 24. cites 49 E. 3. 23.

5. Where *Land is recovered againſt the Feme Tenant in Dower upon Plea, which does not diſaffirm the Poſſeſſion of the Baron*, as where ſhe pleads that *nothing paſſed by the Deed in Scire Facias upon Fine againſt him who pleaded a Feoffment of her Baron by Deed, which paſſed againſt him*, by which the other recovered againſt him; in this Caſe the Feme is not reſtored to the Writ of Dower; but this Matter pleaded in Writ of Dower is a good Bar. Br. Dower, pl. 26. cites 50 E. 3. 7. Br. Reſtore &c. pl. 50 cites S. C.

6. *And* per Wiche, where the *Baron loſes by Dilatory, as* upon *Non-tenure* or *Miſnoſmer of the Vill* &c. ſhe may falſify in Writ of Dower. Br. Dower, pl. 26. cites 50 E. 3. 7. S. P. For this does not diſaffirm the Poſſeſſion of the Baron; but *contra* it ſeems *upon Recovery upon Dilatory againſt the Feme herſelf being in Dower*; Note a Diverſity. Br. Reſtore &c. pl. 1. cites S. C.

7. The *Husband levied a Fine* of his Land and died. The *Wife within five Years after his Death brought Writ of Dower, but did not purſue her Writ till ſix Years were paſt.* Manwood and Harper J. held this to be no Bar; but Dyer e contra. 3 Le. 50. pl. 71. Trin. 15 Eliz. C. B. Anon. Dal. 107. pl. 58. Crave v. Broughton, S. C. held accordingly. —— Mo. 53. pl. 154. Paſch. 5 Eliz. Anon. S. P. Dyer thought that ſhe was barred becauſe ſhe had Title at the Time of the Fine levied by the Intermarriage, though it could not be executed till after the Death of the Baron; And the Reporter ſays, that a Precedent was ſhewn Anno 6 H. 8. where all the Matter was pleaded. ——— Dal. 52. pl. 21. S C. in totidem Verbis. ——— D 224 a. pl. 28. Damport v. Wright, S. P. and ſeems to be S. C. ——— Ibid. Marg. ſays it was ſo adjudged Mich. 31 & 32 Eliz. C. B. and that it was alſo agreed Paſch. 34 Eliz. per Cur. ——— She is barred by Fine and Nonclaim in five Years after her Husband's Death. 2 Rep. 93. a cites it as adjudged 4 H. 7. —— S. P. Arg. 2 Roll Rep. 69 cites 15 Eliz. Paine's Caſe. ——— S. P. if ſhe be of full Age, ſound Memory, out of Priſon, and within the four Seas. Gouldsb. 148. pl. 71. Hill. 43 Eliz. Anon ——— And bringing a Writ of Dower within the five Years is no Bar to ſuch Fine unleſs the Return of the Writ be pleaded. 2 Le. 221. pl. 296. Hill. 30 Eliz. C. B. Fitzhugh's Caſe. —— If ſhe brings a Writ within the five Years *againſt one not Tenant* of the Land, that is not any *Claim* within the Statute, but if ſhe bring a Writ *againſt four that are Tenants*, and *two die*, and ſhe brings Writ againſt the others by *Journeys Accounts* this is a good Claim within the Statute, though the ſecond Writ was after the Time limited; Per Hobert Ch. J. Win. 66. Anne Summer's Caſe. —— But Quære here if the *two that died were not Tenants*. Ibid.

8. 4 & 5 *W. & M.* 16. *This Act ſhall not extend to bar any Widow of any Mortgagor from her Dower, who did not legally join with her Husband in ſuch Mortgage, or otherwiſe lawfully exclude herſelf.*

(Q. 2) Barred. By Acts of Baron and Feme.

1. IN Dower the *Tenant ſaid, that he himſelf levied a Fine to the Feme, now Demandant, and to her Baron come ceo que* &c. *and that the ſame Feme and her Baron granted and rendered it again to the Tenant with Warranty of the Feme*, and the *Feme ſaid, that ſhe had nothing but as Feme*, and therefore was admitted no Bar; quod *miror*, by Reaſon of the Render and Warranty of the Feme himſelf, tit. Dower in Fitzh. 160. and 165. M. 19 E. 2. and 145. M. 6. E. 2. Fine upon Conuſance de Droit come ceo que &c. by the Baron and Feme; quod mirum! For this is a Gift by Colluſion. But *otherwiſe* it is *of a Fine ſur Releaſe*; For the *Title of the Feme does not take Place till the Baron is dead*, and ſo a Releaſe of later Time, and therefore there ſhe may confeſs and avoid the Fine. Br. Dower, pl. 77. cites 13 E. 2.

2. *Jointure* was made after the Coverture, the *Husband and Wife levied a Fine Sur Conuſance de Droit* &c. *of the Jointure*, it ſeems clear, if it be *as that which the Conuſee had of the Gift of the Husband*, that is no Bar in Dower; and the Election is not given to the Wife till after the Death of the Husband, according to the Stat. 27 H. 8. c. 10. D. 358. b. pl. 49. Trin. 19 Eliz. Anon.

3. Feme barred of her Dower by joining in a * *common Recovery* with her Baron. Pl. C. 115. 20 Eliz. Eare v. Snow.

* S.P. Tho' ſhe has no Recompence

Plg. of Recov. 66. cites Pl. C. 514 and 2 Rep. 74. 78. and ſays, He has heard ſome learned Men queſtion this, becauſe ſhe has *no Eſtate then in eſſe*, but he ſays with Submiſſion, the ſame may be ſaid againſt a Fine, and the common Recovery eſtops her as Party, and the Recovery diſaffirms her Husband's Titles to the Lands of which ſhe was dowable. —— So by a *Fine* though the *Uſes* were *declared by the Husband only*. Ow. 6. Trin. 28 Eliz. C. B. Hamington v. Rider.

4. If *a Woman* has Title of Dower and by *Covin cauſes the Tenant of the Land to be diſſeiſſed by a Stranger, againſt whom ſhe brings a Writ of Dower*, and the Feme recovers, yet this is void, and ſhe is not remitted. 3 Rep. 78. a. Hill. 44 Eliz. in Canc. in Fermor's Caſe.

5. If *Baron and Feme levy a Fine* the Feme is barred of her Dower. Per Coke Ch. J. in a Nota ſays, that it is ſo without Queſtion now. 10 Rep. 49. b. Mich 10 Jac. in Lampet's Caſe.

6. Fine levied by Feme Covert *to confirm a Leaſe* is no Bar of her Thirds after the *Leaſe ſatisfied* by the Profits. Chan. Rep. 132. 1 Car. 1. Naylor v. Baldwin.

7. Feme joined with her Husband in a *Fine* in order *to make a Mortgage, but which never was made.* He died, and ſhe brought Dower and got Judgment by Default, and the Heir could not be relieved. For though it was a Bar at Law, it was not ſo in Equity. Ch. Prec. 34. Mich. 1691. cites it as Danby's Caſe.

(Q. 3

(Q. 3) Bar. By what Eſtate, Grant &c.

1. NOTE that the *Lady of M. was in Chancery to be endowed* of the Land of her Baron, where the Heir is in Ward of the King; and becauſe the *Ward of the Land and Body of the Heir was committed to her before by Patent of the King, in which no Exception of Dower was made*, therefore ſhe was ouſted of Dower during the Nonage. Br. Dower, pl. 27. cites 2 H. 4. 7. and 11 H. 4. accordingly, in the Caſe of the Lady Arundel, as it is ſaid there.

2. A *Man granted a Rent of* 10 *l. to a Feme percipiend' de terris ſuis pro tota dote ſua de terris ſuis, and* after *he married her, and* then *died*, and after *ſhe accepted the Rent, and then brought Writ of Dower*; Quære if the Acceptance of the Rent be a Bar in Dower, as Dowment ad Oſtium Eccleſiæ, or ex Aſſenſu Patris; For the Acceptance is Recompence. *Quære.* Br. Dower, pl. 97. cites 20 E. 4. 3.

3. *Entry* into Part of the Land *after the laſt Continuance* by the Demandant will *abate the Writ* of Dower; And it is no Juſtification to ſay that her Husband and ſhe dwelt there till his Death, and that the Heir entered, and ſhe and the Heir dwelt there together till now, and that ſhe *claimed at the Will of the Heir*, and not otherwiſe; But it was held not good for the *Quarantine*; For ſhe ſhould ſhew the Death certain, and the Time of the 40 Days, and after, by reaſon of the Opinion of the Court, ſhe waived the Plea, and traverſed the Entry. D. 76. b. pl. 32, 33. Mich. 6 E. 6. Kettleby v. Kettleby.

4. But in *Scire Facias* to have Execution of Dower recovered, ſuch Entry was no Plea. Ibid. cites 45 E. 3.

4. A *Feoffment* was made *by the Baron to the Uſe of himſelf for Life, and after to the Feme for Life for her Dower, upon Condition to perform his laſt Will.* She entered and agreed thereto, and afterwards brought Dower. It was reſolved, that an Acceptance of a Collateral Recompence was no Bar to the Feme of her Dower. 4 Rep. 1. Mich. 14 & 15 Eliz. Vernon's Caſe.

5. *Feme ſole Leſſee marries the Leſſor*, and the *Leſſor dies within the Term*, and the Wife enters, this ſhall not conclude her Dower after the Leaſe is expired; Arg. Ow. 154. per Shuttleworth, Trin. 29 Eliz. in Caſe of Goodridge v. Walburton, cites 11 H. 4.

6. A Widow recovered Dower, and upon *Writ to the Sheriff to put her in Poſſeſſion*, he *returned that he had delivered* 84 *Acres mentioned in the Writ.* She brought *Scire Facias againſt the Tenant, ſuggeſting that* 60 *Acres of the ſaid* 84 *were the Lands of a Stranger not compriſed in the Record*, and ſo intended to have a new Diviſion. The Tenant pleaded, that the other 24 Acres were Parcel of the Land recovered, and that he had entered and accepted the ſame. Adjudged a good Bar by her Acceptance and *Entry into the* 24 *Acres*, though leſs in Quantity than the third Part of all in the Record. Mo. 679. pl. 928. Mich. 44 & 45 Eliz. C. B. Anon.

7. Dower *ad Oſtium Eccleſiæ, or ex Aſſenſu Patris*, being *aſſented unto*, is a Bar of Dower at the Common Law; But a Jointure was no Bar of her Dower at the Common Law. Co. Litt. 36. a. b.

8. An *Aſſignment of other Land whereof ſhe is not dowable*, or of a *Rent* iſſuing out of the ſame, is no Bar of Dower. Co. Litt. 34. b.

9. An Eſtate made by way of Jointure to the Wife *for Life, or Lives of one or many others, or* to her *for* 100 *Years, or* 1000 *Years, if ſhe live*

ſo

ſo long, or without ſuch Limitation, is no Bar of her Dower, though they be expreſsly made in Satisfaction of her Dower. Co. Litt. 36. b.

10. If an *Eſtate* be made *to others in Fee-ſimple, or for her Life, upon Truſt, ſo as the Eſtate remains in them*, albeit it be for her Benefit, and by her Conſent, and by expreſs Words to be in full Satisfaction of her Dower, yet this is no Bar of her Dower. Co. Litt. 36. b.

11. A *Deviſe by Will* cannot be averred to be in Satisfaction of her Dower, unleſs it be ſo *expreſſed* in the Will. Co. Litt. 36. b.

12. A. *purchaſed in his own and his Son's Name*, (who ſurvived A.) The *Vendor was only Tenant for Life, but gave Security that his Heir ſhould convey the Fee* when of Age. A. died before the Conveyance was executed, ſo that he never was ſeiſed in Fee. Decreed her Title to it to be diſcharged, and an *Account of the Profits* &c. ſhe having enjoyed it 12 Years; But though ſhe had enjoyed a Jointure for ſeveral Years of Lands *evicted* from her, yet the Court would not impeach her Title as to *other Lands*. Fin. R. 368. Trin. 30 Car. 2. Exton & al' v. St. John & al'.

Ibid. 359. Marg. is a Note, that it was afterwards diſmiſſed, and that the Decree of Diſmiſſion was afterwards affirmed upon an Appeal to the Houſe of Lords, and cites Caſes in Parliament 69. ——— 2 Chan. Caſes 172 S.C. but no Decree. ——— S. P. by Ld. Somers, Ch. Prec. 66. pl. 60 Mich. 1696. decreed. Radnor, (Lady) v. Rotheram, and affirmed in Dom. Proc. ——— But if there had been any *Agreement to have had the Benefit of it*, it would have done it. Cited per Ld. Somers. Ch. Prec. 66. as the Caſe of Barker v. Fouke. ——— Ch. Prec. 69. July 1671. Pheaſant v. Pheaſant, S. P. (though not againſt a Purchaſor) in which the Wife had recovered at Law the third Part of a Pepper-Corn, being the Rent reſerved upon the Term aſſigned, upon which ſhe brought her Bill in Equity, and after ſeveral Arguments before Ld. K. Bridgmaa, and Hale, and Vaughan Ch. Juſtices, the Caſe was amicably compoſed, and ſo no Judgment was given. ——— S. C. Chan. Caſes 181. ——— S. C. cited Vern. 358.

13. *A Term and an old Statute was kept on Foot to protect a Purchaſe and attend the Inheritance.* The Widow recovered Dower at Law, but was prevented from taking out Execution by reaſon of the Term and Statute whereupon ſhe brought her Bill to be let into Poſſeſſion of her Thirds. The Court inclined to relieve the Plaintiff, in regard of the equitable Circumſtances of a great Portion and the Purchaſe at an under Value, and referred to the Maſter to examine, and ſtate the Caſe to the Court. Vern. 356. pl. 353. Hill. 1685. Bodmyn v. Vandebendy.

Ibid. in a Nota there, ſays, that this Cauſe being heard before Ld. Keeper Wright, 19 Nov 1702. he reverſed the Decree. ——2 Vern. 365. pl. 327. S. C. decreed accordingly by Ld. C. Sommers, and reverſed by Ld. K. Wright —— Equ. Abr. 218, 219. pl. 2.

15. The Defendant's *Husband* had *deviſed* to her *ſeveral Parts of his Eſtate, altogether of better Value than her Dower*, and had deviſed that the Profits of all the Reſt of his Eſtate for Years ſhould be applied for Payment of Debts and Legacies, *but did not mention that he intended it in Satisfaction of her Dower.* The Defendant ſued at Law and recovered at Law, though they did plead the Will, and averred that it was in Satisfaction of Dower; but the Court there was of Opinion, that no ſuch Averment could have been admitted, unleſs it had been ſo declared in the Will. The Plaintiff being Heir at Law, preferred his Bill to be relieved, and he was relieved; for although it is not declared in the Will to be in Satisfaction of Dower, yet here is that which is tantamount; for where he appoints the Profits of all the reſt of his Eſtate for other Purpoſes, it is plain he never intended ſhe ſhould have her Dower; and in Caſe ſhe were admitted to her Dower, thoſe Purpoſes would be defeated, and what appears to be the plain Intent of a Will by Conſtruction is all one as though it had been expreſſed. 2 Freem. Rep. 234, 235. pl. 306. Mich. 1699. Lawrence v. Lawrence.

S. C. accordingly, but adds, that the Decree of Reverſal was affirmed in the Houſe of Lords, 17 May, 1717.—S C. cited per Cur. 9 Mod 162. Trin. 11 Geo. in Canc. as ſo held in the Houſe of Lords, Anno 1717, and adds, That it is true this Court has gone ſo far as to confine a Widow to her Election which to take, where a Term for Years was ſettled on her in Jointure in Bar of her Dower, tho' no

o Chattel Intereſt can bar her Dower at Law, or within the Statute; but in regard ſhe expreſsly onſented to accept ſuch an Intereſt for her Jointure, this Court would not admit her to have both.

14. In Ejectment, the Plaintiff made Title by *Recovery in Dower*, nd produced in Evidence the Record of the Judgment, the Hab. Fac. Seiſinam &c. The *Defendant offered to prove a 99 Years Term ſubſiſting rior to this Title*, but it was diſallowed; For if he had pleaded this in Bar of the Writ of Dower, yet the Plaintiff muſt have recovered with *Ceſſet Executio*, and the Defendant had a proper Time to have plead-ed it then, and has ſlipped his Opportunity; Beſides, a Chattel Inte-reſt was at Common Law bound by a Recovery in a Real Action, ſo that the Demandant had an immediate Execution without Regard to the ſubſiſting Term. 1 Salk. 291. Mich. 8 Annæ, B. R. Lady Lind-ſey v. Lindley.

15. *Deviſe* of Lands *durante Viduitate* is no Bar of Dower. MS. Tab. May 16th 1717. Lawrence v. Lawrence.

16. *No Chattle Intereſt* can barr Dower at Law or within the Statute but where a Term for Years was ſettled in Jointure in Bar of Dower, in regard that ſhe expreſsly conſented to accept ſuch an Intereſt for her Jointure, Chancery put her to her *Election* whether to take Dower or that Jointure, but would not admit her to have both. Per Cur. 9 Mod. 152. Trin. 11 Geo. Charles v. Andrewes. See 2 Vern. 403. Hil-chins v. Hilchins.

17. *Tenant for Life makes a Leaſe to Remainder-man for ſo many Years as the Remainder-man ſhould live.* It was adjudg'd that his Wife ſhould not be Tenant in Dower; For the Poſſibility the Tenant for Life had that the Eſtate *might revert* to him had barred her of all Right of Dower. Per Cur. 9 Mod. 151. cites 1 E. 3. 14, 15.

18. A *Feme Infant having a Jointure made to her before Marriage*, may elect to abide by it or not when of Age, unleſs after her coming of Age ſhe enters. Account was directed of the Real Eſtate, and after taking thereof ſhe to elect Jointure or Dower. MS. Rep. 14 May 1734. at the Rolls. Cray v. Willis.

(Q. 4) Bar. By what Satisfaction or Acceptance.

1. RENT *granted out of the very Land recovered* in Dower in Re-compence of all the Dower may be pleaded in Bar, but not if it was granted out of other Land. D. 91. a. pl. 12. Mich. 1 Mar. Turney v. Sturges.

2. In Dower *acceptance of* 20 *Acres of Corn during Life* is a good Bar, and ſo of Rent, but otherwiſe of a *Horſe*, and ſuch like which does *not ariſe out of the Land.* D. 91. b. Marg. cites 6 Eliz. Mo. 59. pl. 167. Trin. 6 Eliz. Anon. S. P.

3. If Demandant in Dower *accepted the Land aſſign'd by the Sheriff*, ſhe cannot in another Term pray a *new Execution.* Cro. E. 310. in Caſe of Hanger v. Fry.

4. If ſhe *accepts of* 24 *Acres for her Thirds of* 84 *and enters into them*, She is Barr'd as to any more. Mo. 679. pl. 928. Mich. 44 & 45 Eliz. C. B. Anon.

5. *Dower in Ireland* will be good in Bar of Dower in England. Arg. Cart. 187. Paſch. 19 Car. 2. C. B. So Dower *in Wales* bars Dower in England. Jenk. 41. pl. 78. cites 17 E. 3. Fitzh. Voucher 112. 26 E. 3. Paſch. 3.

Per Sommers C. a Collateral Satisfaction may be a good Bar

6. Acceptance of a *Collateral Satisfaction* for Dower is no Bar of Dower. 1 Chan. Caſes 182. by Ld. Keeper. Trin. 22 Car. 2. Pheaſant v. Pheaſant, and cites 4 Rep. 1. b. Vernon's Caſe.

in Equity, though not pleadable at Law, and ſo decreed a Legacy of *Perſonal Eſtate, and a Deviſe of Part of his Real Eſtate by the Husband to his Wife during her Widowhood, Remainder to J. S. in Tail* to be a Bar or Satisfaction of her Dower if ſhe accepted the Deviſe, though not declared in the Will. 2 Vern. 365. Lawrence v. Lawrence.——Revers'd per Wright K. Ibid.

7. *Nothing but a plain and expreſs Intention of the Parties* ſhall bar the Right of Dower; as where a Settlement was made in Conſideration of a Portion in Marriage; but it did not appear that the Parties intended it ſhould be in Bar of Dower. 9 Mod. 152. cited per Cur. Trin. 11 Geo. in Canc. as ſo held Anno 1717 in the Houſe of Lords. Lawrence v. Lawrence.

ſee further title Jointure.

(Q. 5) Bar. By What Offence of the Baron.

1. IF the *Baron be outlawed in Treſpaſs after Diſſeiſin, and after has Charter of Pardon*, his Feme ſhall be endowed; Contra after Outlawry of Felony. Br. Dower, pl. 82. cites 13 E. 3. and Fitzh. Utlarie 49.

2. A Man ſeiſed of Land ſhall forfeit it by *Felony*, and by the *Attainder* of him the Feme ſhall loſe her Dower. Br. Forfeiture de terres, 78. cites 21 E 3. 49.

3. If a *Man ſeiſed in Fee commits Felony*, and after *makes a Feoffment* and *dies and after is attainted*, the Feme of him ſhall be endowed againſt the Feoffee; Contra againſt the Lord by Eſcheat. Br. Dower, pl. 80. cites Litt. fol. 9. Per Vaviſor.

4. If the *Baron* be *attainted of Felony*, and *gets Charter of Pardon and* after *dies*, yet the Feme ſhall not have Dower *of the Land which he had before the Pardon.* Br. Eſcheat, pl. 27. cites F. N. B. tit. Dower.

5. *Contra if the Land which he gets after the Pardon*; For the firſt Land ſhall Eſcheat. Br. Eſcheat, pl. 27. cites F. N. B. tit. Dower.

6. *So* it ſeems of *Land which he purchaſes, or which deſcends to him Meſne between the Attainder and the Pardon.* Br. Eſcheat, pl. 27. cites F. N. B. tit. Dower.

7. The Husband's being a *Felo de ſe* is no Bar to the Feme of her Dower; Agreed by all the Juſtices. Pl. C. 261. b. Mich. 4 & 5 Eliz. in Caſe of Hales v. Pettit, cites 3 E. 3. Fitzh. Corone 362.

The Feme of one attainted of Murder or Felony

8. *Stat.* 1 *E.* 6. *cap.* 12. *S.* 12. *The Wife ſhall be endowed although her Husband were attainted, convicted, or outlawed for Treaſon or Felony, ſaving the Right of others.*

ſhould not by the Common Law before the Statute 1 E. 6. 12. have Dower againſt the Feoffee of her Baron, though the *Feoffment was made before the Felony or Murder done*; but otherwiſe ſince the Statute. Bendl. 56. pl. 91. Marg. Mich. 3 & 4 P. & M. Gate v. Wiſeman, cites Dal. 140 b. pl. 42. Hill. 3 P. & M. the S. C. the Demandant was barred by the Opinion of all the Juſtices. — Le. 3. pl. 7. S. C. cited by Manwood Ch. B. as reſolved by all the Juſtices of England. ——— Co. Litt. 41. a. cites S. C. reſolved, and reſolved there alſo that ſo it was at Common Law in Caſe of Felony, but as to Felony the ſame is altered by Statute. ——— Le. 3. pl. 7. Mich. 25 & 26 Eliz. in the Exchequer, Mayney's Caſe, S. P. in Caſe of Treaſon; and Manwood Ch. B. ſaid, that by reaſon of this Attainder Dower cannot accrue to the Wife, for her Title begins by the Intermarriage, and ought to continue and be conſummated by the Death of the Husband, which cannot be in this Caſe; for the Attainder of the Husband has interrupted it as in the Caſe of Elopement; and this Attainder is an univerſal Eſtoppel, and doth not run in Privity only betwixt the Wife and him to whom the Eſcheat belongs, but every Stranger may bar her of her Dower by reaſon thereof; for

for by the Attainder of her Husband the Wife is disabled to demand Dower as well as to demand his Inheritance.

But if the *Heir reverse the Attainder* by Writ of Error then the Wife shall be endowed, and though before the Treason committed the Baron had *levied a Fine*, and five Years had passed before the Reversal, yet she shall have her Dower, for during the Attainder she could not claim, and the Action and Right of Dower accrued to her after Reversal of the Attainder by reason of a Title of Record before the Fine by the Seisin in Fee and the Marriage. 13 Rep. 19. Hill. 27 Eliz. in Canc. Ninian Menvill's Case. —— Mo 639. S. C. —— S. C. cited per Coke Ch. J. as Resolved; for she had no Means of Reversal. 2 Bulst. 245.

A Man *seised of Land in general Tail takes Wife and after is attainted of Felony*, before the said Statute 1 E. 6. the Issue should have inherited, and yet the Wife should not have been endowed; for the Statute of W. 2. cap. 1. relieves the Issue in Tail, but not the Wife in that Case, but at this Day, if the Husband be attainted of Felony the Wife shall be endowed, and yet the Issue shall not inherit the Lands which the Father had in Fee Simple. Co. Litt. 40. b.

It was otherwise at the Common Law. Co. Litt. 41. a. for then she should not have recovered her Dower ad Ostium Ecclesiæ, or Ex assensu Patris, any more than her reasonable Dower which the Common Law gave her. —— But this did not extend to Petty Larceny. Ibid.

9. *But note that this Clause is* altered for Treason * by 5 E. 6. *cap.* 11. *S.* 13. *and enacts, that in such Case she shall lose her Dower so long as the Attainder continues in Force.*

* This extends to Petty Treason as well as High Treason. Co. Litt. 37. a.

10. 18 *Eliz. cap.* 1. *which makes it Treason to diminish, falsify &c. the Monies of this Realm, provides that it shall not make the Wife to lose her Dower.*

11. The Wife of one attainted of *Felony* or *Trespass*, or *Heresy*, or *Præmunire* &c. shall be indowed. Co. Litt. 31. a.

12. The Wife of a Man attainted of *High Treason or Petit Treason* shall not be received to demand Dower unless it be in certain Cases specially provided for. But the Wife of a Person attainted of *Misprision of Treason*, *Murder*, *or Felony*, is dowable since our Author wrote, by the Statute in that Case made and provided, which is more favourable to the Woman than the Common Law was. Co. Litt. 392. b.

13. Tenant of a *Copyhold for Life*, in which the *Custom was that the Wife should have her Widow's Estate*, and the Husband was attaint of Felony and executed, and whether the Wife in this Case shall have the Widow's Estate, was the Question upon the Demurrer; Winch being only present seemed that she should not without a special Custom. Win. 27. Hill. 19 Jac. Allen v. Brach.

14. 21 *Jac.* 1. *cap.* 26 *S.* 2. *It is Felony without Benefit of Clergy to acknowledge, or procure to be acknowledged any Fine, Recovery, Deed inrolled, Statute Recognizance, Bail or Judgment in the Name of any Person not privy or consenting thereto, howbeit this Offence shall not take away Dower.*

(Q. 6) Barred; By what Act or Offence of the Feme.

1. IF *Feme, Tenant of the King, takes a Grant of the Ward of the Heir during his Nonage, and does not accept her Dower*, this is a Bar in Dower pro Tempore &c. Br. Executions, pl. 57. cites 24 E. 3. 39.

2. If

Co. Litt. 33. a. S. P.

2. If a Man be ſeiſed of Lands in Fee, and takes a Wife, and afterwards the *Feme is attainted of Felony*, and after the *Husband aliens*, and afterwards the *Feme is pardoned*, and then Husband dies, the Feme ſhall be endowed. 13 Rep. 23. Hill. 27 Eliz. in Canc. in Ninian Menvill's Caſe.

3. The Statute of 11 & 12 W. 3. [cap. 4. S. 4.] enacts, That no Papiſt [or Perſon making Profeſſion of the Popiſh Religion] ſhall purchaſe any Manors, Lands, or Terms, [Hereditaments] &c. It was ſaid by the Lord Chancellor, that in this Caſe a Purchaſa muſt be made by the Act of the Party in the Way of Grant or Conveyance, or at leaſt by Will, but in Caſe of one dying Inteſtate it is the Act of the Law. 3 Wms.'s Rep. 48, 49. Trin. 1730. in Caſe of Davers v. Dewes, whence the Reporter infers, that for the ſame Reaſon it ſhould ſeem that a *Papiſt is capable of taking as Tenant* by the Curteſy or *in Dower*.

(R) What *Act in Law* will *bar* the Wife of her Dower.

Divorce.

Co. Litt. 32. a. S. P.

1. IF the Divorce be Cauſa Precontractus, the Wife ſhall not have Dower. 47 Ed. 3. pl. 78.

Co. Litt. 32. a. S. P.

2. So if it be Cauſa Conſanguinitatis. 47 E. 3. pl. 78.

Co Litt. 32. a. S. P.

3. So if it be Cauſa Affinitatis. 47 E. 3. pl. 78.

4. So if it be Cauſa Frigiditatis. 47 E. 3. pl. 78.

5. But if it be Cauſa Profeſſionis the Wife ſhall be endowed. 47 E. 3. pl. 78

But it is ſaid, that if the Aſſignment of Dower *ad Oſtium Eccleſiæ* be *ſpecified*, viz this is good.

6. If a Woman be endowed ad Oſtium Eccleſiæ, yet ſi Matrimonium in Vita contrahentium accuſatum & diſſolutum ſit quacunque ratione, deſinit eſſe Dos, cum deficiat Matrimonium, & deſinit Dotis Exactio. Bracton, lib. 2. Fol. 92. S. 4. and Lib. 4. Fol. 304.

That notwithſtanding any Divorce ſhall happen, yet ſhe ſhall hold it for her Life, that Co. Litt. 32. a. ad finem.

Adjudg'd no Bar. Co. Litt. 33. b.

7. Divorce *a Menſa & Thoro* only, as for Adultery, ſeems to be no Bar of Dower. Co. Litt. 32. a.

(S) *In what Caſes Aſſignment* of Dower is neceſſary.

1. IF a Woman recovers Dower of Land, ſhe cannot enter before Execution is ſued. 40 E. 3. 22. 45 E. 3. 5. b.

2. The ſame Law is where the Recovery is of a Rent. 40 E. 3. 22. yet there it is certain enough.

3. In

3. In Dower, the *Tenant pleaded Recovery by himſelf againſt the Baron* *Aſſiſe*, and the *Demandant ſaid that the Baron was ſeiſed after Cover-* *ure, and infeoffed the Tenant, and after diſſeiſed him and recovered by Aſ-* *ſe*; Judgment if Dower, and ſo confeſſed and avoided him. Br. Con-eſs and Avoid, pl. 12. cites 14 H. 4. 33.

5. If there be *Lord and a Woman Tenant by Fealty, and* 3 *s. Rent*, and *ey intermarry*, and the *Lord dies*, the Wife ſhall have 12 d. of the Rent for her Dower of the Seigniory by way of Retainer &c. with-ut any manner of Aſſignment made by any Perſon &c. Perk. S. 417.

6. If a Man *endows his Wife ad Oſtium Eccleſiæ*, he then openly de-lares the Quantity and Certainty of the Land which ſhe ſhall have or her Dower; and in ſuch Caſe the Wife, after the Death of the Husband, *may enter* into the Land of which ſhe was endowed, *without ther Aſſignment*. Litt. S. 39.

7. If a Woman brings a Writ of *Dower of* 6 *l. Rent-charge*, and ſhe has Judgment to recover the third Part, although it be certain that ſhe ſhall have 40 s. yet ſhe *cannot diſtrain for* 40 *s. before the Sheriff de-liver the ſame unto her*; For whereſoever the Writ demands Land, Rent, or other Things in certain, there the Demandant after the Judgment may enter or diſtrain before any Seiſin delivered unto him by the Sheriff upon a Writ of Habere Facias Seiſinam; But in *Dower*, where *the Writ demands nothing in certain*, there the Demandant after Judgment cannot enter or diſtrain until Execution ſued, by which Ex-cution the Sheriff is by the King's Writ to deliver a third Part in Certainty to the Demandant. Co. Litt. 34. b. Co. Litt. 37. a. b. S. P. where the Writ of Dower is of 3 s. Rent. —Perk. S. 416. S. P. accordingly.

8. So when the *Wife of one Tenant in Common demands a third Part* *f a Moiety*, yet after Judgment ſhe cannot enter until the Sheriff deli-er to her the third Part, although the Delivery of the Sheriff ſhall educe it to no more Certainty than it was. Co. Litt. 34. b. Co. Litt. 37. b. S. P.

9. Where it *appears in certain what Lands* or Tenements *the Wife* *ball have* for her Dower, *As in Caſe of an Endowment Ad Oſtium Ec-leſiæ, or Ex Aſſenſu Patris*, the Wife may enter without Aſſignment f any; But where the Certainty appears not, as to be endowed of the hird Part to have in Severalty, or the Moiety, according to the Cuſ-om to hold in Severalty, Dower muſt be aſſigned to her after the Death of the Husband, becauſe it does not appear before Aſſignment what Part of the Lands or Tenements ſhe ſhall have for her Dower. Litt. S. 43. and Co. Litt. 37. a.

(T) *What Perſons may aſſign* Dower of Common Right.

[And againſt whom a Writ of Dower lies for a Collateral Reſpect.]

1. AN Infant **may aſſign Dower in Pais, becauſe he is compellable by Writ.**

Before the Guardian in Chivalry enter, the Heir within Age may aſſign Dower, for the Guardian may waive the Wardſhip; But there needs neither Livery of Seiſin, nor Writing to any Aſſignment of Dower, becauſe it is due of Common Right. Co. Litt. 35. a.

2. [But] **an Infant** in Ward cannot **aſſign Dower** of the Land in Ward, **for the Prejudice that may come to the Lord thereby.** 9 H. 6. 6. b.

Co Litt. 39. a. S. P. of the Lands and Tenements which he hath in Ward. ——— Ibid. 35. a. S. P ——— Anno 9 H. 5. Dower 197. A. *Man of the Age of* 18 *Years* took a Wife, and *by Aſſent of his Guardian endowed her ad Oſtium Eccleſiæ*, and it was adjudged a good Endowment, although the Husband died before the Age of 21 Years. Co. Litt. 34 a.

3. Guardian in Chivalry **may endow her.** 9 H. 6. 6. b. 24 b.

Co Litt. 35. b. S. P. 4. **And a** Writ of Dower lies againſt Guardian in Chivalry. 47 **Aſſ. 5. per Finchden.**

If a Man be poſſeſſed of the Wardſhip of certain Land, either jointly with his Wife, or in the Right of his Wife, yet the Writ of Dower lies againſt the Husband only. Co. Litt. 38. b.

5. **If a** Husband hath a Ward in the Right of his Wife as Guardian in Chivalry, **a** Writ **of Dower** lies againſt the Husband, without naming the Wife. 47 **Aſſ. 5. per Finchden.**

Fol 682.

6. A Writ **of Dower** does not lie againſt Guardian in Soccage. 29 **Aſſ.** 68.

Co. Litt. 35. a. S. P. For no Aſſignment can be made but by ſuch as have a Freehold or againſt whom a Writ of Dower does lie. Co. Litt. 35. a.

7. A Guardian in Soccage cannot aſſign **Dower.** 29 **Aſſ.** 68. **Quære.**

Though the King does commit the Cuſtody of the Land to another, yet he may aſſign Dower to the Wife in Chancery, and ſhe ſhall have a Writ to the Eſcheator to deliver the Land to her. F N. B. 263. (D). ——— Ibid. in the new Notes there (b) cites Kelw. 133. that it ſeems the Committee cannot aſſign Dower; but ſays Ouære tamen, if it be not good till the Heir ſues his Livery.

8. The King committed the Wardſhip during the Nonage of the Infant; and whether the *Committee* might aſſign Dower ſo as to bind himſelf, Kelw. * 112. dubitatur.

* This is at Fol. 133. b. pl. 112. Caſus incerti Temporis.

9. If a *Woman Guardian in Socage bring a Writ of Dower* againſt the Heir, it is *no Plea* for the Heir *to ſay, that ſhe is Guardian in Socage* and may endow herſelf &c. Perk. S. 452.

10. *And if* a Woman Guardian in Socage bring a Writ of Dower *againſt the Feoffee of the Husband with Warranty*, the *Feoffee cannot* ſhe

the ſpecial Matter, and *pray* that the Court would award *that ſhe may endow herſelf* of the Faireſt Part &c. becauſe that the Feoffee may vouch the Heir. But the Guardian in Knights Service may ſo do &c. Perk. S. 453.

11. As concerning Dower at the Common Law, there muſt be an Aſſignment either *by the Sheriff by the King's Writ, or* elſe *by the Heir or Tenant of the Land by Conſent* or Agreement between them. Co. Litt. 34. b.

12. An Endowment *Ex aſſenſu Matris* is as good as Ex aſſenſu Patris; becauſe there is an Appearance of a conſtant and perpetual Heir. Co. Litt. 35. b.

13. It is held in the 2 H. 3. Dower 199. That if the *Heir apparent be within Age*, yet the Endowment *Aſſenſu Patris is good.* Note, that Littleton in the Caſe of Dower Ad Oſtium Eccleſiæ doth put the Huſband of full Age; But here of the Dower Ex Aſſenſu Patris he ſpeaks generally. Co. Litt. 35. b.

14. The *Lord*, of whom the Land is held *in Chivalry*, is not poſſeſſed as a Guardian againſt whom a Writ of Dower lies until he enters; Of the Wardſhip of the Body he is poſſeſſed before Seiſure, becauſe it is Tranſitory. But he *is not poſſeſſed of the Lands until he enters.* Becauſe it is permanent, and *therefore if he does not enter, the Heir within Age may aſſign Dower.* Co. Litt. 38. a. b.

(U) [Aſſignment.]

Of what Things it may be.

[Or what ſhe ſhall be intitled to.]

1. IF the Wife recovers Dower of a Rent, ſhe ſhall not have the Rent incurred before Judgment, nor after Judgment before Execution. 40 E. 3. 22.

2. If the Husband ſows the Ground and dies, the Property of the Corn is in the Executors but ſubject to this Condition, that if the Heir aſſigns to her the Land ſown for her Dower ſhe ſhall have the Corn; For ſhe ſhall be in de optima Poſſeſſione above the Title of the Executors. 2 Inſt. 81.

(U. 2) In what Caſes ſhe has Election to be endowed of one Thing, or another, or of Both.

1. SOmetimes the Wife may chuſe to be endowed *of one Land, or of other Land* &c. or of *Seigniory, or* of a *Tenancy* &c. or *of Land, or* of a *Rent-Charge, or* of a *Rent-Seck* iſſuing thereout &c. But in ſuch Caſes ſhe ſhall not have Dower of both, if not that it be in Special Caſes &c. Perk. S. 318.

2. If a Man ſeiſed of one Acre of Land in Fee takes a Wife and *exchanges* the ſame Acre of Land *with a Stranger*, for another Acre of Land, 130. Mich. Fitzh. Dower, pl.

23 E. 3. S. P. by Wilby. — F N. B 149. (N). S. P. she shall not have Dower of Both. —— Co. Litt. 31. b. S. P.

Land, and the *Exchange is executed*, and the Husband dies. Now it is at the Liberty of the Wife to have Dower of the Acre which the Husband put in exchange, or of the Acre which the Husband took in Exchange; But she shall not have Dower of both Acres. Perk. S. 319.

3. If there be *Lord and Tenant by Fealty, and* 12 d. *Rent*, and the *Lord takes a Wife and purchases the Tennacy in Fee* and dies, in this Case it shall be at the Liberty of the Wife to be *endowed of the Seigniory or of the Tenancy* &c. Perk. S. 320.

4 *So* shall it be if a Man *seised of a Rent-charge in Fee* takes a Wife, and *purchases* the *Land in Fee* whereout the Rent is issuing and dies, it shall be at the Liberty of the Wife to be endowed of the Land, or of the Rent &c. Perk. S. 320.

5. If there be *Lord and Tenant by Fealty, and the Lord takes a Wife*, and the *Tenancy escheats* unto the Lord, and he enters and dies, in this Case it shall not be at the Liberty of the Wife to have Dower of the Seigniory, or of the Tenancy; But *she shall be forced to take her Dower of the Tenancy*, and the Reason is, because that the Seigniory is determined during the Coverture, by Act of Law, and it is to no Disadvantage unto the Wife to be endowed of the Tenancy, for if she be put out of Possession of Part thereof by a more ancient Title, the Seigniory shall be revived for so much, and if all the Tenancy be recovered by a more ancient Title, then the Seigniory shall be revived in all, &c. and then she may have Dowry of the Seigniory &c. Perk. S. 321.

(X) *Assignment.*

How it is to be *made.*

An Assignment of Dower where the Husband was sole seised cannot be made of the 3d or 4th Part in Common but ought to be in Severally. Co Litt. 34. b. in Principio.

1. If a Woman recovers Dower of Land, of which the Tenant is sole seised, it ought to be assigned by Metes and Bounds. 45 E. 3. 5. 6.

Where the Husband was *seised in Common*, the Wife shall not be endow'd *by Metes and Bounds*. Co. Litt. 32. b.

2. But otherways it is where the Thing recovered is not severable. 43 E. 3. 15 6.

Sty. 276. Booth v. Lambert. Trin. 1651. B.R. the S C. where a Special Verdict found that the Tenant said to the Widow thus, viz. *I do endow you of a third Part of*

3. If A. seised of Lands in Fee takes a Wife, and after devises it for 21 Years to B. and dies, and after C. his Heir assigns to the Wife the third Part of the Land for her Dower, without setting it out by Metes and Bounds, and the Wife accepts it in Satisfaction of her Dower; tho' she was not bound to accept so in Common, without setting it out by Metes and Bounds, nor the Heir bound to assign it but by Metes and Bounds, for the Prejudice that may accrue to them to occupy it in Common, yet inasmuch as the third Part in Common is due by Law, and they both consented to accept it according to Law, they may by their Consent waive the Assignment by Metes and Bounds, which is only for their own

own Advantage, and accept it as it is due by Law; and though the Leſſee for Years did not agree thereto, yet the Aſſignment of the Tenant of the Freehold ſhall bind him. Trin. 1651. between *Coots and Lambert*, adjudged upon a ſpecial Verdict, Intratur Somerſet. H. 1649. Rot. 201.

all the Lands my Conſin J. S. your Huſband died ſeiſed of. Roll Ch. J. to which Nicholas and Ask. Juſtices agreed, held that it may be aſſign'd Generally of the third Part in ſome Caſes, and the Parties may agree againſt Common Right, and that here both Parties agreed to take Dower in this manner; but Jerman e contra. But per Roll Ch. J. if the *Sheriff aſſigns* Dower and does it not *per Metas & Bundas*, it is Error if it might have been ſo Aſſigned, and where a Feme cannot be endow'd per Metas & Bundas, ſhe may *enter without Aſſignment*. Sty. 277.

4. A Rent may be reſerved for Equality of Dower, if the thing Aſſigned be of greater Value than ſhe ought to have. 17 E. 3. 10.

5. But this cannot enure as a Reſervation, if the Wife in another Clauſe of the Deed makes a Grant of the Rent, without any mention in the Deed, that the Thing is of greater value. 17 E. 3. 10.

6. If the Guardian aſſigns Dower, reſerving a Rent for equality during the Nonage of the Heir, this is not good, becauſe this ſhall not go to the Heir. 17 E. 3. 10.

7. If Dower be aſſigned upon Condition, the Condition is void. Com. Colthirſt. Beju. for ſhe comes in by her Husband. (A a) pl. 1. S P.—Co. Litt. 34. b. S. P.

8. If Dower be aſſigned of the Lands, excepting the Trees growing on the Land, this is a void Exception for the Cauſe aforeſaid. Mr. Coventry at a Moot cited 44 El. B. R. between *Bullock and Finch*, to be ſo adjudged.

9. If Dower be aſſigned with a Remainder over, it is a void Remainder, becauſe ſhe comes in by her Husband; and when it ſhould be a good Remainder, it would be without a particular Eſtate. Com. Colth. Beju. Pl. C. 25. b. S. C. the Remainder is void tho' Livery and Seiſin is made to the Feme, becauſe the Dower has Relation to the Death of the Baron.

10. The King may aſſign Dower without limiting any Eſtate. Fitz. Natura 263. Da. 1. 46.

11. If a Woman be endowed of an Advowſon, ſhe ſhall be aſſigned the third part of the Advowſon, and not only the third part of the profit, ſcilicet the third preſentation. 17 E. 3. 38. b. Contra, 17 E. 3. 22. b. Co. Litt. 22. a. is that ſhe ſhall be endow'd of the third Preſentation to an Advowſon.

12. If a Woman recovers Dower of a Rectory impropriate, where there is not any Glebe, the Sheriff ſhall put her in poſſeſſion of the third part of the Tithes generally, and not of the Tithes that iſſue out of any third part of Lands of the Pariſh in certain. Mich. 9 Jac. B. per Curiam. Co. Litt 32. a. ſays that the ſureſt Endowment of Tythes is of the third Sheaf, cited Paſch 5 Jac. the Counteſs of Oxford's Caſe held accordingly.

becauſe it is uncertain what Land ſhall be ſown.——11 Rep. 25. b. Coke Ch. J.

13. If a Woman be dowable of three Manors, the Sheriff may aſſign her one of the Manors in Lieu of all three. 12 E. 4. 2. or the Moiety of a Manor. Ancient Entries. Quare Impedit 529. 10. S. P. per Cat. and Littleton. Br. Dower, pl. 72. cites S. C. So

of three Acres; for if he aſſigns the third Part of every Acre it would be infinite. —— If upon a Recovery in a Writ of Dower de tribus Maneriis the Sheriff on an Hab. fac. Seiſinam returns that he has

rendered to the Feme one Manor, this is not good; for ſhe ſhall have the third Part of each; But if the Writ was of all Lands and Tenements, and there was Meadow and Paſture, the Sheriff may aſſign all the Meadow; Agreed by all the Juſtices. Bendlows ſaid, that if the Writ had been of all Tenements it would have been good, which Brown denied. Mo. 12. pl. 47. Trin. 4 & 5 P. & M Anon ——— Ibid. 19. pl 66 Mich. 2 Eliz. Anon. S. P. and ſeems to be S. C. held accordingly And if the Aſſignment be made by Conſent of the Parties, or by Aſſignment of the Heir or Tenant of the Land, then the Aſſignment of the one Manor in the Name of her Dower of all the Manors is good enough; and ſo was the Opinion of all the Juſtices.

S. P. Br. Dower, pl. 72. cites 12 E. 4. 2.

14 So if an Advowſon be appendant to one or more of the ſaid Manors, the Sheriff may aſſign one of the Manors with the Advowſon appendant in lieu of Dower. 12 E. 4.

15. If a Woman be dowable of one Manor, the Sheriff may aſſign the third Part of the Manor in common in lieu of Dower, without ſetting it out by Metes and Bounds. Ancient Entries, Quare Impedit 529. 10. and Quare impedit in Dower 1. ſo aſſigned in Chancery.

16. A Feme is *endowed of a third Part of the Manor to which Franchiſes are appendant*, ſhe ſhall not have the third Part of the *Franchiſes*; for theſe cannot be divided. Contra where ſhe has the whole Manor in Dower. Br. Dower, pl. 102. cites 3 E. 3. Itinere Derby.

17. If *on a Recovery of the third Part* in Dower the *Sheriff aſſigns a Moiety* &c. the Tenant has *Remedy* againſt the Sheriff *by Aſſiſe*, or he may have a *Scire Facias* againſt the Sheriff *to aſſign de novo*. F. N. B. 148. (I) in the new Notes there (b) cites 22 R. 2. Execution 165. and ſays, ſee 21 H. 7. 29.

18. If the *Freehold*, whereof ſhe is dowable, be *in the Poſſeſſion of divers Perſons by ſeveral Titles*, the Wife in a Writ of Dower brought againſt one of them, ſhall recover but the third Part of the Freehold which is in his Poſſeſſion; So that a Man or a Woman who hath Poſſeſſion of Parcel of the Freehold (of which the Woman is dowable) ſhall not be charged according to the Poſſeſſion of the whole Freehold of which the Woman is dowable; if he or or ſhe will not. Perk. S. 423.

19. Dower *aſſigned by Sheriff per Metas* &c. *and Demandant* refuſes, yet ſhe may enter at any Time after. D. 278. b. pl. 4. Mich. 10 & 11 Eliz.

So if Feme accepts a Rent for Years in Allowance of her Dower or

20. If Aſſignment and *Grant* of Land be made to the Feme *for Term of Years* in Recompence of her Dower, this will not bar her; becauſe of this ſhe is not Tenant in Dower, nor has ſuch Eſtate in ſuch Caſe as ſhe would have if ſhe had been indowed, viz. an abſolute Eſtate for Life. 2 And. 31. in pl. 20. Trin. 38 Eliz. Anon.

for the Life of him that aſſigns it, theſe Rents ſhall not bar her of her Dower, becauſe they are not ſuch-like Eſtates as ſhe ſhould have in her Dower, which the Law appoints to be an Eſtate for her Life. And. 288. in pl. 296. ad finem. Paſch. 34 Eliz. ——— Hob. 153. S. P. by Hobart Ch. J. cites 7 H. 6. 34. and 33 H. 6. 2.

21. The *Wife of one Jointenant* ſhall have the *third Part of a Moiety* which her Husband purchaſed to hold in common, with the Heir of the Husband, for in this Caſe her Dower cannot be aſſigned by Metes and Bounds. Litt. S. 44.

22. Though of many *Things that be intire*, whereof no Diviſion can be made by Metes and Bounds, a Woman cannot be endowed of the Thing itſelf, yet a Woman ſhall be endowed thereof in a ſpecial and certain Manner. Co. Litt. 32. a.

23. A

23. As of a *Mill* a Woman ſhall not be endowed by Metes and Bounds, nor in common with the Heir, but either ſhe may be endowed of the *third Toll-Diſh*, or *de integro Molendimo per Quemlibet tertium Menſem.* Co. Litt. 32. a. She ſhall have the third Part of the Profit aſſigned to her, and ſhe ſhall have a Freehold in the third Part of the Mill &c. F. N. B 49 (K) cites Mich. 45 E 3. —— Perk. S. 342. S. P. as to the third Part of the Profit, cites 1 H. 5. 1. Mich. 45 E. 3. Dower 16 Aſſ. 41. —— 11 Rep. 25. b. Coke Ch. J. cited Mich. 3 & 4 Eliz. Bendl. [118. 120. pl. 51.] where the Aſſignment was accordingly.

24. Of a *Villein*, either the third Day's Works, or every third Week or Month. Co. Litt. 32. a.

25. Of the third Part of the Profit of *Stallage.* Co. Litt. 32. a.

26. Of the third Part of the Profits of a *Fair.* Co. Litt. 32. a.

28. Of the third Part of the Profits of the Office of *Marſhalſea.* Co. Litt. 32. a.

29. Of the third Part of the Profits of the *Keeping a Park.* Co. Litt. 32. a.

30. Of the third Part of the Profits of a *Dove-Houſe.* Co. Litt. 32. a.

31. Of the third Part of the Profits of a *Piſcary*, viz. Tertium Piſcem, vel Jactum retis tertium. Co. Litt. 32. a.

32. Of the third Part of the *Profits of Courts* Fines, Heriots &c. Co. Litt. 32. a.

33. If the Wife be intitled to have Dower of three Acres of Marſh, every one of the Value of 12d. and the Heir by his Induſtry and Charge makes it good Meadow, every Acre of 10s. Value, the Wife ſhall have her Dower according to the *improved Value*, and not according to the Value as it was in her Husband's Time; For her Title is to the Quantity of the Land, viz. one juſt third Part. Co. Litt. 32. a.

34. And the like Law it is if the Heir *improve the Value* of the Land by *Building.* Co. Litt. 32. a.

35. And on the other Side, if the *Value* be *impaired* in the Time of the Heir, ſhe ſhall be endowed according to the Value at the Time of the Aſſignment, and not according to the Value as it was in the Time of her Husband. Co. Litt. 32. a.

36. There *needs neither Livery of Seiſin nor Writing* to any Aſſignment of Dower, becauſe it is due of Common Right. Co. Litt. 35. a.

37. Both of Dower Ad Oſtium Eccleſiæ, and Ex Aſſenſu Patris, *the Certainty muſt be expreſſed.* Co. Litt. 35. b.

38. Dower demanded of the *third Part of Tithes of Wool and Lamb* in three ſeveral Towns, and it was demanded of the Court how the Sheriff ſhould deliver Seiſin; and the Court held it the beſt way for the Sheriff to *deliver the third Part of the tenth Part*, and the third tenth Lamb, viz. the 30th Lamb. Brownl. 126. Mich. 9 Jac. Anon.

39. Writ of Dower *of Tithes* ought to be brought of the *third Sheaf.* Roll Rep. 68. per Coke Ch. J. Trin. 12 Jac. B. R.

40. Upon an *Habere Facias Seiſinam* in Dower, the Sheriff *returned*, *Quod habere fecit Seiſinam de tertia Parte of the Honour, Hundreds, Tenements* &c. *viz. De uno Tenemento ſive firma in C. vocat' Weſton-Farm, in Tenura J. S. and* 12 *other Tenements by Copy*; and it was held, that this being in an Aſſignment of Dower, and only the Return of the Sheriff, was certain enough, and that there needed not ſuch preciſe Certainty therein as in Declarations and Indictments; Adjudged. Cro. J. 621. Mich. 18 Jac. Sir Charles Howard v. Sir William Cavendiſh. Palm. 264. S. C.

41. *Commiſſion out of Chancery* was ordered to aſſign Thirds for Dower. Chan. Rep. 38. 7 Car. 1. Huddleſtone v. Huddleſtone. S. P. Toth. 145 cites 25 Eliz. Wild v. Wells.

42. Error

42. Error of a Judgment in Dower of the *third Part of a Mill and Kiln*, and two Acres of Land, where the Judgment was to recover Seiſin of the third Part of the aforeſaid Tenements *ſeverally per Metas & Bundas*, and the Error aſſigned was, that it could not be per Metas & Bundas of the Mill and Kiln, for if it ſhould, neither of the Parties could uſe his Part, but that the Judgment ought to be *de tertia Parte tantum*; and the Judgment was reverſed. Lev. 282. Paſch. 18 Car. 2. B. R. Gilpin v. Cookſon.

43. Where a Writ of *Dower* was *brought againſt ſeveral Purchaſors*, the Court directed, that the Sheriff ſhould *charge them all proportionably*, though otherwiſe the Sheriff might have charged all out of one Party, and the Party could have no Remedy at Law; But *in Equity* they ought to be all equally charged; and therefore the Court gave this Direction. Freem. Rep. 227. pl. 234. Paſch. 1677. Anon.

2 Chan. Caſes 160. S. C.

44. Equity will relieve againſt a *Fraudulent and partial Aſſignment* of Dower by the Sheriff. Vern. 218. pl. 216. Hill. 1683. Hoby v. Hoby.

(Y) Aſſignment of Dower *againſt common Right* in lieu of Dower.

What it is.

See (X) pl. 11.

1. TO aſſign Dower of an Advowſon is againſt common Right, for ſhe ought to have the third Preſentation of Common Right. 12 E. 4. 2.

This it ſeems is to be intended out of other Lands. See (Z) pl. 7.

2. So an Aſſignment of Rent out of Land is againſt Common Right. 12 E. 4. 2.

Upon an Habere Facias Seiſinam upon Recovery of Dower of three Maners, reſolved the Sheriff cannot give her Seiſin of one Manor, but he muſt give her Seiſin of the third Part of every Manor; But if the Recovery be of all Lands, viz. Meadow &c. Paſture the Sheriff may Aſſign her Dower in the Meadow only. Mo. 12. pl. 47 Trin. 4 & 5 Ph. & M. Anon.

3. An Aſſignment of all the Wood, or all the Meadow in lieu of all the Wood, Meadow, Paſture and Arable, is not againſt Common Right, but Common Right is the third Part of each. 12 Ed. 4. 2. 6.

4. If ſhe be dowable of three Manors, and ſhe accepts of the third oneManor in Dower Allowance of all, this is an endowment againſt Common Right. 18 H. 6. 27. 19 E. 3. Quare impedit 154.

5. A Feme was endow'd of the *Moiety of the Rent*, *by reaſon of the Cuſtom of the Land out of which* the Rent iſſued. Br. Rents pl. 20. cites 4 E. 3.

6. In Dower the *Tenant pleaded a Fine levied by the Prior of N. of the ſame Rent of* 20 l. *of which Dower is demanded, to J. M. and his Heirs, upon Condition, that if the Heir, or any Heir of J. M. ſhall be within Age at the Time of the Death of his Anceſtor, that then the Grantor and his Succeſſors ſhall be diſcharged of the Payment of the Rent during the Nonage, and ſaid, that the Baron died,*

his Son within Age; Judgment if Dower during his Nonage; For the Rent is ceaſed during the Nonage, and yet the Feme recover'd Dower by Award and Ceſſet Executio during the Nonage, and therefore Error was brought in B. R. Brook ſays, to what End the Writ of Error was taken? For it ſeems that it is a good Judgment. Br. Dower, pl. 51. cites 23 E. 3. 19.

(Z) What Perſon may aſſign it.

[Againſt Common Right]

1. THE Sheriff cannot **aſſign Dower againſt common Right.** 12 E. 4. 2. **Contra** 18 H. 6. 27.

2. **The** Heir may. 12 E. 4. 2. b. 26 Aſſ. 41.

3. **And** ſo **the** Right Tenant of the Land **may.** 12 E. 4. 2. b.

4. **The** Sheriff may aſſign a Rent **in lieu of Dower.** 20 Aſſ. 41.

5. **If the** Heir **be** in Ward to the King, **and the Wife is to be endowed in Chancery, the** Chancery may aſſign a Rent de novo **to her** out of the Land **of which ſhe is dowable, in lieu of Dower, and this ſhall bind the Heir.** 26 Aſſ. 41. Dower cannot be aſſign'd in Chancery unleſs where the Heir of the King's Tenant is in Ward, and in ſuch Caſe it is aſſign'd in Court,

6. So **if a** Writ **be directed** out of Chancery to the Eſcheator to deliver to the Wife ten Marks Rent, and Land in the Name of Dower, **and the** Eſcheator aſſigns to her five Marks Land, and five Marks Rent de novo out of other Land of which ſhe is dowable, **this ſhall bind the Heir.** 26 Aſſ. 41. **adjudged by all the Juſtices.**

which is more uſual, or a Writ to the Eſcheator to do it, cites F. N. B 263. If it had been ſaid, that the Heir had aſſign'd in Obedience to the Decree it might have been good, but in ſuch Caſe the Tenant had been in by the Aſſignment, and not by the Decree; Per Holt Ch. J. in delivering the Opinion of the Court. Ld. Raym Rep 784. Trin. 1 Ann in Caſe of Smith v. Angel —— 1 Salk. 354 355. pl. 1. S. C. and Holt Ch. J. held it plain, that no Eſtate or Intereſt veſted in the Wife by the Decree in Chancery — 7 Mod. 43. S C — Jenk. 9. pl. 17. cites 7 Aſſ 48. Fitzh. Dower 78. and 26. Aſſ 4. [but it ſeems miſprinted and ſhould be 26 Aſſ. according to Roll.]

7. **A** Rent out of the ſame Land **may be aſſigned in lieu of Dower.** 7 H. 6. 34. b. 26. **Aſſ.** 41. The Guardian in Chivalry may

aſſign a Rent out of the Lands and Tenements. which he hath in Ward in allowance of Dower, and it is good. Co. Litt. 39. a.

8. If *Tenant in Tail* aſſigns a Rent out of the Land in lieu of Dower, this ſhall bind his Iſſue, unleſs it amount to more than a third part; Per 2 Judges. And. 288. Paſch. 24 Eliz. Bickly v. Bickly.

9. Aſſignment of Dower made *by a Diſſeiſor* is good, and ſhall not be avoided, if it be not made by Covin or Fraud, if the Woman have Right to have the Thing in Dower. Perk. S. 394. Co Litt. 35. a. and 357. b. S P. and if it be not prejudicial to the Diſſeiſee. —— Br. Damages, pl. 96 cites 12 Aſſ 20. S. P. —— S. C. cited per Cur. 2. Rep 67. a. for it is a lawful Act.

10. If a *Diſſeiſor*, Abator, or Intruder, be of Land *by Covin of the Woman who has Right to have Dower* of the ſame Land, and ſuch Diſſeiſor, Abator, or Intruder, endow the ſame Woman, the Diſſeiſee who has Right unto the Land, may avoid and defeat ſuch Dower by his Entry into the Land &c. Perk. S 395. Co. Litt. 35. a and 357. b. S. P.

11. If J. S. be *Tenant* of Land unto which a Woman has Right to have Dower, and he is *diſſeiſed* of the ſame Land *by the Woman and a Stranger*, or by the Woman alone, and *afterwards ſhe is endowed of the ſame Land* by one who is in the Land by her and *the other joint Diſſeiſor*, or by one of them, ſuch Endowment may be avoided by the Entry of the Diſſeiſee, becauſe ſhe ſhall not take Advantage of the Wrong of which ſhe herſelf was Party &c. Perk. S. 396.

Co. Litt. 35. a. S P. 12. If an *Aſſignment of Rent* be made unto a Woman in Allowance of Dower, which ſhe ought to have of the ſame Land, *by a Diſſeiſor*, Abator, or Intruder, the Diſſeiſee, or he who has Right unto the Land, ſhall not be bound by ſuch Aſſignment, notwithſtanding that it be without any Covin of the Woman &c. Perk. S. 398.

13. Aſſignment of Dower by a *Guardian in Soeage* is not good, as it ſeems, becauſe a Writ of Dower does not lie againſt him. Perk. S. 404.

14. The ſame Law is of *Tenant by Elegit*, Tenant by Statute Merchant, Tenant by Statute Staple, and by Leſſee for Years &c. Perk. S. 404.

15. But if made *by him who has the Freehold* it is good if it be of ſuch a Thing as may be aſſigned, and of which ſhe has Right to have Dower; And though ſhe has not Right to have Dower thereof, yet it ſhall ſtand good, until it be defeated and avoided &c. Perk. S. 404.

Perk. S. 397. S. P. —— 2 Rep. 67. a. S. P. per Cur. cites 7 H. 6. 34. 8 E. 3. 38. Fitzh. Dower 110. and 10 E. 2. Dower 139. 16. It *muſt be made by* him that is *Tenant of the Land*, but herein certain *Diverſities* are to be obſerved; If two or more be *Jointenants* of Lands, the one of them may aſſign Dower to the Wife of a third Part in Certainty, and this ſhall bind his Companion, becauſe they were compellable to do the ſame by Law. Co. Litt. 34. b. 35. a.

Perk S. 397. S. P. 17. *But* if one of them aſſign *a Rent* out of the Land to the Wife, this ſhall not bind his Companion, becauſe he was not compellable by the Law thereunto. Co. Litt. 35. a.

18. If the Husband makes *ſeveral Feoffments* of ſeveral Parcels, and dies, and the *one Feoffee aſſigns Dower* to the Wife of Parcel of Land in Satisfaction of all the Dower which ſhe ought to have in the Land of the other Feoffee, the other Feoffees ſhall take no Benefit of this Aſſignment, becauſe they are Strangers thereunto and cannot plead the ſame. Co. Litt. 35. a.

9 Rep 18. b. in Bedingfield's Caſe. 19. *But* in ~~that~~ Caſe, *if the Husband dies ſeiſed of other Lands* in Feeſimple, and the ſame deſcend to his Heir, and the Heir *endows the Wife in certain of thoſe Lands, in full Satisfaction* of all the Dower that ſhe ought to have, as well in the Lands of the Feoffees as in his own Lands, this Aſſignment is good, and the ſeveral Feoffees ſhall take Advantage of it; And therefore if the Wife bring a Writ of Dower againſt any of them, they may vouch the Heir, and he may plead the Aſſignment which he himſelf has made in Safety of himſelf, leſt they ſhould recover in Value againſt him, ſo as there is a Privity in this reſpect between the Heir and the Feoffees, and by this Means the ſame may be pleaded by the Heir that made it; And ſo it is adjudged in our Books. Co. Litt. 35. a.

(A. a) Aſſignment [of] *Common Right.* *How.*

Fol. 684.

1. IF a Man aſſigns a Rent out of Land of which ſhe is dowable upon Condition, in lieu of Dower, this is not good, for ſhe ought to have it free of any Condition, as ſhe ſhould have the Land. Maſter Bridgman, at a Moot in Aula cited a Report, 27 Eliz. B. between *Wentworth and Wentworth*, to be ſo adjudged.

2 And. 30. pl. 20. Trin. 38. S. C. the Condition was, that if the Rent was arrear at the Day, it ſhould ceaſe and determine, and that then ſhe ſhould have her Dower; and all the Court held that it did not bar her of her Dower; For if the Aſſignment bars the Feme of her Dower, ſhe ought to have ſuch Eſtate in the Thing aſſigned as ſhe ſhould have in the Dower, which is an abſolute Eſtate for her Life, and if it be not ſhe ſhall not be barr'd. —— Cro. E. 451. pl. 19. S. C. adjudged for the Demandant. —— Noy 55. S. C. adjudged for the Demandant. —— See (X) pl. 7. S. P.

2. A Rent out of the ſame Land may be aſſigned in lieu of Dower without Deed. 12 H. 4. 17. b. 7 H. 6. 33. b.

3. The Aſſignment muſt *be abſolute*, and not conditional, or ſubject to any Limitations. Co. Litt. 34. b. ad finem.

(B. a) *What* Things may be aſſigned *in lieu of Dower.*

[And how without Deed.]

[And what Actions be for ſuch Things.]

[And Pleadings.]

1. AN Aſſiſe lies for Rent aſſigned without Deed out of Land of which ſhe is dowable, (therefore it is in lieu of Dower.) 33 H. 6. 2. b.

Br. Dower, pl. 3. cites S. C. —— Br. Aſſiſe, pl. 6. S. C. cited by Littleton and divers Serjeants; and it is there ſaid that the like Matter is 7 H. 6.

2. [But] an Aſſiſe lies not for Rent aſſigned without Deed out of other Land of which ſhe is not dowable, (therefore it is void and not in lieu) 33 H. 6. 2. b. Perkins, S. 407.

3. In Dower the Defendant pleaded that he had aſſigned to the Wife 20 *Acres of Corn out of the Land in name of Recompence of her Dower*; and held a good Bar, as well as of Rent, or any other Profit out of the Land. Mo. 59. pl. 167. Trin. 6 Eliz. Anon.

4. The Reſervation of an *Horſe or Sheep* is a good Reſervation of Rent, yet Aſſignment of an Horſe or Sheep in lieu of Dower is not good. For it is not *of the Nature of the Soil.* Mo. 59. pl. 167. Trin. 6 Eliz.

5. *Common*

5. *Common of Paſture for two Cows* is good in Name of Recompence of Dower. Mo. 59. pl. 167. Trin. 6 Eliz. Anon.

D. 361. b. pl. 11. S. C. ruled accordingly.

6. In Dower brought by the Wife of Beamont Maſter of the Rolls, in the Time of E. 6. the Defendant ſaid, that he himſelf before the Writ brought did *aſſign a Rent of* 10 *l. per Annum* to the Demandant, *in Recompence of her Dower*, upon which the Demandant did demur in Law; and the Cauſe was, becauſe the *Tenant had not ſhewed what Eſtate he had in the Lands at the Time of the granting of the Rent*, as to ſay that he was ſeiſed in Fee, and granted the ſaid Rent; *ſo as it might appear* to the Court upon the Plea, *that the Tenant had a lawful Power to grant ſuch a Rent*, which was granted by the whole Court, and the Demurrer holden good. 2 Le. 10. pl. 15. Hill. 20 Eliz. C. B. Beamont v. Dean.

7. Upon an *Aſſignment of Part of the Lands* in Dower, the *Heir by Parol may aſſign a Way through the other Parts.* Adjudged 2 Roll. Rep. 475. Mich. 22 Jac. White v. Robinſon.

(C. a) In what Caſes a Woman ſhall be *twice endowed.*

[Eviction.]

Br. Scire Facias, pl. 161. cites S. C —— F. N. B. 149. (M). S. P. and Ibid. in the new Notes there (c) ſays, See 4 E. 3. 25. 36. 50 E 3. 7. yet there ſeems to be this Diverſity, If a Feme be endowed by a Diſſeiſor, ſhe ſhall have the Warranty &c But if ſhe recovers the Lands only which are granted over by the Heir, ſhe has loſt her Warranty againſt the Grantee. 7 E. 3. 7. 21 E. 3. 48. 10 E. 3. Quid Juris 41. —— Perk. S. 418. S. P. unleſs in Special Caſes.

1. If a Woman be endowed, and after her Dower is evicted by an elder Title, ſhe ſhall have a new Writ of Dower, and ſhall be endow'd of the other two Parts. 43 Aſſ. 32. admitted.

Br. Scire Facias, pl. 161. cites S. C

2. If a Woman brings a Writ of Dower againſt the Tenant of the Land, who vouches the Heir in the ſame County, and the Woman recovers againſt the Heir if he hath, and if not, againſt the Tenant, and the Woman ſues Execution againſt the Heir, and after this is evicted by an elder Title, ſhe ſhall have a Scire Facias upon the firſt Recovery againſt the Tenant to be endowed of the two Parts. 43 Aſſ. 32.

Br. Scire Facias, pl. 161. cites S. C.

3. The ſame Law if the firſt Endowment was in Chancery. 43 Aſſ. 32. adjudged.

4. Feme *Tenant of the King is endowed in Chancery during the Nonage of the Heir*, and after the *Heir has Livery*, and after the *Feme is evicted*, ſhe *ſhall have Scire Facias to have the Land re-ſeiſed, and to be endowed of other two Parts*, and when the Heir is vouched in the ſame County the Feme ſhall recover Dower of the Land of the Heir. Br. Dower, pl. 65. cites 43 Aſſ. 32.

5. If a Woman after the Death of her Husband entreth and *agrees to Dower ex Aſſenſu Patris, or ad Oſtium Eccleſiæ*, ſhe is concluded to claim any Dower by the Common Law; but if ſhe will, ſhe may refuſe the Dower ad Oſtium Eccleſiæ &c. and then ſhe may be endow'd according to the Courſe of the Common Law. Litt. S. 41.

6. If a Man *ſeiſed of two Acres of Land in Fee by rightful Title, and of another Acre by Diſſeiſin*, takes a Wife and dies, and his *Heir* enters and *aſſigns*

aſſigns the Acre which his Anceſtor had by Diſſeiſin unto the Wife in Name of Dower, in allowance of all the Freehold which her Husband had &c. And the *Diſſeiſee enters into the Acre aſſigned* unto her and puts her out, ſhe ſhall be new endowed of the third Part of the two Acres which her Husband had by rightful Title, in ſuch Manner as if the other Acre had never been in the Poſſeſſion of her Husband &c. Perk. S. 419.

7. If *Tenant in Tail make a Diſcontinuance in Fee, and the Diſcontinuee taketh a Wife and hath Iſſue and dieth, and* the Diſcontinuee *is not ſeiſed of any other Thing during the Coverture, of which his Wife is dowable, and his Iſſue enters,* againſt whom his *Mother bringeth a Writ of Dower and recovers,* and hath Execution of the third Part by Metes and Bounds, and the *Iſſue in Tail bringeth a Formedon* againſt the Tenant in Dower, and *ſhe vouches the Iſſue of the Diſcontinuee, who enters into the Warranty and loſeth, and the Demandant had Execution.* Now, the Tenant in Dower ſhall be new endowed of the third Part of the two Parts which remain &c. notwithſtanding that his Iſſue hath enfeoffed a Stranger of Part thereof or of all. For notwithſtanding that the Poſſeſſion which her Husband had (whereof ſhe is dowable) be defeaſible, yet ſhe ſhall have Dower thereof until it be defeated &c. Perk. S. 420.

8. If a Woman endowed loſes by Action tried her Dower, if ſhe prays *Aid of him in Reverſion,* ſhe ſhall be new endowed of that which remaineth. F. N. B. 149. (M.)

9. If the *Baron alienes Parcel* of his Lands *during the Coverture and dies,* and the *Heir enters into the Reſidue and allows his Mother Parcel of the Lands, which remain, in Recompence of all her Dower,* and ſhe after brings Action of Dower againſt the *Alienee* of other Lands, he *ſhall plead this Aſſignment* and bar her of her Dower; But if the Executor of the Baron aſſigns to the Feme Parcel of the Lands alien'd in Recompence of her Dower, the Heir nor the other Feoffees of the Baron ſhall not plead it; Per Dyer. Mo. 25, 26. in pl. 86. Trin. 3 Eliz. and that it had been ſo adjudg'd.

10. B. ſeiſed of Land in Fee *takes to Wife J. and enfeoffs C. in Fee, who takes Alice to Wife; C. dies, Alice is endowed, B. dies,* J. recovers Dower againſt Alice and dies, Alice ſhall enjoy the Land again during Life. Co Litt. 42. a.

11. If ſhe *is endow'd of the immediate Eſtate deſcended from the Baron to the Heir* and ſhe is impleaded afterwards ſhe ſhall vouch the Heir and ſhall be newly endow'd of other Lands which the Heir has; *But if* ſhe is endowed by *the Alienee of the Baron or of the Heir,* and and ſhe is after impleaded, ſhe ſhall not vouch the Alienee to be newly endow'd. 9 Rep. 17. b. Hill. 28 Eliz. per Cur. in Bedingfield's Caſe.

And this is the Reaſon, that when the Feme brings Writ of Dower againſt the Alienee of the Baron &c. and he vouches the Heir, the Demandant may ſhew that the Heir has Lands deſcended to him in the ſame County (for to another County the Original does not extend) and pray that ſhe may be endowed of his Eſtate, and this is for the Benefit of his Voucher to be newly endow'd. Ibid. 17. b.

(D. a) *What Charges* made by the Husband, or other, and upon what Things, the Wife ſhall avoid.

1. D. 8 Eliz. 251. a Man takes a Wife, having a Manor in which is a Cuſtom, that the Lord, Superviſor, or Deputy, may demiſe by Copy, and deviſes, that two ſhould make cuſtomary Eſtates for the Payment of his Debts, and dies, the two hold Courts in their own Name, and grant Copies in Reverſion according to the Cuſtom, the Wife hath one of the Copyholds aſſigned to her for her Dower, and per Curiam ſhe ſhall avoid this Grant.

In what Caſes the Feme ſhall have Dower of Copyhold Lands. See tit. Copyhold (E. e)

2. Co. 4. 26 El. 24. the Lord of a Copyhold Manor, within which there were many Copyholders for Life, took Wife, a Copyholder died, and the Lord granted it to another, and died, and adjudged, that the Wife ſhould not avoid this Grant in a Writ of Dower, becauſe the Cuſtom was before the Title of Dower, and the ſaid Opinion of 8 El. cited contra.

A Man ſeiſed of Lands in Fee takes a Wife, and grants a Rent-charge, and after makes a Feoffment, and takes back an Eſtate Tail and dies. The Wife recovers Dower againſt the Iſſue in Tail by Reddition; The Wife makes a Surmiſe that her Husband died ſeiſed, and prays a Writ to inquire of the Damages, and it is granted to her, in this Caſe ſhe holds the Lands charged with the Rent charge, For by her Prayer ſhe accepts herſelf dowable of the ſecond Eſtate, For of the firſt Eſtate whereof ſhe was dowable her Husband died not ſeiſed, and ſo ſhe had concluded herſelf; Wherefore if the Rent charge be more to her Detriment than the Damages beneficial to her, it is good for her in that Caſe to make no ſuch Prayer. Co. Litt. 33 a.

3. If the Wife accepts Dower, of the Heir againſt Common Right, ſhe ſhall hold it ſubject to the Charges of her Husband 18 H. 6. 27.

4. But otherwiſe it is if ſhe be endowed againſt Common Right by the Sheriff. 18 H. 6. 27.

Fol. 685.

If a Man be ſeiſed of three Manors of equal Value and Wife, and charge one of the Manors with a Rent-charge and dies, ſhe may by the Proviſion of the Law take a third Part of all the Manors and hold them diſcharged. But if ſhe will accept the intire Manor charged, it is holden that ſhe ſhall hold it charged. Co. Litt. 173. a.

5. If the Husband grants a Rent out of four Manors, and dies, and his Wife is endowed by the Heir of one Manor in lieu of all, ſhe ſhall hold it diſcharged. 19 E. 3. Quare impedit 154. per Thorpe.

6. If A. ſeiſed in Tail of a Manor to which an Advowſon is appendant grants the next Preſentation to the Church of B. and after takes C. to Wife, and dies, and the Wife is endowed of this Manor with the Appurtenances, in lieu of all her Dower, and after the Church is void, quære whether ſhe may preſent and avoid the Grant made before the Coverture.

7. The Dower of a Wife who was *married after a Statute or Recognizance acknowledged*, ſhall be extended; But if the Title of Dower precede the Statute or Recognizance, it is not liable at all to ſuch Statute or Recognizance. Jenk. 26. pl. 69. cites 8 E. 1 Fitzh. Aſſiſe, 417.

8. W. brought a Writ of Dower againſt B. C. Leſſee for Years by *Leaſe* of the Husband rendering Rent *before the Coverture*, pray'd to

be receiv'd for his Term. The Wife recovers and had Judgment. By the Court the Leaſe of C. is ſaved by 21 *H.* 8. *cap.* 16. and the Court adviſed, that an *Habere Facias Seiſinam* ſhall be awarded to the Sheriff to put the Wife in poſſeſſion, with a *Proviſo quod Ten' ad Termin' annor' non expellatur.* And Beamond ſaid, that 3 Eliz. it was ſo ſaid. Noy. 65. Whitley v. Beſt.

9. Tenant in Dower *ſhall not be diſtrain'd for a Debt due to the King by the Husband* in his Life-time in the Lands which ſhe holds in Dower. Co. Litt. 31. a.

F.N.B. 157. (A) ſays there is a Writ in the Regiſter directed to the Sheriff, that he do not diſtrain the Wife who holds Lands in Dower for the Debts of the Husband which he owed to the King *before the Contract of Marriage between him and his Wife*, and ſhe may have ſuch Writ out of the Chancery directed unto the Treaſurer and Barons of the Exchequer, commanding them that they inquire thereof, and if they find the ſame, that they ſurceaſe and diſcharge the Wife.

10. The *Endowments by Metes and Bounds according to Common Right is more beneficial* to the Wife than to be *endow'd againſt Common Right*; For there *ſhe ſhall hold the Land charged, in reſpect of a Charge made after her Title of Dower.* Co. Litt. 32. b.

11. If *Baron and Feme grant a Rent-charge by Fine* out of Land, *or make a Leaſe for Years*, rendering Rent to the Baron and his Heirs, and afterwards the Feme recovers Dower, ſhe ſhall hold the Land charg'd. 10 Rep. 49. b. Mich. 10 Jac. in Lampet's Caſe.

(E. a) Attendency.

1. TENant in Dower of a Meſnalty ſhall be attendant to the Heir for the third Part of that which the Rent is over. 1 H. 4. 3.

Lord, Meſne and Tenant are, and the Tenant takes Feme and Wife of the dies without Heir, and afterwards the Meſne enters into the Land and endows the third Part; Whether the Wife ſhall pay to the third Part of the Services which were due between her Baron and the Meſne, or the third Part of the Services which are between the Meſne and the Lord Paramount, dubitatur Keilw. 129. a. b. pl. 98. Caſus incerti Temporis. Anon.

2. [But] If a Woman be endowed of a Meſnalty, the Heir cannot diſtrain the Woman for the third Part which ſhe ought to pay him. 1 H. 4. 3.

3. Feme Tenant in Dower ſhall hold of the Heir *pro particula*, and he ſhall make Avowry for the Portion upon her, and it is a *good Plea for her that the Heir holds by leſs Services.* Br. Tenure, pl. 84. cites Fitzh. Avowry 173. 3 E. 3.

4. *And* if *Great Grandfather*, *Grandfather*, *Father*, *and Son* are, and the *Lord gives the Services to the Grandfather and his Feme in Tail*, and the *Great Grandfather attorns*, and the *Grandfather dies in the Life of the Great Grandfather*, and the *Feme has Iſſue*, and the *Great Grandfather dies*, and the *Iſſue enters and does the Services to his Mother*, and *after he and his Mother dies*, and *the Son enters and endows his Mother*; Quære if ſhe ſhall be attendant of any Services, becauſe the Services which the Baron did are now ſuſpended in the Tenancy by the deſcending of the Land held by the Great Grandfather to the Iſſue in Tail, who is Heir to the Great Grandfather who was Tertenant. Br. Tenures, pl. 84. cites Fitzh. Avowry 173. 3 E. 3.

5. Where

5. Where a *Man gives in Tail rendering certain Services*, and the *Donee takes Feme, and dies without Iſſue*, and the *Feme is endowed*, ſhe ſhall render the third Part of the Services, and the Donor may avow for them, and yet the Tail is extinct. Br. Tenures, pl. 82. cites 10 E. 3. Avowry 159.

S. P. Br. Dower, pl. 64. cites 34 E. 3. 15.

6. Where *Tenant in Tail dies without Iſſue*, the *Donor enters*, the *Feme of the Tenant in Tail recovers Dower and has Execution*, ſhe *ſhall render the third Part of the Services to the Donor*. Br. Extinguiſhment, pl. 31. cites 34 Aſſ. 15.

S. P. And yet in theſe Caſes the Seigniory was once extinct

7. *So* where there is *Lord and Tenant*, and the *Tenant dies without Heir*, ſo that the *Land eſcheats*, and after the *Feme of the Tenant is endowed* &c. Ibid.

14 E. 2. For there is a *Diverſity between the Act of the Law*, as a dying without Iſſue or without Heir &c. *and the Act of the Party*, as Seignory purchaſed in Fee &c.

Br. Dower, pl 64. cites 34 E. 3. 15. & 23 E. 3.

8. *Contra where the Lord purchaſes the Tenancy in Fee, and the Feme of the Tenant is after endowed*, ſhe ſhall not render any Thing; For the two firſt Caſes of the Death are the Act of the Law, and the Caſe of the Purchaſe or ſuing Proceſs of Forejudger in Writ of Meſne &c. are the Acts of the Party and his Folly. Ibid.

9. Where Tenant in Tail dies without Iſſue, and the Feme is endowed, or if Lord and Tenant are, and the Tenant dies without Heir, the Lord may enter by Eſcheat. And in the other Caſe the Donor entered, the Feme, the Tenant, or the *Feme of the Tenant* in Tail *recovers Dower, and has Execution*, ſhe *ſhall hold by the third Part of the Services*; For this is the Act of God or of the Law; *Contra where the Lord purchaſes the Land in Fee, and ſhe is endowed*, ſhe ſhall render nothing to the Lord, for it is his own Act and Folly. Br. Tenures, pl. 33. cites 34 Aſſ. 15.

10. If a *Man holds by Homage and Fealty, and* 10 *s. Rent*, and *makes a Gift in Frankmarriage of the ſame* Land ſo held *with his Siſter*, and after the *Donee in the fourth Degree takes Feme and has Iſſue and dies, and his Iſſue enters and endows the Mother of the Poſſeſſion of his Father*, The Queſtion wss, if the Mother ſhall pay the third Part of the Rent to the Heir as he pays over to the Donor? or whether ſhe ſhall hold this third Part diſcharged during her Life? It was argued that ſhe ſhall hold it diſcharged; But Keble was Opinion that ſhe ſhould pay the third Part of the Rent to the Heir. Keilw. 124. a. pl. 80. Caſus incerti Temporis. Anon.

11. If there be *Lord, Meſne, and Tenant*, and the *Meſne grants to the Tenant to acquit him againſt the Lord and his Heirs*; the *Lord dies*, his *Wife has the Seigniory aſſigned to her for her Dower*, and diſtrains the Tenant, although the Grant was to acquit him againſt the Lord and his Heirs only; yet becauſe ſhe continued the Eſtate of her Husband, and the Reverſion remained in the Heir, *this Grant of Acquittal did extend to the Wife*. Co. Litt. 241. a.

12. A Man makes a *Gift in Tail, reſerving* 20 *s. Rent, and dies*, the *Donee takes Wife and dies without Iſſue*; the *Heir of the Donor* enters and *endows the Wife*; ſhe is ſo in of the Eſtate of her Husband, that although the Eſtate Tail be ſpent, and the Rent reſerved thereupon determined, yet after ſhe be endowed ſhe ſhall be Attendant to the Heir in reſpect of the ſaid Rent; And ſo it is of Lord and Tenant, the Wife that is endowed ſhall be Attendant for the due Services, but if any Services be incroached, although the Incroachment ſhall bind the Heir, yet the Wife ſhall be contributary, but for the Services of right due. Co. Litt. 241. a.

(F. a) Ex Aſſenſu Patris &c.

1. AN *Infant* being *in Ward at the Age of* 18 *Years took Feme by Aſſent of his Guardian, and endowed her ad oſtium Eccleſiæ*; It was adjudged a good Endowment though the *Baron died before the Age of* 21, becauſe he * was paſſed the Age of 14, and that the Marriage was with Conſent of his Guardian. Fitzh. Dower, pl. 197. cites Paſch. 9 H. 3. *Bat ſee Co. Litt. 34. contra.*

* The Original has the Word (ne) Anglice (not) which is not Senſe, and ſo ſeems to be miſprinted.

2. Aſſignment of Dower Ex Aſſenſu Patris, this ſhall be by Deed; For otherwiſe the Franktenement of the Father cannot paſs, and Aſſent lies not in Averment but in Specialty, and *here Franktenement paſſes without Livery of Seiſin*; quod nota. Br. Dower, pl. 7. cites 40 E. 3. 43.

Co Litt. 36. a. S. P —— The *Wife ought to have a Deed of the Father or Mother, proving his Aſſent* and Conſent, for his Freehold ſhall be bounden thereby, and Livery and Seiſin ſhall not be made thereof, and the Father may well make ſuch a Deed unto his Son's Wife &c. and ye tin ancient Books ſuch Aſſent and Conſent has been tried by Proofs, but the Law is contrary at this Day. Perk. S. 442.

3. In the ſame Manner as there is Dower Ex Aſſenſu Patris, in the ſame Manner and Form there is Dower † Ex Aſſenſu Matris, mutatis mutandis. Perk. S. 441.

† Co. Litt. 35. b. S. P. Such Dower is good. —— S. P. F. N. B. 150. (L) —— The laſt Edition of F. N. B. 150. (L)

4. But there is no Dower *Ex Aſſenſu Fratris nec Conſanguinei.* Ibid.

5. *Such Endowments ought to be made immediately after Affiance* made betwixt them *at the Church Door, or in the Church*, if the Marriages are uſed to be in the Church &c. Perk. S. 442.

cites 9 H. 3. Dower 19. and 18 E 2. Dower 167. Contra. But Dower 19. is neither the S. C. nor the S. P and Dower 167. is the S. C. of 8 E. 2. and ſo likewiſe is pl. 168. but neither of them is S P. But Dower 191. cites Trin. 9 H 3. and is that on Iſſue as to the Aſſent of the Mother &c. it was found againſt the Demandant, by which ſhe was barred. But Dower 134. cites 29 E. 3. is an Inference drawn from that Caſe, viz. That a Man cannot endow his Feme Ex Aſſenſu of any other than his Father; for that ſhe ſhall not have Writ of Dower Ex Aſſenſu Conſanguinei.

6. And *yet* it has been holden in Ancient Books, that *where the Son is Heir apparent* unto his Father (and ſo he ought to be, for ſuch Endowment made unto the Wife of the ſecond Son is nothing worth) ‡ if he *marries againſt his Father's Will, and afterwards within eight Weeks* after the Marriage, the ſame Son *endows his Wife, with the Aſſent of his Father*, of the Lands and Tenements of the Father &c. it was holden that the ſame was a good Endowment &c. Perk. S. 443.

‡ Fitzh. Dower, pl. 199 S. P. cites Anno 2 H. 3. —— F. N. B. 150. (L) S. P.

7. Where the Endowment Ex Aſſenſu Patris, vel Matris, is good and ſufficient in Law, *the Wife* of the Son *immediately after the Death of her Husband, in the Life of the Husband's Father, may enter* into the ſame Lands ſo aſſigned unto her in Dower &c. Perk. S. 444.

Litt. S. 40. and Co. Litt. 35. b. S. P.

8. *So* if the Son endows his Wife with the Aſſent of the Father, *of Lands of the Father which he held jointly in Fee with a Stranger* at the Time of his Aſſent &c. Perk. S. 446.

9. *So* ſhall it be if ſuch Endowment be made *of Lands* or Tenements *which the Father holds for the Term of his Life*, at the Time of ſuch Endowment. Perk. S. 446.

10. *But if* the Father had been *ſeiſed in Tail* of ſuch Lands whereof ſuch Endowment is made at the Time of his Aſſent &c. *he ſhall be*

bounden thereby during his Life; *But the Iſſue in Tail ſhall not* be bound thereby, nor a Woman who has Title to have Dower of the ſame Land before the Aſſent &c. As the Father's Wife which he had at the Time of the Aſſent, *nor any Stranger who have ancienter Title* to the ſame Land &c. ſhall be bound by ſuch Endowment or Aſſent &c. Perk. S. 447.

11. If there be Father and Son, and the *Father is ſeiſed* of Land *in Fee with his Wife in the Right of his Wife*, and the *Son endows his Wife of the ſame Land with the Aſſent of the Father*, and the *Son dies, living his Father*, the Son's Wife ſhall not have Dower of this Land againſt the Father, yet the Father may make Feoffiment of the ſame Land during the Coverture between him and his Wife, and it ſhall be good againſt him; and it has been ſaid, that it is becauſe that in ſuch Caſe the Husband does preſently diſmiſs himſelf of the Poſſeſſion, but in the other Caſe he remains ſeiſed of the ſame Land during the Coverture, and in the right of his Wife; and when this Matter appears unto the Court, the Court, who is a third Perſon, ſhall ouſt the Son's Wife of her Dower, becauſe otherwiſe the Court ſhould do Wrong unto the Wife of the Father &c. Tamen quære, for that the Father cannot plead ſuch Matter; but if it be in an Action in which Reſceit lies, if the Wife be received upon the Default of her Husband, ſhe may plead this Matter &c. yet notwithſtanding that ſhe is received, it ſeems that upon the Matter of Law the Son's Wife ſhall have the Dower which was aſſigned unto her by her Husband with the Aſſent of his Father &c. [during the Coverture.] Perk. S. 448.

12. *Writ* of Dower Ex Aſſenſu Patris *lies as well againſt the Guardian* as againſt *the Tenant of the Freehold*. F. N. B. 150. (B).

13. If the Son *endows his Wife at* the Age *of ſeven Years Ex Aſſenſu Patris*, if ſhe before the Husband *attain to the Age of nine Years*, the Dower is good; But *otherwiſe it is of an original abſolute Diſability*. Co. Litt. 33. a.

Perk. S. 445. S. P. cites Trin. 6 E 3. 34. —— F. N. B. 150. (A) S. P. and the new Edition cites 4 E. 3. Dower 117. and 6 E. 3. 34. and Perk. 86. [which is the ſame Caſe as cited above.]

14. *Tenant for Life of* a Carve of Land, the *Reverſion to the Father in Fee*. The Son and Heir apparent endows his Wife of the Carve by the Aſſent of the Father. The *Tenant for Life dies. The Husband dies.* The Reverſion was a Tenement in the Father, and yet this is no good Endowment Ex Aſſenſu Patris, becauſe the Father at the Time of the Aſſent had but a Reverſion expectant upon a Freehold, whereof he could not have endowed his own Wife, and though Tenant for Life died, living the Husband, yet *Quod ab initio non valet tractu Temporis non convaleſcet.* Co. Litt. 35. a.

S. P. per Cur. 3 Rep. 38. a. Hill. 34 Eliz. B. R. in Ratcliff's Caſe.

15. The *youngeſt Son*, and Heir apparent, cannot endow his Wife Ex Aſſenſu Patris of Lands whereof the Father is ſeiſed in Fee, of the Nature of Borough Engliſh, becauſe the Father may have another Son, and then the Husband is not Heir apparent, and it is in reſpect of the conſtant and perpetual Appearance, that the Son and Heir apparent may endow his Wife of his Father's Land. And *ſo* it is of Lands in *Gavelkind*, and this is the reaſon that Dower Ex Aſſenſu Fratris, or Conſanguinei, is not good; For that altho' he is Heir apparent at that Time, yet for the common Poſſibility that he may have Iſſue, and every Iſſue that the Brother or Couſin ſhould heve afterwards ſhall exclude him, he is no ſuch Heir apparent as the Law intends; So it muſt be ſuch a Son and Heir apparent as *muſt continue an Heir apparent*. Co. Litt. 35. b.

16. Though the Freehold and Inheritance is in the Father, yet in reſpect of the conſtant and perpetual Appearance of the Heir *the Heir apparent does endow*, and the Father *does but aſſent*; and the efore where

where the Father did endow the Wife of his Son and Heir apparent, that Endowment was held void, becauſe the Husband in that Caſe muſt endow, and the Father aſſent. Co. Litt. 35. b.

17. If a Man endows his Wife Ex Aſſenſu Patris, and the Husband dies, the *Wife may enter, or have a Writ* of Dower, *though the Father be living*. Co. Litt. 35. a.

18. If a Wife be endowed Ex Aſſenſu Patris, and the Husband dies, the *Wife has Election either to have her Dower at the Common Law, or Ex Aſſenſu Patris*; If ſhe bring a Writ of Dower at the Common Law, and count, albeit ſhe recover not, yet ſhe ſhall never after claim her Dower Ex Aſſenſu Patris. Co. Litt. 145. a. Fitzh. Dower, pl. 158. cites Paſch. 12 E. 2. S. P.

(G. a) De la pluis beale.

1. IN Dower, the *Tenant vouched the Heir of the Baron in Ward of the Demandant for Cauſe of Nurture, and ſet forth Deed of the Anceſtor of the Infant*, and he *was compelled to plead in Bar, becauſe now the Feme may endow herſelf of the beſt Part*, becauſe *Guardian by Nurture is always intended Socage Tenure, upon which Tenure this Endowment of the beſt* &c. *lies*. Br. Dower, pl. 42. cites 21 E. 3. 30.

2. *Contra* of Tenure *in Chivalry*, and therefore ſhe was barred. Br. Dower, pl. 42. cites 2 E. 3. 30.

3. If there be *Lord, Meſne and Tenant*, and the *Tenant holds of the Meſne by* 3 *d.* and the *Meſne holds over by* 20 *d.* and the *Tenant takes a Wife*, and the *Meſne releaſes unto the Tenant all the Right which he has in the Tenancy* &c. and the *Tenant dies*, and his *Wife is endowed* by the Heirs *of the third Part of the Tenancy, ſhe ſhall be attendant* unto him *by* 1 *d. and not by the third Part of the* 20 *d.* becauſe that ſhe ſhall be endowed of the beſt Poſſeſſion which her Husband had during the Coverture &c. Perk. S. 428.

4. If the *Husband has a Bailiwick* &c. or *a Fair*, &c. *as appendant unto his Manor* within the ſame Precinct, of which Manor the Husband was ſeiſed in Fee during the Coverture, and held the ſame in Socage, now *if the Wife be endowed of the Moiety of the Manor by the Cuſtom, ſhe ſhall have the Profit of the Moiety of the Bailiwick &c. or of the Fair as appendant* unto the Moiety of the Manor; But quære if the Bailiwick or Fair be diſappendant in Fee from the Manor after the Death of the Husband, and before the Endowment, whether ſhe ſhall then have the Moiety of the Profit of the Bailiwick or Fair &c. But it ſeems ſhe ſhall have the ſame, becauſe ſhe ſhall be endowed of the beſt Poſſeſſion which her Husband had during the Coverture or Marriage &c. Perk. S. 436.

5. Where *Judgment is given* in a Writ of Dower *that the Demandant ſhall be endowed de la pluis Beale*, ſhe may take her Neighbours, and in their Preſence endow herſelf by Metes and Bounds of the Faireſt Part of the Tenements which ſhe hath as Guardian in Socage, to have and to hold for Term of her Life. Litt. S. 49.

6. A *Woman Guardian in Socage bringing a Writ of Dower againſt Guardian by Knight's Service* (before 12 Car. 2. 24.) ſhould upon his pleading the whole Matter, have been adjudged to endow herſelf de pluis Beale, i. e. that is the Faireſt of the Socage Land. But ſuch Dowment could not be without Judgment; *If the Socage Land were not ſufficient for her whole Dower, ſhe ſhould retain for Part, and recover againſt the Guardian in Chivalry for the other Part.* After Judgment as aforeſaid, Litt. S. 43. Co. Litt. 38. a. b. — If Feme who has Title of Dower occupies the Land as

Guardian in Socage by her own Right, and not as Rightful Guardian, ſhe ſhall not endow herſelf de la pluis Beale; For this is in a Judgment given in the King's Court. 5 Rep 30. b. 31. a. in Coulter's Caſe.

ſaid, whether in the King's Court or the Lord's the Wife ſhould in the Preſence of her Neighbours have endowed herſelf of the beſt of the Land, which ſhe held as Guardian in Socage by Metes to hold it for Life. Hawk. Co. Litt. 55.

(H. a) By Cuſtom.

1. IN *Aſſiſe* the *Tenant ſaid, that the Land is within the Manor of D. in which is the Fee of L. where the Uſage has been Time out of Mind, that the Feme ſhall have the Whole in Dower dum ſola ſit, and if ſhe marry that ſhe ſhall forfeit it*, and admitted. Br. Cuſtoms, pl. 67. cites 25 Aſſ. 11.

F. N. B. 150. (P) S. P. 2. Vill which is not a Borough or Incorporated may have a Cuſtom that the Feme ſhall be *indow'd of the Whole*, as in Gavelkind and others. Br. Cuſtoms, pl. 72. cites 21 E. 4. 53, 54.

In ſome Places ſhe ſhall have the Whole 3. In ſome Boroughs by Cuſtom ſhe ſhall have for her Dower *all the Tenements* which were her Husband's. Litt S. 166. or Half dum ſola & caſta vixerit, and the like. Co. Litt. 111. a.

Co. Litt. 33. b and 111. a. S. P. ——S. P. adjudg'd accordingly. Cro. E 825. pl. 26 Paſch. 4 Eliz. C. B. Davis v. Selby. ——Le. 133. pl. 182. Hill. 30 Eliz. C B Hunt v. Gilbum. S. P adjudg'd accordingly ——Cro. E. 121. pl. 11. S. C. held accordingly. ——Gouldsb. 108. pl. 13. Hum v. Auſtin. S. C.

4. The Cuſtom of Kent is that the Wife ſhall be endowed *of the Moiety of Gavelkind Land*, and ſhall loſe her Dowry if ſhe marry again; Three Juſtices held the Plea good, and that ſhe had not Election to be endowed of the third Part at the Common Law, but was tied to the Cuſtom; But Anderſon e contra. Mo. 260. pl. 408. Paſch. 30 Eliz. Anon.

5. If a Cuſtom be that a Feme ſhall be endow'd *of a Moiety of the Lands*, yet ſhe *ſhall not be endow'd of the Moiety of a Fair held on the ſame Land*; Per Newdigate J. 2 Sid. 139. Hill. 1658. B. R.

(I. a) Quarentine.

She ſhall remain there but 40 Days, of which the Day of his Death is accounted the Firſt; and *if upon her Husband's Death ſhe departs* from her Houſe, *ſhe cannot return again* within the 40 Days. 2 Inſt. 17. ——Hob. 153. per Hobart Ch. J. cites D 76. Mich. 6 E. 6. [b. pl. 32. Kettillsby v. Kettillsby.] ——If the Widow be holden from her Quarentine ſhe ſhall her *Writ* de Quarentina habenda to the Sheriff, by Virtue of which Writ the Sheriff may make a *Proceſs* againſt the Defendant *returnable*

1. *Mag. Charta* 9 H. 3. cap. 7. *THE Widow ſhall have her Dower and Quarentine in the Chief Houſe if it be not a Caſtle, and if it be, a competent Houſe ſhall be provided until her Dower is aſſigned, and ſhe ſhall have in the mean Time her reaſonable Eſtovers of the Common, and ſhe ſhall have a third Part of the Lands of her Husband aſſigned for her Dower, which were his during Coverture, except ſhe was endow'd with leſs at the Church Door.*

turnable within two or three Days, and may and ought, if no juſt Cauſe be ſhewn againſt it, *ſpeedily to put her into Poſſeſſion.* 2 Inſt. 16, 17.

By a *Caſtle* in this Statute it is intended one that is *fortified* and maintained for the Defence of the Realm, and *not* a Caſtle *in Name* for the Habitation of the Owners; but this muſt be of a Houſe whereof ſhe is dowable. 2 Inſt. 17.

2. If ſhe *marries within the* 40 *Days* ſhe loſes her Quarantine; For then her Widowhood is paſt, and the Quarantine is appropriated to the Widow's Eſtate. 2 Inſt. 17. Co. Litt. 32. b. S. P.

3. The Word *Eſtovers in the Statute is taken for Suſtenance.* 2 Inſt. 17. and Lord Coke there ſays, that There is an Opinion in the Books [and in Marg. cites 19 H. 6. 14. b. and Regiſt. 175.] that the Widow *cannot kill any of the Oxen* of the Husband's whilſt ſhe remains in the Houſe; but obſerves that the Regiſter ſays, Quod interim habeat rationabilia Eſtoveria de Bonis eorundem Maritorum, which Lord Coke ſays, ſeems to be an Expoſition of this Branch. And that in this Caſe it *ſeems to contain Meat, Drink, Garments and Habitation,* though *when reſtrained to Woods it ſignifies Houſe-bote, Hedge-bote and Plough-bote.* 2 Inſt. 17, 18.

4. Widow for 40 Days next after the Death of her Baron is by the Law allow'd her *Quarentine* to live in the Houſe of her Baron, and to be ſuſtain'd with Victuals there, and not for any longer Time. Per Omnes J. Jenk. 284. pl. 18.

(K. a) Againſt whom Dower lies.

1. IN Dower the *Tenant vouch'd*, and the *Vouchee vouch'd the Heir of the Baron* of the Demandant; the *Demandant ſhew'd that the Heir had Aſſets by Deſcent in the ſame County.* The Demandant ſhall not recover againſt the Heir but againſt the Tenant only; For there is no immediate Privity between the Heir and her; For ſhe ſhall recover againſt the Heir only when the Tenant in Demeſne vouches him. 9 Rep 17. b. per Cur. in Bedingfield's Caſe cites 18 E. 3. 36. b.

2. Writ of Dower does not lie *againſt a Guardian in Socage* as it lies againſt a Guardian *in Chivalry*, therefore the *Indowment is Diſſeiſin*; *Quære* inde. Br. Dower, pl. 63. cites 29 Aſſ. 68 Co. Litt. 35. a. S. P.

3. Dower ſhall be brought *againſt the Guardian where the Infant is in Ward, and not againſt the Infant*, becauſe the *Guardian has Intereſt*. Br. Dower, pl. 20. cites 46 E. 3. 19. Co. Litt. 35. a. S. P.

4. In Raviſhment of Ward it was agreed that Writ of Dower may be brought *againſt the Baron alone, where the Baron is poſſeſſed of a Ward in Jure Uxoris, and the Feme Mother of the Infant demands Dower*; For in Writ of Dower againſt Guardian Voucher does not lie. Br. Dower, pl. 23. cites 48 E. 3. 20.

5. *But Right of Ward* ſhall be againſt both; For there Voucher lies. Br. Dower, pl. 23. cites 48 E. 3. 20.

6. Where there were *Grandfather, Father, and Son*, and the *Grandfather held the King*; The *Father took Feme*; The *Grandfather died*; The *Father had Iſſue and died before Office found, and before any Entry*, and after an *Office was found for the King, that the Grandfather was ſeiſed, and died ſeiſed, and held of the King, and that he had Iſſue, who had Iſſue him who now is Heir and within Age*, by which the King *ſeiſed and committed the Ward durante minore ætate*, and the

Feme of the Father, Son of the Grandfather, brought Writ of Dower against the Committee, and the Committee demurred upon the Matter. Br. Dower, pl. 66. cites 1 H. 7. 17.

7. Writ of Dower lies againſt the *Committee* of a Ward, and he *may have Aid of the King*. Br. Dower, pl. 66. cites 4 H. 7. 1. per Vaviſor, who vouched 15 E. 3.

8. Where the *Tenant pleads in Bar of Dower and demands Judgment ſi Actio*, there tho' the Action does not lie againſt the Committee, yet *by this Concluſion the Defendant has loſt his Advantage*, and ſo *Quacunque Via* the Action lies well. Br. Dower, pl. 66. 1 H. 7. 17. per Brian.

9. A *Grantee of a Rent in Fee takes Wife*; The *Grantee releaſes to the Ter-tenant and dies*; His Wife ought to bring her Writ of Dower *againſt the Ter-tenant*, for he is to pay the Rent, and there is no other againſt whom the Writ of Dower may be brought. *So* in the Caſe of the *Releaſe* of the Meſne, *or Fore-judger of the Meſne by the Ter-tenant*; Where Dower is brought by the Wife of the Meſne it ought to be againſt the Ter-tenant. Jenk. 4, 5. pl. 6.

10. *But where a Grantee of a Rent in Fee dies*, and his Wife is dowable, ſhe ought to bring her Writ of Dower *againſt the Heir of the Grantee*, and not againſt the Tenant of the Land; for he (the Grantee) is the True Tenant of the Rent; in the other Caſes the Rent is extinct; in this laſt Caſe it is not. Jenk. 5. pl. 6.

(L. a) Writ and Abatement.

By the Common Law, if a *Woman had accepted Part of her Dower* from any Perſon, *ſhe could not recover the Reſidue unleſs by Writ of Right* of Dower. 2 Inſt. 262. in Principio, cites Bract. Lib. 4. fol. ‡ 321. b.

1. *Weſtm.* 1. *cap.* 49. 3 *E.* 1. *IN a Writ of Dower (unde nihil habet) the Writ ſhall not abate by the Exception of the Tenant, that ſhe has received her Dower of another before the Writ purchaſed, unleſs he can ſhew that ſhe received Part of her Dower * of himſelf, and in the † ſame Town before the Writ purchaſed.*

‡ This is miſprinted for (311. b) and is in Lib. 4. Cap. 13. S. 15.

* Firſt it muſt be of the ſame Tenant, and not of another, tho' it be in the ſame Town; As if the *Husband enfeoffs A. of Whiteacre and B. of Blackacre, both in Dale*, and the *Wife receives Dower of A* ſhe notwithſtanding *ſhall have a Writ of Dower* (*unde nihil habet*) *againſt B.* by the expreſs Purview of this Act, for he is not the ſame Tenant of whom ſhe received her Dower. 2 Inſt. 262.

2dly, If A. having a Wife does *infeoff the Husband of one Acre, and the Wife of another, and both in Dale*; A. dies; The Husband aſſigns Dower of his Acre, yet does the Writ of Dower (unde nihil habet) lie againſt the Husband and Wife, for they are not the ſame Tenant. 2 Inſt. 262.

3dly, If the *Baron* be *ſeiſed of Black-acre and White-acre in Dale*, and *after the Coverture makes a Leaſe for Life of Black-acre, and grants White-acre, and the Reverſion of Black-acre to A. and his Heirs*, to whom Attornment be made, and dies, the *Wife receives Dower of A. of White-acre*, and after the *Leſſee for Life dies*, the *Wife ſhall have a Writ of Dower* (*unde nihil habet*) *to be endowed of Black-acre*; For altho' it be againſt the ſame Tenant, and in the ſame Town, and before the Writ purchaſed, which are the three Points required by this Act, yet is there another Property neceſſarily implyed, and that is, that he be ſuch a Tenant of both the one Land and the other at the Time of the Receipt of the Dower, as ſhe might have had her Writ of Dower (unde nihil habet) againſt him, of both which ſhe could not have in this Caſe, in reſpect the Leſſee for Life was Tenant of the Freehold at that Time, and ſo no Default of her. 2 Inſt. 262.

† A Writ of Dower (unde nihil habet) *does lie in an Hamlet*, but yet if the Demandant has received Dower out of the Hamlet, and in the ſame Town, the Writ ſhall abate, otherwiſe it is, tho' it be in the ſame Pariſh, if it be in another Town, for the Words of the Statute be, En meſme la Ville. 2 Inſt. 263.

2. I

2 In Writ of Dower aſſign'd, it is *no Plea to the Writ to ſay that the Demandant is ſeiſed of parcel of her Dower* of this ſame &c. But it is good in Common Writ of Dower. Thel. Dig. 148. Lib. 11. cap. 35. S. 2. cites Mich. 9 E. 2. Brief 813. Britton ca. 109.

3. In Dower, the *Tenant pleaded Jointenancy by Fine* with one Tho. and the *Demandant ſaid, that after this Fine her Baron was ſeiſed and infeoffed the Tenant*, and ſo he is ſole Tenant, and Iſſue taken thereupon, and found for the Demandant, by which ſhe recover'd; But it was ſaid, that all might be revers'd in B. R. Thel. Dig. 226. Lib. 16. cap. 7. S. 8. cites 3 E. 3. It. North. Maintenance de brief 14.

4. *Dower in N.* and the *Tenant ſays that H. is a Hamlet of N.* Judgment of the Writ, this is a good Plea; [*But*] *if he brings another Writ in N.* the *Tenant ſhall not ſay that there are two N's, and none without Addition.* Br. Brief, pl. 540. cites 3 E. 3.

5. In Dower *of the third Part of a Manor* where the Tenant *pleaded Nontenure of Parcel*, the *Demandant was receiv'd to maintain that he was fully Tenant* of her Demand, *notwithſtanding that Nontenure ought not to be alleg'd in Writ of Dower* &c. Thel. Dig. 226. Lib. 16. cap. 7. S. 11. cites 4 E. 3. 159. Quære.

6. Where a *Feme takes a Manor in Allowance of all her Dower of the Tenements* of her Baron, the Writ of *Waſte ſhall be brought againſt her as Tenant in Dower, and not as Leſſee for Life*, as well by the Heir of the Baron as by a Stranger; But otherwiſe it is, if upon Debate had between her and him in Reverſion ſhe receives the Manor by Accord of the Leaſe of him in Reverſion to releaſe her Action of Dower. Thel. Dig. 170. Lib. 11. cap. 52. S. 9 cites Paſch. 4 E. 3. 138.

7. In Dower, the *Demand was as to Parcel of the Moiety, and of the third Part of the Reſidue*, and the Tenant would have compelled the Demandant to ſhew Cauſe why he demanded the Moiety, but before Cauſe ſhewn the Tenant *pleaded to the Reſidue in Abatement that ſhe had received Parcel of her Dower*, and Iſſue thereupon taken, and after the *Demandant would not have ſhewn Cauſe of the other Demand*, becauſe the Tenant had pleaded to the Writ for the Reſidue &c. *Yet ſhe was Compell'd* by the Court to ſhew Cauſe, or to Amend her Demand. Thel. Dig. 88. Lib. 10. cap. 1. S. 11. cites Hill. 7 E. 3. 308. Dower 102.

8. *In Dower unde Nihil habet* it was *pleaded* to the Writ, *that the Tenant himſelf had Aſſign'd her Dower* to the Demandant *in the ſame Vill of which the Demandant was ſeiſed*; The Demandant replied, *that at the Time of his Aſſignment, the Tenant was not ſeiſed of the Tenements of which Dower is now demanded, but one A. then held them for Term of his Life, the Reverſion expectant to you*, and ſo theſe Tenements are come to you after the Death of the ſaid A. &c. Judgment of this Writ be not good enough; upon which the Tenant was put to *anſwer over*. Thel. Dig. 225. Lib. 16. cap. 7. S. 3. cites Mich. 2 E. 2. Dower 124. and Hill. 12 E. 3. Dower 86.

9. In Dower by ſeveral Præcipes, the Name of one of the Tenants was left out in this Clauſe, unde queritur, and alſo in the Summons, by which it was abated againſt all. Thel. Dig. 94. Lib. 10. cap. 6. S. 3. cites Hill. 12 E. 3 Brief 671.

10. *But* in Dower *unde Nihil habet*, *Seiſin of Parcel* of her Dower *in the ſame Vill* is a good Plea. Thel. Dig. 148. Lib. 11. cap. 35. S. 2. cites 7 E. 3. 308. Mich. 2 E. 2. Dower 124. and 12 E. 3. Dower 86.

Seiſin of Parcel of her Dower *in the ſame Vill, is no Plea* in Writ of Dower by the Statute of Weſtm. 1. cap. 49 *without ſaying that it is of the Aſſignment of the Tenant.* Thel. Dig. 149. Lib. 11. cap. 35. S. 21. cites Hill. 12 E. 3. Dower 89. Quære.

11. It

11. It was adjudged that *in* Writ of *Waſte brought againſt Tenant in Dower*, it ſuffices to name the Feme by her proper Name and Surname, *without naming her by her proper Name, with that Wife of ſuch a one.* Thel. Dig. 50. lib. 6. cap. 2. S. 3. cites Mich. 31 E. 3. Briet 326. & Paſch. 32 E. 3. Briet 295.

12. In Dower *againſt a Guardian*, the *Demand was of the third Part of a Carve of Land* &c. The Tenant *pleaded that the Demandant herſelf is ſeiſed of the third Part of this Carve*, et non allocatur to all the Writ; becauſe he does *not ſhew How* ſhe is ſeiſed, *or of whoſe Aſſignment or otherwiſe* &c. by which the Tenant was put to anſwer to the two Parts. Thel. Dig. 149. lib. 11. cap 35. S. 12. cites Trin. 39 E. 3. 22.

13. In Dower the Demand was *of the third Part of* 40 *l. Rent.* Br. Demand, pl 47. cites 44 E. 3. 32.

14. *So of the Moiety of Rent*, and not of Sum certain. Ibid.

15. Dower was brought againſt the Earl of Warwick, and the *Writ was De Libero Tenemento of J. W. her Husband in Terra Gwerr in Wales*, and her *Demand was De tertia Parte Terræ Gwerr*, and ſo ſhe ſuppoſes *the Land of Gwerr to be in Terra Gwerr*, and yet good by Award. Br. Demand, pl. 1. cites 47 E. 3. 6.

Br. Brief, pl. 512. cites S C. and ſo the Demand of the Thing in itſelfis good.

16. *So* of *the Manor of B. in B.* Ibid.

Br. Brief, pl. 512. cites S. C.

17. *And* where Land is *in Foreſta de K. which is not of any Vill*, the Writ ſhall be Præcipe quod reddat &c. *in Foreſta de K.* and *not De Foreſta.* Ibid.

Br. Brief, pl 512. cites S. C. it ſhall be in Foreſta, and not de Foreſta.

18. Dower *if the third Part of* 10 *l.* and did not demand five Marks, and ſo it ought to be quod nota. Br. Demand, pl. 51. cites 11 H. 4. 83.

19. In Dower the Demandant *demanded the third Part of a Garden*; For the *Writ is general Rationabilem dotem ſuam quæ ei contingit de Libero Tenemento J. B. viri ſui in N.* &c. Per Marten, the Demand is good, becauſe the Writ has paſſed the Chancery; But note that this Term is not in the Writ, but only Libero Tenemento &c. and the Opinion of the Court was, that the Writ was good as in Aſſiſe, by which the Tenant demanded the View &c. Br. Demand, pl. 8. cites 8 H. 6. 3.

20. In *Waſt* it was agreed by the Opinion of all the Court, that a Feme ſhall be endowed *of a Villein appendant in Groſs*, and the *Writ ſhall be De Libero Tenemento.* Br. Dower, pl. 91. cites 2 H. 6. 11.

21. Dower *of the Moiety by Cuſtom* the *Writ ſhall be General*, and ſhall have ſpecial *Declaration of the Cuſtom* for the Moiety. Br. General Brief, pl. 23.

22. In Dower the Demand was *Medietatis* 23 *Acrarum Terræ, pro eo quod the Land eſt de Tenura in Gavelkind, ſecundum Conſuetudinem ad Antiquo Uſitat' quod de Meditate dotari debent*, and *did not ſay De Tempore cujus contrar'* &c. and yet good, becauſe the Courſe is ſo, and it ſeems there, that ſhe *ſhall ſay ſhe is Sole according to the Cuſtom.* Br. Dower, pl. 70. cites 2 E. 4. 17.

23. Dower *againſt a Guardian* ſhall be *by Name of Guardian*; and there it is a good Plea, that he is not Guardian. Br. Dower, pl. 94. cites 9 E. 4. 31.

24. In.

24. Writ of Dower lies *againſt Guardian in Chivalry, without naming other Guardians who have Parcel of the Heritage of the Heir in Ward, but all* the Guardians *ſhall be jointly vouch'd.* Thel. Dig. 49. Lib. 5. cap. 23. S. 1. cites Mich. 16 E. 3. Brief 657.

25. Dower, and made the *Demand of two Mills.* Skrene demanded Judgment of the Writ; For where ſhe makes Demand of two Mills *they are only two Scites of Mills and two Tofts, and have been always of the Life of the Baron,* by which the *Demand ſhall be of two Tofts* &c. Quod non negatur. Br. Demand, pl. 5. cites 14 H. 4. 35.

26. In Dower *of the third Part of the Moiety of a Manor,* and the *Tenant demanded the View,* by which the *Demandant made her Demand of the third Part of the Manor of B. ſevering the other Moiety.* Pigot ſaid, now the Demand ſhall be *of the third Part of all the Acres and Rent,* and yet good as above per Cur. For *where a Manor is parted between two Coparceners each has a Moiety* of the Manor; *Contra* it ſeems *where the one has all the Demeſnes, and the other all the Services,* but as long as the one has Land and Services, and the other likewiſe, each has a Moiety of the Manor. Br. Demand, pl. 10. cites 9 E 4. 5.

27. In Dower if the *Tenant makes Default by which Grand Cape iſſued, the Demandant ſhall make his Demand*; For no Certainty appears before the Demand made, nor in Aſſiſe before the Plaint. Contra in Præcipe quod reddat. Br. Dower, pl. 96. cites 38 H. 6. 18.

28. A Writ of Dower *unde Nihil habet lies in Caſe* where a Woman takes her Husband, who is ſole ſeiſed of Lands or Tenements to him and his Heirs in Fee Simple, or unto him and the Heirs of his Body &c. Or if the Husband during the Marriage betwixt him and his Wife be ſolely ſeiſed in Fee Simple, or in Fee Tail of ſuch Eſtate, that the Iſſue begotten betwixt him and his Wife may inherit the ſame, or dies ſeiſed thereof, or be thereof diſſeiſed and dies, his Wife ſhall have a Writ of Dower unde Nihil habet againſt him who is Tenant of the Freehold of the Land, or againſt him who is Guardian in Knight's Service of the Land. F. N. B. 147. (E).

29. Dower, the *Writ was, Præcipe A. quod reddat E. Fulliam rationabilem dotem ſuam de terris &c. dudum B. Fulliam quondam viri ſui* &c. Exception was taken to the Writ, becauſe it was not in this Manner; Præcipe A. *quod reddat E. Fulliam que fuit Uxor B. Fulliam* &c. For in the Beginning of the Writ, ſhe ought to be named Uxor of her Huſband &c. for that is the Name whereby ſhe claims her Dower; And ſhe ought to be his lawful Wife, otherwiſe ſhe may not claim any Dower. And the Court held that the Writ was ill; and that the Words in the Writ B. Fulliam quandam viri ſui &c. are not ſufficient. Cro. J. 217. pl. 4. Hill. 6 Jac. B. R. Fulliam v. Harris.

2 Brownl. 300, 301. S. C. reſolv'd to be Error. And it is ſaid that it does not vary in Subſtance, but becauſe the Form in the Regiſter is otherwiſe, the Juſtices would not amend it.

30. For the moſt Part Dower *ad Oſtium Eccleſiæ, & Ex Aſſenſu Patris* have *the Nature of a Dower at the Common*; And for theſe the Wife may have a Writ of Dower, although they be certain, as for the third Part at the Common Law. Co. Litt. 35. b.

31. Although the *Guardian in Chivalry,* or the *Grantee of the King of a Wardſhip,* has but a Chattle during the Minority of the Heir, and the Woman ſhall recover a Freehold in her Writ of Dower, yet after the Guardian as is aforeſaid has enter'd into the Land, That *Writ lies againſt him, and not againſt the Heir* who is Tenant of the Freehold, becauſe the Law has truſted the Guardian to plead for the Heir within Age, and that is in his Cuſtody, and alſo for his own particular Intereſt, and by this Diverſity all the Books be reconciled. Co. Litt. 38. b.

32. So if the *Guardian dies the Wife ſhall have a Writ of Dower againſt his Executors*, and if there are two Executors and one of them alone takes the Profits, the Writ of Dower ſhall be maintain'd againſt him only. Co. Litt. 38. b.

Noy. 126. Brownlow v. Littleton, S. C. held accordingly; and cites Paſch 39 Eliz. B. R. Williams v. Williams, where in the like Caſe the Plaintiff brought a new Writ of Error quod Coram Vobis reſidet againſt the Executor, who brought a Sci. Fa. to have Execution of the Damages, and the Party pleads that there is Error hanging for the Damages; And per Cur. if the Plaintiff in Error has aſſigned Error according to the Courſe of the Court, then the Plea is good, but otherwiſe if he had not aſſigned Errors. For the Sci. Fa. for the Damages is to haſten him to proceed Cum Effectu in the Error.

32. In Dower there was *Judgment by Default*, and a *Writ of Enquiry* if the Husband died ſeiſed, and of what Eſtate either in Fee or Tail, *and Judgment* was given *that ſhe recover &c. and her Damages to 60 l.* and a Writ of *Error brought, and the Record being removed the Widow died*; Adjudged that the Writ ſhall not abate by the Death of the Defendant in Error, though otherwiſe by the Death of the Plaintiff, and thereupon the Plaintiff in Error proceeded and aſſigned Errors. Yelv. 112. Mich. 5 Jac. B. R. Bromley v. Littleton.

33 Dower is brought *againſt a Guardian in Chivalry*, pending the Writ, the *Heir comes of full Age*. The Writ of Dower abates, for the Guardianſhip ended *by the Act of God*; and the Guardian has nothing of which Dower may be render'd. Jenk. 170 in Caſe 32.

34. A Writ of Dower *de Rectoria & omnimodis Decimis, without ſhewing the Particulars* is good; for the *Demand in a Writ of Dower need not be ſo particular as in other Writs*; for the Demandant has not the Charters ſo as to be enabled to make a preciſe Demand; and as Dower is favoured in Law, ſo are the Proceedings therein. Sty. 68. 92 99. Hill. 23 Car. Thyn v. Thyn.

35. A Writ of Dower will lie *De uno Crofto*; Per Roll Ch. J. Sty. 194. Hill. 1649.

36. Error aſſign'd to reverſe a Judgment in Dower was, that the *Demand was de tertia parte decimarum Garbarum in* C. whereas the Word Garba admits of divers Conſtructions, and ſignifies any Thing bound up in Bundles, ſo that it is uncertain what Kind of Tithes are demanded by that Word, but adjudged that it was certain enough, for the Word Garba is taken at Common Law to be Corn bound up, and here the Demand was of the third Part of the Tithes Garbarum Granorum. Sty. 236. 238. Mich. 1650. B. R. Fairfax v. Fairfax.

37. So where it was *De Rectoria de C.* it was aſſign'd for Error that it ſhould be De Rectoria *Eccleſiæ de C.* but the Court held it well enough in a Writ of Dower, in which there is *not ſuch Certainty required* as in a Præcipe. Sty. 236. 238. Mich. 1650. Fairfax v. Fairfax.

(M. a) Proceedings and Pleadings.

1. *Stat. Marlb.* 12. 52 H. 3. *IN Dower (unde nihil habet) four Days ſhall be given in the Year, and more if conveniently may be; ſo that they ſhall have five or ſix Days (at leaſt) in the Year.*

2. Writ of *Dower by one Præcipe againſt W. of Land in C. and by another Præcipe againſt R. of Land in eadem Villa. R. made Default, and W. ſaid that C. is not a Vill but a Hamlet, Judgment of the Writ, and* he

held a good Plea in his Mouth, notwithſtanding that the Fault was in the other Præcipe, in which the Demandant had ſuppoſed it to be a Vill. Thel. Dig. 193. Lib. 13. cap. 1. S. 1. cites Mich. 18 E. 2. Brief 829.

3. If a *Diſſeiſor or Abator endows a Feme, ſhe may plead it in Bar againſt the Heir of her Baron*; and Brook ſays it ſeems to him that it is *the ſame againſt others.* Br. Dower, pl. 59. cites 12 Aſſ. 20.

4. In Aſſiſe the *Tenant ſaid, that her Baron was ſeiſed in Fee during the Eſpouſals and died, and the Land deſcended to the Plaintiff within Age, and becauſe it was held in Socage A. B. as next of Kin to the Infant entred, and we aſſigned Dower*; Judgment if Aſſiſe. Br. Dower, pl. 63. cites 26 Aſſ. 68.

5. Dower *againſt B. Guardian of the Land, and Heir of K.* The *Defendant ſaid, that the Fatder of the Infant was J. of R. Judgment of the Writ, and in Caſe the Writ ſhall be good, we are ready to render Dower*; Per Knivet, you cannot plead to the Writ and render all at one Time. The Demandant prayed Judgment, by which Seiſin of the Land was awarded, and becauſe the Demandant averred that he was not at all Times ready to render Dower, Inqueſt of Damages was awarded, and that the Execution ceaſe till the Inqueſt ſhall be paſſed. Br. Dower, pl. 40. cites 38 E. 3. 33.

6. In Dower, the *Tenant ſaid that the Feme had married A. and living him married B. of whoſe Dowment ſhe now demands, and A. is yet alive*, & non allocatur; by which he added, *and ſo not accoupled in lawful Matrimony*, by which nothing was entered but Ne unques accouple &c. and Writ awarded to the Biſhop to certify it; Quod Nota. Br. Dower, pl. 54. cites 39 E 3. 15.

7. In Dower, the Demand was *of the third Part of a Carve of Land*; Clam. ſaid, that *ſhe herſelf is ſeiſed of the third Part of this Carve*; Judgment of thed Writ; Per Knivet J this is no Plea unleſs he had *ſaid of whoſe Aſſignment, or that ſhe recovered it*; For if it be by Diſſeiſin, yet ſhe hall have Dower of two Parts, by which he was compelled to anſwer to the two Parts. Br. Dower, pl. 55. cites 39 E. 3. 17.

8. Dower was brought by a Feme *againſt two by ſeveral Præcipes*, and *the one prayed Aid of the other as Coparcener*, and ſo it ſeems that *ſeveral Tenancy is a good Plea* in Dower. Contra in Aſſiſe. Br. Dower, pl. 99. cites 39 E. 3. 4.

9. In *Dower*, the *Feme juſtified to hold Evidences*, becauſe ſhe was *enſeint* by her Baron, and *detain them to the Uſe of the Infant*, and the *Tenant tendered Iſſue that ſhe was not enſeint by her Baron the Day of her Baron's Death*, and the Iſſue was not received, but only *if ſhe was enſeint the Day of the Death of her Baron*, or not. Br. Iſſues joines, pl. 6. cites 41 E. 3. 11.

10. A *Protection does not lie in Dower*, for this would tend to ſtarve the Widow. The *ſame Law* is *in a Quod ei deforceat* brought by Tenant in Dower, where ſhe has loſt her Dower by Default. Jenk. 50. pl. 95. cites 43 E. 3. 6. by all the Counſel.

11. In Dower, the Feme confeſſed and avoided *a Recovery had againſt her Baron.* Br. Confeſs and Avoid, pl. 9. cites 47 E. 3. 13.

12. In Dower, the *Baron makes a Feoffment and ouſts the Feoffee*, and *he recovers by Aſſiſe.* The *Baron dies.* The *Feme brought Dower*, and the *Feoffee pleaded the Recovery in Aſſiſe againſt the Baron*, and therefore ſhe ſhall not falſify in this Caſe; by which ſhe ſaid, that long Time before her Baron was ſeiſed que Dower la poit, and the other e contra; and ſo ſhe is dowable of the firſt Poſſeſſion before the Recovery. Br. Dower, pl. 22. cites 47 E 3 13.

13.

13. *Dower unde nihil habet*, the *Tenant came at the firſt Day and ſaid, that he had been always ready to render* Dower, and the *Demandant averred, that oftentimes before the Writ purchaſed ſhe demanded Dower*, and could not have it, and was received inaſmuch as it was at the firſt Day; And it is ſaid elſewhere, that this is inaſmuch as the Heir is in by Title; But contra in Colinage, Aiel, and Mortdanceſtor, for this is to affirm the Title and Eſtate of the Tenant; Note the Diverſity; For there ſuch Averment ſhall not be taken. Br. Tout temps priſt. pl. 34. cites 2 H. 4. 7.

14. In *Dower*, the *Tenant vouched Proceſs continued to the Sequatur*, which was *returned not ſerved*, and the *Tenant was eſſoigned*, and at the Day made Default, and therefore *Petit Cape* was awarded, and yet per Hull clearly, he cannot ſave his Default; Quære. Br. Proceſs, pl. 29. cites 3 H. 4. 4.

15. In Dower, the *Tenant ſaid, that N. gave to the Baron and his firſt Feme for Life*, the *Remainder to this Tenant in the Tail*, the *Remainder in Fee to the right Heirs of the Baron*, and after the *firſt Feme died*, and *he married this Feme and died*, and this *Tenant entered as in his Remainder*, and demanded Judgment if of ſuch Eſtate Dower &c. Till. ſaid, the Plea amounted but to Ne unques Seiſie que Dower la poit; But per Hank. and Thirn, he *ought to anſwer to the Plea* by reaſon of the Fee in Remainder in the Baron, which is doubtful to the Lay-Gents; But where a Man *leaſes to a Baron for Term of Life*, the *Reverſion to the Leſſor*, *or* the *Remainder to a Stranger*, there the Demandant may ſay that Seiſie que Dower la poit; ſo a Diverſity &c. For the Baron has not Fee. Br. Dower, pl. 33. cites 11 H. 4. 73.

16. Dower *of the third Part of* 20*l.* [*Rent*;] Norton ſaid, your *Baron never had any thing in the Rent but jointly with N. who is alive.* Judgment if Dower, and *was not compelled to ſhew whether he pleaded as Ter-tenant, or as Pernor of the Rent*; And the *Demandant ſaid, that N. releaſed to her Baron all his Right which he had in the Rent, and did not ſhew the Deed of Releaſe*, and therefore was *counſelled by the Court to plead* that *Seiſie que Dower* la poit, and ſo ſhe did, and *proved the Releaſe in Evidence*; Quod Nota, and ſo to Iſſue; Quære of this Iſſue general. Contra of the ſpecial Matter. Br. Dower, pl. 34 cites 11 H. 4. 83.

17. In Dower; the *Baron purchaſed Rent*, and *died before the Day of Payment*, yet the Feme ſhall be endowed; and if the *Tenant pleads that Baron Ne fuit unques Seiſie que Dower* la poit, *the other ſhall not plead ſpecial Matter, but ſhall ſay* that *Seiſie que Dower* la poit, and *ſhall give the Matter in Evidence.* Br. Dower, pl. 35 cites 11 H. 4. 88.

Br Confeſſion, pl. 15. cites S. C

18. It is no Plea in Dower *that the Tenant at another Time brought Formedon againſt the Baron of the Demandant, who upon Deed of Tail ſhewed in Pais rendered the Land in Pais, pending the Writ, by which the Tenant entered and averred the Tail*; Judgment ſi Actio; For Render does not bar a Stranger of a Meſne Eſtate, and alſo Fee-ſimple cannot be rendered without Livery of Seiſin. Br. Dower, pl. 37. cites 12 H. 4. 21.

19. In Dower, the *Tenant pleaded Recovery in Aſſiſe againſt the Baron*, and the *Demandant ſaid, that the Baron infeoffed him during the Coverture, and after diſſeiſed him, of which Diſſciſin he recovered*; and the *Tenant ſaid, that he was ſeiſed till by the Baron diſſeiſed, upon which he recovered*, abſque hoc *that the Tenant any thing had before the Recovery*, and it ſeems that it ought to be, Abſque hoc that he any thing had *before the Diſſeiſin.* Br. Traverſe per &c. pl. 52. cites 14 H. 4. 33.

20. In Dower, the Tenant *pleads Jointenancy by Fine with B. who is not Party to the Writ.* The *Demandant avers, that after the Fine her Husband was ſeiſed in Fee* of this Land, *and thereof infeoffed the Tenant alone*

alone, and ſo he was ſole Tenant. Iſſue was taken upon this, and found for the Demandant. The Demandant had Judgment by Advice of Parliament. This is in Favour of Dower; otherwiſe in other Præcipes, if there be not a Confeſſion and Avoidance of the Joint Seiſin, and an Averment of Sole Seiſin on the Day of the Purchaſe of the Writ. 43 Aſſ. pl. 6. 14 H. 6. 8. 25. 17 E. 2. pl. 1. and 13. The Statute De conjunctim Feoffatis aids Jointenancy by Deed, but not by Fine; bnt the Law is as above. Jenk. 9. pl. 15. cites 3 E. 3.

21. Dower, and *demanded the third Part of two Mills, and of other Land*, the *Tenant demanded Judgment of the Plaint; For where ſhe demanded of two Mills, they were only the Scite of two Mills at all Times during the Coverture, and were Toſts*, and *to the other Parcel alleged Tail in N. and conveyed Remitter to the Tenant during the Seiſin of the Baron*, and *to the other Parcel that the Demandant detained from him certain Evidences concerning the ſame Land, and if ſhe would render the Evidences, he is, and at all Times has been, ready to render Dower.* Br. Dower, pl. 39. cites 14 H. 4. 43.

22. In Dower, the *Tenant pleaded Recovery in Aſſiſe againſt the Baron*; Judgment ſi Actio; the *Demandant ſaid, that the Baron was ſeiſed and eſpouſed her, and infeoffed the Tenant, and after diſſeiſed him, and he brought Aſſiſe and recovered*, and the Baron died, and prayed Dower; The *Tenant ſaid, that he was ſeiſed till diſſeiſed by the Baron, and after he recovered by Aſſiſe, abſque hoc that the Baron was ſeiſed before the Diſſeiſin que Dower la poit.* The Demandant ſaid, that ſhe was ſeiſed before que Dower la poit. Br Dower, pl. 38. cites 14 H. 4. 33. Br Confeſs and Avoid, pl. 12 cites S. C.

23. In Dower the *Tenant demands the View*; *after the View* had the *Writ abates for falſe Latin*; the Demandant *brings another Writ of Dower for the ſame Land* againſt the *ſame Tenant*, he *ſhall not have the View* in this Caſe; for Viſus non eſt Neceſſarius, and the * Statute ſays, Non concedatur Viſus Niſi ubi eſt Neceſſarius. By the Juſtices of both Benches. Jenk. 106. pl. 3. cites 3 H. 6. 34. * Weſt. 2. 13 E. 1. cap. 48.

24 In Dower the *Tenant ſaid, that he was ſeiſed till by the Baron diſſeiſed, upon whom he re-entered*; Judgment &c. The *Demandant ſaid, that before the Tenant any Thing had W. was ſeiſed and enfeoffed her Baron, by which he was ſeiſed* &c. and prayed Dower; And per Martin, it is an ill Replication; For it *may be that all this was before the Coverture*, and the Diſſeiſin alſo, and then no Seiſin in the Baron que Dower la poit. Br. Dower, pl. 95. cites 14 H. 6. 5. 6.

25 If it be pleaded that the Land was aſſigned to the Feme in Dower, ſhe *need not ſay that it was by Metes and Bounds*; for it ſhall be intended a lawful Aſſignment, which is by Metes and Bounds. Br. Pleadings, pl. 145. cites 10 H. 6. 1.

26. In Dower it is no Plea *to ſay that the Baron had nothing but for Life*; for this *amounts to general Iſſue*, that Ne unques Seiſie que Dower la poit; Per Cur. Br. Dower, pl. 84. cites 10 H. 6. 17.

27. *But* it is a good Plea *that the Baron had nothing but jointly in Fee with the Tenant who ſurvived*, by reaſon of the Fee Simple confeſſed in him. Br. Dower, pl. 84. cites 10 H. 6. 17.

28. Where the *Tenant pleads a joint Eſtate made to the Baron and J. N. and* that the Baron died, and *J. N. ſurvived, whoſe Eſtate he has*, the *Demandant ſhall not ſay that Seiſie que Dower la poit, without ſhewing how* or to *traverſe that J. N. nothing had of the Feoffment of the Feoffor*, per Newton; which Brook ſays ſeems to be Law. Br. Dower, pl. 48. cites 22 H. 6. 42.

29. In Dower *Tenant to Parcel ſaid, that* 40 *Acres Parcel* &c. *are in the Vill of D. of which he was not Tenant the* Day *of the Writ purchaſed, nor ever after, but J. N. was Tenant*; Judgment of the Writ; *and as to ſix Meſſuages in D. the Plaintiff detained from him certain Evidences concerning*

concerning the ſame Land, and that he has been at all Times ready to render Dower in Caſe ſhe would render the Evidences; Judgment &c. *and as to* 20 *Acres in another Vill, that N was ſeiſed and enfeoffed the Baron, and the Heir now Tenant, and the Baron died, and the Heir ſurvived and held by Survivor*; Judgment &c. *and as to the Land in P. he demanded the View*, and was ouſted of the View; and the Reaſon ſeems to be becauſe he has pleaded to the reſt, he has taken Notice; and the Plaintiff to the Part of which the Survivor was pleaded, ſaid that the Defendant releaſed to his Father in his Life, and ſo Seiſie que Dower la poit priſt, and it was held a good Plea; and to the Detainer of the Evidence Littleton ſaid, this goes to all the Action; which was denied; and the Tenant was compelled to ſhew in certain what Evidence he detained, and ſo he did, viz. a Charter Special &c. Br. Dower, pl. 4. cites 33 H. 6. 51.

30. In Treſpaſs it is not ſufficient *to ſay that the Tenant holds in Dower of the Dowment of A. B.* but *ſhall ſay that W. was ſeiſed in Fee and took her to Feme and died, and the Iſſue entered and endowed her*; quod Curia conceſſit. And by ſome *ſhe ſhall ſhew how ſhe held by Metes and Bounds*; But per Priſot *contra*; For when it is alleged that ſhe held in Dower, it ſhall be intended by Metes and Bounds. Br. Dower, pl 56. cites 37 H. 6. 38.

31. In Dower the *Tenant ſaid, that S. was ſeiſed in Fee and enfeoffed him, and leaſed to the Baron to hold at Will, which Eſtate he continued during his Life, abſque hoc that he was ſeiſed of ſuch Eſtate que Dower* &c. and had *all entered* by Judgment, by Reaſon of the long Continuance of the Poſſeſſion for doubt of the Lay Gents. Br. Dower, pl. 58. cites 39 H. 6. 9.

32. By which he *ſaid that the Baron during the Eſpouſals was thereof ſeiſed in Fee, and conveyed Eſtate to him, and that he endowed the Feme* of it viz. of *the third Part thereof, to which the Feme agreed*, and the Demandant imparled. Br. Dower, pl. 68. cites 5 E. 4. 22.

33. Dower unde nihil habet, the *Tenant ſaid that he was ſeiſed of two Meſſuages and ten Acres of Land in Fee, and this aſſigned to the Demandant for her Dower, to which ſhe agreed*; & non allocatur *without alleging Seiſin in the Baron.* Br. Dowet, pl. 68. cites 5 E. 4. 22.

34. Dower *againſt a Guardian* ſhall be by Name of Guardian, and there it is a *good Plea that he is not Guardian.* Br. Dower, pl. 94. cites 9 E. 4. 31.

35. In *Dower* of the Moiety *of the Manor of D in D.* the *Tenant ſaid, that two Acres, Parcel* of it, *is in S.* and is no Plea; For as the Demand is in D. ſhe ſhall recover nothing but that which *is* in D. Br. Brief, pl. 216. (218.) cites 9 E. 4. 6.

36. And the ſame Year fol. 17. the Tenant was awarded to anſwer, and therefore no Plea to the Writ. Ibid.

37. In Dower the *Tenant ſaid, that he has been at all Times ready to render Dower, and yet is* &c. and the *Demandant ſaid, that he*, viz. *the Baron died ſeiſed, and that ſuch a Day and Year ſhe required the Tenant to endow her at D. and he refuſed* &c. the *Tenant ſaid, that the ſame Day the Tenant offered the Feme to go with her to the Land, and to aſſign her Dower, and ſhe refuſed, abſque hoc that he refuſed*, and the Court held the Iſſue good upon the Refuſal upon this Special Pleading. Br. Dower, pl. 73. cites 13 E. 4. 7.

38. *But* if he had *ſaid Generally that he did not refuſe*, ſome ſaid that it ſhould not be [a good] Plea, becauſe he *does not deny the Requeſt.* Br. Dower, pl. 73. cites 13 E. 4. 7.

Br. Waiver &c. pl. 26. cites S. C.

39. In Dower the *Tenant pleaded Ne unques Seiſie que Dower* la poit; and the *Demandant ſaid, that the Father of her Baron was ſeiſed in Fee, and died ſeiſed, and the Land deſcended to her Baron as Son and Heir*; this

his Feme, *Demandant, then being his Feme, and* after the *Baron, be-re any Entry made by him or any other, died,* and ſo ſhe dowable by he Law; and note, that *ſhe was compelled per Cur. to ſay that no En-y; for if any had entered ſhe ſhould not have Dower, for then there is oſſeſſion in Fact, which tolls the Poſſeſſion in Law,* and after *ſhe con-luded, and So ſhe dowable by the Law,* and the Juſtices held the Con-luſion good, and ſo *ſhe was not compelled to ſay, and So ſeiſed of ſuch eſtate que Dower la poit, but to put it to the Law and to the Judgment of the Court,* and ſo note, that a Feme ſhall be endowed of the Seiſin nd Poſſeſſion in Law without Seiſin in Fact; quod nota; For other-wiſe it is of Tenant by the Curteſy; and the Reaſon ſeems to be *inaſ-much as the Baron may enter in Jure Uxoris, but* the *Feme cannot compel her Baron to enter into his Land*; for if he ſhould ſay ut ſupra, and *ſo Seiſie que Dower la poit, this Concluſion ſhall waive the Special Matter.* Br. Dower, pl. 75. cites 21 E. 4. 60.

40. Error was Aſſign'd becauſe the *Tenant in the Writ of Dower leaded that the Baron was not ſeiſed the Day of the Eſpouſals, et unquam nde Poſtea,* which was held *a Confeſſion of the Action* in a manner, amen quære inde, and after becauſe it appear'd by the Examination of the Clerk of C. B. that the *Record there was nec unquam* inde oſtea, therefore it was *Amended* by the Statute per Judicium, and hat the Demandant recover her Dower and Damages tax'd by the nqueſt 20l. according to the firſt Judgment. Br. Error pl. 188. ites 22 E. 4. 45.

41. In *Dower* the *Tenant ſaid that the Baron was not ſeiſed thereof he Day of the Eſpouſals nor ever after,* and the Jury *found that they were ſeiſed thereof the Day of the Eſpouſals and ever after,* the Verdict has not made the Plea good, but if the Plea had been that they were not ſeiſed the Day of the Eſpouſals and the others ccontra, and it had been found that he had been ſeiſed the Day of the Eſpouſals, his Verdict had made the Plea good. Br. Verdict. pl. 81. cites 22 E. 4. 46.

42. In Dower the *Tenant Vouches the Heir* of the Husband *in the ſame County*; The *Heir demands the Lien and denies it*; *This Iſſue ſhall be tried before the Demandant ſhall have Judgment in Dower.* By all the Judges in the Exchequer Camber. Jenk. 176. pl. 52. cites 4 H. 7. Fitzh. Dower 19.

43. In this Caſe of Dower the *Judgment* varies; If it be *found a-gainſt the Heir that he has Lands in the ſame County* where the Writ is brought, the *Demandant in* Dower *ſhall have Judgment againſt the Heir*; *If* the Iſſue be *found for the Heir,* the *Demandant ſhall have Judgment againſt the Tenant.* Jenk. 176. pl. 52. cites 28 E. 1. Voucher 241. 17 E. 3. 47. 19 E. 2. Fitzh. Reſceipt. 17. 16 E. 3. Fitzh. Variance 61. Judgment 165. 166.

44. The Proceſs is *Summons, Grand Cape and Petit Cape* in the Common Pleas. F. N. B. 148. (D)

45. Dower, the *Defendant pleaded that the Husband of the Demandant was alive at C. in K.* The *Feme replied that her Husband died at F.* in the Pariſh of F. *in the ſaid County of K.* upou which they were at Iſſue; on Day given to make Proofs, the Plaintiff examined her Witneſſes in Court, the Defendant examined no Witneſſes. Judgment was, the Plaintiff ſhould recover her Dower. Mo. 14. pl. 35. Paſch. 2 Eliz. Thorn v. Rolfe.

D. 185 a. pl. 65. S. C. there were no Poſitive Proofs of his being dead but conjectural and preſumptive and no Proof at all of his being alive. And ſo the Demandant recovered ——— Bendl. 86. pl. 131. S. C. and Judgment accordingly. ——— And. 20. pl. 42. S. C. adjudged.

46. In

.46 In Dower *againſt ſeveral Defendants ſome confeſs'd the Action*, and *others demanded the View.* The Juſtices at firſt ſeem'd clear, that ſince they did not vary in Dilatories &c. they ſhall have the View. But 11 R. 2. and 46 E. 3. and 33 H. 6. being to the contrary, and 14 H. 6. 6. this being an Action which is favour'd in Law, the View at length was ouſted according to thoſe Books, but the Court offered to ſeal a Bill of Exceptions, ad quod non fuit reſponſum D. 179. pl. 41. Hill. 2 Bliz. Herbert v. Vernon.

Bendl. 118. pl. 151. S. C adjudg'd. —4 Le. 201. pl. 323. S.C. adjudged.

47. Dower by E. M. *Tenant vouched as Leſſee for Life of a Leaſe of the Husband with Warranty, the Heir of the Husband in Ward to the King, for Cauſe of Gard, and prayed Aid to the King*, and had it, and after a procedendo Judgment was given that the Demandant recover againſt the Tenant, and Tenant againſt the Heir, ſed expectet Executio per Recompenſatione tertiæ Partis prædict' againſt the Heir till he come to full Age, and till the Hands of the King be amoved. Dy. 256. pl 7. Mich. 8 and 9 Eliz. Michell v. Nethercote.

Dal. 100. pl. 31. S C. accordingly.

48. The *Demandant* after the Death of her Husband *entred into the Land in Demand, and continued the Poſſeſſion of it five Years*, and afterwards the *Heir entred*, upon which *ſhe brought Dower.* It was agreed in that Caſe, that the *Tenant needed not to plead Tout-temps priſt after his Re-entry*, for the Time the Demandant had occupied the ſame, is a ſufficient Recompence for the Damages. 3 Le. 52. pl. 75. Mich. 15 Eliz. C. B. Riche's Caſe.

49. It was adjudged, that if the *Sheriff aſſigned Dower* to the Wife by Writ to him directed, *and does not return the Writ*, yet the Wife is lawfully ſeiſed in Dower. Cro. E. 17. in pl. 8. cited Paſch. 25 Eliz. C. B. by Fenner to have been adjudg'd 10 Eliz. in Aſhborough's Caſe.

50. If Dower be demanded of *Common* certain, *the Certainty muſt be ſhewed.* Godb. 21. pl. 27. Paſch. 26 Eliz. C. B.

51. In Dower, the Tenant *pleaded Quod dedit & conceſſit unum Annualem Redditum* &c. in Recompence of Dower, *which ſhe accepted* &c. Per Walmſley, As this Caſe is pleaded there is not any Aſſignment of the Rent for the Dower, and therefore it is not any Bar of Dower, for it is pleaded, Quod dedit & conceſſit unum Annualem redditum &c. and altho' dedit & conceſſit are good Words in the Deed, yet when the Tenant is to plead it, he is to plead it in apt Words, viz. *Quod aſſignavit*; for a Gift of Rent or Land is no Bar to Dower, and to that Purpoſe cited a Caſe in the Years of Ed. 2. in the Book at large, where it was pleaded, that the Son granted Land in Dower to his Feme Ex aſſenſu Patris, and ruled that it was not good, for it ought to have been Aſſignavit; For in pleading every one ought to plead according to Law, and as it is here pleaded the Feme may have a Writ of Annuity upon this Grant, which ſhe cannot have if it were an Aſſignment, and the Words of the Deed being Dedit &c. the Intent of the Parties to have it a Grant does thereby appear, and the Tenant, againſt whom it is, has pleaded it as a Grant; and if he has Election to uſe it as he will, (as in many Caſes a Man ſhall have) yet he has here made his Election to have it as a Grant, and we may not take it otherwiſe, and Judgment accordingly. Cro. E. 452. pl. 19. Mich. 37 and 28 Eliz. C. B. Wentworth v. Wentworth.

52. In Dower, the *Tenant appear'd upon the Grand Cape*, and *being only Leſſee for Years* of the Land he *might plead Non-Tenure*, but whether now he might wage his Law of Non-Summons ſo as the Writ be abated was doubted, becauſe by the Wager of Law he takes upon himſelf the Tenancy, and affirms himſelf to be Tenant according to 33 H. 6. 2. per Priſot, to which it was anſwered by Rhodes and Windham J. that here the Tenant being only Leſſee for Years is not at any

ny Miſchief; For *if Judgment and Execution be had againſt him, he ight notwithſtanding afterwards enter upon the Demandant.* Le. 92. l. 119. Mich. 29 and 30 Eliz. C. B. Michel v. Hyde.

53. Dower againſt W. and D. *Upon the Grand Cape W. made De- ault. D. ſurmiſed that he is not Tenant of the Land, but that the De- andant's Husband leaſed to him for 50 Years*, and that this Action is rought by Covin to him loſe his Term, and pray'd to be receiv'd. And per tot. Cur. *he ſhall be receiv'd, tho' he was Party to the Writ*, nd that by the Statute of Glouceſter, becauſe he is in equal Miſ- hief; And they held clearly, that upon the Default of W. the De- andant ſhould not have a Judgment for a Moiety, the Cauſe of the Receipt trenching to the Whole; And by all but Rhodes, *if Judg- ent had been given upon the Default of both*, viz. *W. and D. yet the Term of D. ſhould ſtand; but D. ſhould be out of Poſſeſſion, and put to his Action.* 3 Le. 168. pl. 219. Mich. 29 Eliz. C. B. Williams v. Drew.

54. A Writ of Dower was brought of Lands in the County of Nor- humberland. The Pariſh Church wherein this Land lay was at New- aſtle, which is a County by itſelf. Per Cur. the *Proclamation of ummons* ought to be *at the Pariſh Church Door*, tho' *in another County* han were the Land lies, and this by the Statute, of 31 El. Cro. E. 472. pl. 35. Paſch. 38 Eliz. C. B. Ragiſter's Caſe.

55. Tenant in Dower *vouched the Heir of the Husband* in the ſame County, *who preſently entered into the Warranty, and ſaid that he had no Aſſets*; *Judgment* was given preſently *againſt Tenant with a Ceſſet Ex- ecutio*; And afterwards the Iſſue was tried and *found that the Heir had ot Aſſets, and the Wife had Execution.* Cited Hutt. 72. as Mich. 28 & 39 Eliz. Aſhburnham v. Skinner.

Win. 88. S. C. cited as adjudged and affirmed in Error.

56. Note, If a Man be ſeiſed of certain Lands, and takes Wife, and fter *aliens* the ſame *Land with Warrauty*, and after the Feoffor and Fe- offee die, and the *Wife of the Feoffor brings* an Action of *Dower againſt he Iſſue of the Feoffee, and he vouches the Heir of the Feoffor*, and *hang- ng the Voucher*, and undetermined, and the *Wife of the Feoffee brings* er Action of *Dower againſt the Heir of the Feoffee*, and *demands the hird Part of that whereof her Husband was ſeiſed*, and *will not demand he third Part of theſe two Parts of which her Husband was ſeiſed.* It was adjudged, that ſhe ſhould have no Judgment until ſuch Time as he other Plea was determined. Litt. S. 54.

57. The *Reaſon why Tout Temps Priſt is a good Plea* in a Writ of Dower brought againſt the Heir to bar her of the mean Values and Damages is, *becauſe the Heir holds by Title, and does no Wrong till a De- and be made.* But in a Writ of Aiel, Coſinage &c. where the Land nd Damages are to be recovered, there ſuch Plea is not good; for here the Tenant of the Land has no Title, but holds the Land by Wrong, aud the Feoffee of the Heir cannot at the firſt Day plead Tout Temps Priſt, becauſe he had not Land all the Time ſince the Death of he Anceſtor. Co. Litt. 33. a.

58. In a Writ of Dower Unde Nihil habet, *no Protection is allowable*; ecauſe the Demandant has Nothing to live upon; but *otherwiſe* it is *n a Writ of Right of Dower.* Co. Litt. 131. a.

59. If one grants a *Rent-charge to a Man and his Heirs*, and dies, nd his Wife brings a Writ of Dower againſt the Heir, and the *Heir n bar* of her Dower *claims the ſame to be an Annuity* and no Rent- harge, yet the Wife ſhall recover her Dower; For he cannot deter- mine his Claim by Election, but by ſuing of a Writ of Annuity; nei- her can the Heir have after the Endowment an Annuity for the two Parts; for that ſhould not be according to the Deed of Grant; for ei- her the Whole muſt be a Rent-charge, or the Whole an Annuity. Co. Litt. 144. b. 145. a.

60. *Tout Temps Priſt* is a good Plea in a Writ of Dower brought againſt the Heir to *bar her of the mean Values and Damages*, the Reaſon is, Becauſe the Heir holds by Title, and does no Wrong till a Demand be made. Co. Litt. 33. a. in Principio.

61. If Dower be *brought againſt one who is not Tenant of the Freehold*, the Tenant before Judgment ſhall be received, and upon Default of the Tenant he may falſify after Judgment. Brownl. 126. Mich. 6 Jac. Anon.

62. In Dower the *Tenant after Appearance of the Jury, but before they were ſworn, made Default*, and a Petit Cape was awarded; at the Day in Bank the *Tenant informed the Court that he is only Tenant for Life, and that the Reverſion is in one P.* who ought to be received to ſave his Title, and the Court ordered him at the Return of the Petit Cape to plead his Plea. Brownl. 126. Mich. 9 Jac. Ld. Morley's Caſe.

63. The *Manner to make Summons* in Dower, if the *Land lies in one County and the Church in another County*; Then upon the Statute the Sheriff ought to come to the next Church, though it be in another County, and there make Proclamation. 2 Brownl. 122. Mich. 9 Jac. C. B. Anon.

64 If *Proclamation* be made by the Sheriff on the Summons, at the Door of any of the Churches where the Lands lie, it is ſufficient, and need not be at the Doors of all. Brownl. 126. Hill. 13 Jac. Allen v. Walter.

65. No *Writ of Error* lies before the Value be inquired of; for till then the Judgment is not perfect. Brownl. 127. Hill. 13 Jac. Gleſold v. Carr.

66. In Dower *of Lands in three Villages*, **Allen's Caſe** was cited 14 Jac. C. B. that a *Summons and Proclamation at the Church of one of them is good*; *and* that the Summons *muſt be* 14 *Days before the Return of the Writ.* But in the Caſe between **Gray and Rowland**, that *want of a Summons is not Error*, *but* that *otherwiſe no Grand Cape ſhall be awarded* by the Statute 31 Eliz. cap. 3. Noy 22. Trin. 15 Jac. Harriſon v. Maſſam.

67. In a Writ of Dower the *Tenant demands the View*, and the *Demandant counterpleads* the View, *Quod le Tenant n'ad Entry Niſi per le Baron*; and thereupon the Tenant demurs; and it was adjudged a good Counterplea, and the Tenant ouſted of his View. Hutt. 44 Hill. 18 Jac. Bridgeland v. Poſt, and cites 9 E. 4. fol. 6. and 2 H. 4. 24.

68. Dower, the *Tenant vouches the Heir in the ſame County, who entered into the Warranty, and pleaded Riens per Deſcent*, upon which they were at Iſſue, and at the Niſi Prius made *Default* at the Day in Bank; *Judgment* was given againſt the Tenant; It was moved that it ought to have been *conditional*, viz. againſt the Heir for what he had in the ſame County, and if he had not any Eſtate, then againſt the Tenant; But the Court held both Ways good. Cro. J. 688. pl. 3. Trin. 21 Jac. B. R. Goldingham v. Somes.

Win. 81. S C. adjornatur. —— Ibid 88. S C. the Court ſeem'd of Opinion that the Judgment might be conditional, but the Judgment ſtood as it was. —— Hutt. 71. S. C. adjudged for the Demandant upon View of a Precedent of 38 & 39 Eliz. Rot. 1208. [or 1288. according to Cro. J.] Aſhburnham v. Skinner.

69. In Dower againſt an Infant, he appeared by his Guardian, and *pleaded that* his Father who was *Husband* to the Demandant, was *ſeiſed of a Meſſuage and certain Lands in Socage*, and *deviſed them to the Widow for her Jointure, and full Satisfaction of Dower, and that* after the Death of his Father, *ſhe entered* into the ſaid Meſſuage and Lands *and was ſeiſed* by Virtue of the Deviſe &c. The *Widow replied* by Proteſtation that he did not deviſe, and for Plea confeſſed the Seiſin of the Husband

Husband and her Entry; but farther pleaded, *that ſhe entered as Guardian in Socage to the Infant, and that ſhe diſagreed to accept the Land by the Deviſe*, and traverſed the Entry and the Agreement. The Court ſaid that this Bar was good, though it had been more pregnant to have alleged that ſhe entred Virtute Legationis prædictæ, and ſo was ſeiſed; And after it was ſaid that the Replication was good without the Traverſe; For this was not expreſly ſet down, but that was merely the Conſequence of the Plea, which in Truth was not traverſable. Win. 100. Mich. 22 Jac. C. B. Baker v. Baker.

70. Error in Dower where the Defendant *pleaded Ne unques Accouple in loyal Matrimony*; Upon a Writ to the *Biſhop* he *certified Quod copulata fuit in vero Matrimonio ſed clandeſtino; & quod W. & E. Thori & menſæ participatione mutuo cohabitaverunt ad mortem prædicti W.* Error was aſſigned, that the Certificate does not anſwer to the Words of the Iſſue, which is Quod ne unques accouple in loyal Matrimony. But reſolved the Certificate was good; for vero Matrimonio (although clandeſtino) copulati is as good as Legitimo copulati Matrimonio, for they are all one by Intendment; and although it be Clandeſtino, yet it does not vitiate the Marriage; and when it is added, Thori & menſæ participatione durante Vita cohabitaverunt, that proves they continued Husband and Wife during his Life. And Judgment was affirmed. Cro. C. 351. pl. 16. Hill. 9 Car. B. R. Wickham v. Enfield.

71. A Woman brings Dower againſt the Tertenant of certain Land in H. in Com. Suſſex ex dotatione A. viri ſui defuncti; The Tenant *pleads a Feoffment of the Manor of Dale to certain Perſons to the Uſe of the ſaid Husband, and the Demandant for their Lives for her Jointure* &c. The Remainder to a Stranger; This Plea is ſufficient without ſaying, that after the Husband's Death ſhe entered and claimed it for her Jointure; Theſe Words are ſuperfluous in this Caſe; (for the ſaid Jointure is a Bar Prima Facie to the Demandant in Dower) the *Demandant replies, that the ſaid Husband before the ſaid Feoffment, had conveyed the ſame Manor to the Uſe of himſelf in Tail, Remainder to the Demandant for Life*, Remainder to a Stranger in Tail; and that after the Death of her Husband, without Iſſue, ſhe claimed the ſaid Eſtate and entered, and by that was in her Remitter; the *Tenant rejoins as above, and does not traverſe the Claim*, and the ſaid Entry and Remitter to be in of the ſaid firſt Eſtate; The Demandant had Judgment affirmed in Error. The Demandant in the Replication need not traverſe the ſaid Entry after the Death of her Husband pleaded in Bar; For it is vain and impertinent; But the Tenant in the Rejoinder ought to maintain his Bar, and traverſe her Entry, and claim by the former Eſtate Tail, Remainder to the Demandant for Life. This firſt Conveyance with a Remainder ut ſupra ſhe ſhould not waive becauſe of the Prejudice of the ſaid Remainder. Jenk. 334. pl. 72. cites Cro. J. 489. Wood's Caſe.

72. And though *neither Day nor Place of Marriage was mentioned* in the Bp's. Certificate it was held not material; For it is not iſſuable becauſe the Certificate of the Bp. is concluſive. Ibid.

73. The Court was moved for a Superſedeas to ſtay Proceedings upon the *Grand Cape* in Dower, Quia *Erronice Emanavit*, becauſe the *Return of the Summons was not accordeng to the Statute* 31 *Eliz. cap.* 3. which ſays, After Summons. 2dly, The Land lies in a Vill call'd H. and the Return is of a Proclamation of *Summons at the Pariſh Church of J. and it does not appear that the Land was in that Pariſh*; beſides it was Proclamari feci ſecundum formam Statuti, and it is *not returned to be made on the Land*; ſo the Grand Cape was ſuperſeded. Mod. 197. Hill. 26 & 27 Car. 2. C. B. Furnis v. Waterhouſe.

74. *Error*

74. *Error* to reverſe a Judgment in C. B. *in a Writ of Dower unde nihil habet, becauſe the View was not granted*; and it was alleged, that although in a Writ of Right of Dower the View is grantable, yet in Dower unde nihil habet *it never was at the Common Law*, becauſe the Woman that had nothing to maintain her ſhould not be delayed in the Recovery of her Right. Freem. Rep. 375. pl. 483. Mich. 1674. Aſtmall v. Aſtmall.

75. Dower unde nihil habet the *Tenant demanded the View*; The *Demandant counter-pleaded, becauſe the Baron alienavit Tenementa prædicta to the Tenant*, & hoc &c. the Tenant demurred generally, and it was inſiſted for him that the Counter-plea was ill, and that it ought to have been *Feoffavit*, for by the Word *Alienavit* it does not appear what Eſtate he had aliened; for a Leaſe for Years is an Alienation; but adjudged that *Alienation implies all the whole Eſtate which he had*, and the Statute Ed. 2. 48. ouſts the Tenant of the View of the Lands which the Husband aliened to him, or to any of his Anceſtors, and ſo the Plea is in the very Words of the Statute, and good. 3 Lev. 220. Trin. 1 Jac. 2. C. B. Bernes & Ux' v. Rich.

3 Lev. 275. S. C. Adjornatur. —— Carth. 133. S. C. adjudg'd that the Writ does not lie. —— 3 Mod. 281. S. C. And per Cur. when a Statute which gives a Remedy for mean Profits is expounded, it ought to be according to the Common Law. Now where intire Damages are to be recovered, and the Demandant dies before a Writ of Inquiry executed, the Executor cannot have any Remedy by a Scire Facias upon that Judgment, becauſe Damages are no Duty till they are aſſeſſed. Sed adjornatur. —— 2 Show. 97. S. C. adjudg'd accordingly.

76. *Tenant* in Dower *dies before Writ of Inquiry* executed; Adminiſtrator cannot bring Scira Facias for the Damages and Meſne Profits. 1 Salk. 252. pl. 1. Trin. 2 W. & M. in B. R. Mordant v. Thorold.

77. Detainer of Charters was pleaded *after Imparlance*, and on Demurrer Judgment was for the Plaintiff. Show. 271. Trin. 2 W. & M. Burdon v. Burdon.

78. In Dower upon *Default Grand Cape iſſued*, and *Demandant ſuggeſted that her Husband died ſeiſed* &c. and a *Writ of Inquiry of the Value of the Lands*, and 60 l. Damages were returned; it was moved to ſtay the filing this Writ of Inquiry becauſe the Tenant had no Notice of it; but it was anſwered, that in real Actions Perſonal Notice is not to be given, but the Tenant is to take Notice, becauſe the Writs, viz. the Summons are always executed on the Lands and not elſewhere; but per Cur. *Perſonal Notice ought to be given of the Writ of Inquiry, and of the Execution thereof*, for the Grand Cape is a Judgment, and thereby the Suit is determined at Common Law; the Damages for the Value of the Land is only an Addition by the Statute of Marlbridge, and therefore for want of Notice the Inquiſition was diſcharged, and Reſtitution was awarded of the Damages levied. 3 Lev. 409. Hill. 6 W. 3. C. B. Perkins v. Lamb.

79. *Want of Abridgment* was aſſign'd in *Error*. See 10 Mod. 225. Paſch. 13 Ann. B. R. Shipley v. Shipley.

In Dower a *Plea of Leſſee for Years* ought not to be receiv'd *after Plea and Judgment for the Demandant*.

80. A *Recovery in Dower will eſtop* the Tenant and all claiming under him from *giving a Prior Term in Evidence*. 2 Ld. Raym. Rep. 1293. Mich. 8 Ann. B. R. Booth v. the Marques of Lindſey, & al. Comyns's Rep. 581. Trin. 11 Geo. 2. Green v. Roe.

(N. a) Pleadings.

Where there muſt be a Profert or Monſtrans of Deeds.

1. IN Dower the *Tenant vouch'd the Heir of full Age*, he ſhall ſhew Deed as it is ſaid; *Quære.* Br. Dower, pl. 98. cites 48 E. 3. 5.

2. In *Dower* the *Tenant pleaded Jointenancy* in the Baron *with W. who Survived*, and the *Demandant pleaded a Releaſe by W. to her Baron*, and becauſe ſhe did not ſhew the Releaſe all the Court councell'd her to plead Seiſie que Dower, and to give this Matter or Releaſe in Evidence, and yet the Deed does not belong to her, and ſo ſhe did. Br. Monſtrans, pl. 37. cites 1 H. 4. 13.

3. *But* the Feme was not ſuffered to plead a *Releaſe in Fee made to her Baron Tenant for Life* without ſhewing the Deed of Releaſe; but ſhe might ſay Seiſie que Dower la poit, and give the Matter in Evidence; Per Paſton, Weſtbury, and Rolfe. Br. Monſtrans, pl. 5. cites 11 H. 4. 83.

4. A *Feme* who is *endow'd of Rent* ſhall not have Aſſiſe without ſhewing the Deed of Commencement, for this belongs to the Heir in Reverſion; Per Paſton, Weſtbury and Rolf. Br. Monſtrans, pl. 5. cites 3 H. 6. 20.

5. A Feme who demands *Dower of Rent* of the Baron need not ſhew Deed, for the Deed of Rent belongs to the Heir; Per Strange; Quod non negatur. Br. Monſtrans, pl. 49. cites 7 H. 6. 1.

6. A Feme ſhall ſhave Dower of a *Rent-charge* without ſhewing the Deed, becauſe the Deed does *not belong* to her; Arg. Pl. C. 46. in the Caſe of Wimbiſh v. Talbois.

(O. a) Judgment and Executions.

1. *Stat. Merton*, 20 E. 3. cap. 1. *OF Widows which be deforced of their Dower, or Quarentine of Lands whereof their Husbands died ſeiſed, and they recover by Plea, they that be convict of ſuch Deforcement ſhall yield Damages the Value of the whole Dower to the Day that the Widows by Judgment ſhall have recovered Seiſin, and ſhall be amerced at the King's Pleaſure.*

The *Statute of Merton extends to Copyholds*, where the *Cuſtom* is, that Women are dowable.

Co. Litt. 33. a. ——— S. P. agreed by all the Juſtices. Mo. 410. pl. 559. Trin. 27 Eliz. B. R. in Caſe of Shaw v. Thompſon. —— Cro. E. 426. pl. 26. S. C. & S. P. admitted, that the Damages were well awarded in the Copyhold-Court. —— 4 Rep. 30. b. pl. 22. S. C. reſolved accordingly. ——— S. P. by Yelverton. Cro. C 43.

Ld Coke ſays he had read in an ancient and learned Reading upon the Statute 20 *H.* 3. *cap* 1. that it *extends only to a Writ of Dower, Unde nihil habet*, and not to a Writ of Right of Dower; For in no Writ of Right Damages are to be recovered. Co Litt. 32. b.

2. Where a *Man married infeoffed A. and died, J. abated* (without Covin of the Feme) *and endowed the Feme*, and *A. brought Aſſiſe againſt them*, and *all found ut ſupra*, and the *Plaintiff recovered two Parts*, and the Br. Damages, pl. 181. cites S. C.

the *Feme retained the third Part in Dower*, and the *Plaintiff recovered Damages, and the third Part of the Damages was recouped.* Br. Dower, pl. 59. cites 12 Aſſ. 20.

Br. Utlagary, pl. 36. cites S. C. and M. 3 E 3.

3. Where a Feme brings Dower ſhe ſhall not recover Damages, becauſe the *Baron was outlawed in Treſpaſs*, ſo that the Franktenement was void only. Br. Damages, pl. 98. cites 13 Aſſ. 5.

4. 4. K. was *endowed by the King in Chancery*, and among other Things *a Rent reſerved by Patent to the King and his Succeſſors upon Grant of a Fair to the Prior of B. and his Succeſſors was aſſigned to her.* Upon this Aſſignment ſhe brought a Scire Facias in the Exchequer, and had Judgment there to recover the Rent, the Arrearages and Damages; but on Error brought in the Exchequer Chamber the Judgment was reverſed as to the Rent and Damages; becauſe ſhe ought not to have Judgment of the Rent being the Inheritance of the King, nor of Damages in the Scire Facias, but as to the Arrearages the Judgment was affirmed, becauſe they were due to her, aud as to theſe ſhe was privileged by her Eſtate for Life to ſue in the Exchequer; Arg. Mo. 565 in pl. 770. cites 14 E. 3. the Counteſs of Kent's Caſe.

5. In *Dower*, the *Tenant ſaid*, that *he has been at all Times ready to render* Dower, *and yet is*, and the *Demandaut averred the contrary*, by which *ſhe recovered Dower, and* for Damages *prayed the Inqueſt to inquire of the Damages*, and could not have it; For it is an Iſſue joined between the Parties, which ſhall be tried by Niſi Prius; Per Cur. Br. Enqueſt, pl. 79. cites 34 E. 3. and Fitzh. Enqueſt, pl. 79.

6. If *a Feme recovers in Dower*, ſhe cannot diſtrain for the Rent, nor ſuch like, before Execution, and the Sheriff may put her in Seiſin by Graſs, Turf, or Beaſts of the Land, but he cannot drive them out, but ſhall take Seiſin by them and diſmiſs them there. Br. Executions, pl. 108. cites 40 E. 3. 21, 22.

7. Dower *againſt the Tenant for Life of the Leaſe of the Heir of the Baron, who vouched the Heir to Warranty*; The *Demandant recovered againſt the Tenant, and he over in Value againſt the Heir.* Br. Dower, pl. 10. cites 41 E. 3. 24.

8. *But* where the *Tenant vouches the Heir to Warranty by the Deed of his Anceſtor*, there the *Demandant recovered againſt the Vouchee, and the Tenant ſhall hold in Peace.* Contra ſupra upon his own Deed; Note a Diverſity. Br. Dower, pl. 10. cites 41 E. 3. 24.

9. *But* it is ſaid in the next Note there enſuing, that in Dower *againſt Tenant for Life of the Leaſe of the Baron, who vouched the Heir to Warranty*, the *Feme ſhall recover againſt the Tenant and he over in Value*, and yet in this Caſe the Reverſion made by the Anceſtor is Cauſe of Warranty. Br. Dower, pl. 10. cites 41 E. 3. 24.

Br. Aſſiſe, pl. 24. cites S. C.

10. In Writ of Admeaſurement of Dower, if the *Tenant comes at the firſt Day ready* to be admeaſured, the *Plaintiff ſhall not recover Damages*; Quod Nota. Br. Admeaſurement, pl. 1. cites 42 E. 3. 19.

11. Where a Feme is *newly endowed in Chancery*, there ſhe ſhall not recover Damages; For thoſe of the Chancery do not give Damages. Br. Damages, pl. 195. cites 42 Aſſ. 32. and 43 E. 3. 32.

Br. Damages, pl. 27. cites S. C.

12. In Dower, the *Tenant made Default after Default*, and the *Demandant averred that her Baron died ſeiſed, and prayed Writ to inquire of Damages*, and had it, and the *Sheriff returned that the Inqueſt returned no Damages*, and the Demandant prayed that he be amerced, becauſe the Writ is not ſerved; Per Thorpe, he ſhall not be amerced but where he returns illy of himſelf, and here he returned as the Jury found. Br. Dower, pl. 13. cites 44 E. 3. 3.

Br. Dower, pl. 16. cites S. C.

13. Scire Facias *againſt the Baron and Feme upon Recovery in Dower againſt them.* The *Baron appeared*, and the *Feme made Default*, and he *ſaid that he is ſole Tenant, and the Feme had nothing*; and the Opinion there-

there was that he ſhall have the Plea well without his Feme, by which he was ſuffered to plead in Bar alone, *and ſaid, that after the Recovery the Demandant entered into the Land claiming the third Part, and delivered Seiſin to the Defendant, who had the two Parts by Name of all that which to him belong in Name of the third Part, rendering one Mark per Annum, and has received it and ſhewed Acquittance thereof*; Judgment if Execution; and the Opinion was, that it is no Plea; For he who recovers Dower cannot enter into the third Part. Br. Scire Facias, pl. 36. cites 45 E. 3. 5.

14. In *Dower*, the *Tenant came at the Summons and ſaid that he has been at all Times ready* to render Dower, and yet is and the *Demandant ſaid that he was not ready*, and that her Baron died ſeiſed, and the firſt Averment of the Demandant cannot be taken, becauſe the Tenant came at the Summons, and *Writ to inquire of the Damages* was awarded, and found that the Baron died ſeiſed, and Damages &c. Per Tilleſley, this *is only Inqueſt of Office*, where it *ought to have been by Iſſue tried*, and therefore the Demandant ſhall not have Judgment upon it; Contra per Thirn. *Quære.* Br. Enqueſt, pl. 17. cites 11 H. 4. 40, 41.

Where the *Tenant has been at all Times ready to render* Dower, the Demandant ſhall not recover Damages tho' her Baron died ſeiſed; For this is not any Default in the Tenant. Br. Dower, pl. 32. cites 11 H. 4. 40.——If the *Baron dies ſeiſed* the Feme ſhall recover Damages. Br. Damages, pl. 52, cites 11 H. 4. 40, 41.

But per Chyan and Hill, where the *Tenant is at all times ready to render* Dower the Demandant ſhall not recover Damages; For no Default is in the Tenant. Ibid.

But in Coſinage the Demandant ſhall recover Damages, tho' the Tenant be ready to render Dower; For he *is not in by good Title*; *Contra of the Heir* in Dower. Ibid.

15. In Dower *againſt two*, the *one ſaid that he aſſigned* 6 *s.* 8 *d. Rent out of the Land to the Feme for her* Life, *the which ſhe accepted* &c. and *the other ſaid that he is, and at all Times has been, ready to render Dower*; and it was held a good Aſſignment, by which *ſhe ſaid that ſhe did not agree to the Aſſignment* and per Strange, ſhe ſhall recover Dower againſt him immediately of the Moiety, tho' the Plea of the other be not yet tried; For *this is as a Confeſſion by the one, and a Plea in Bar by the other.* Br. Dower, pl. 46. cites 7 H. 6. 33, 34.

16. Note, that where the *Tenant confeſſes the Action, or pleads to the Writ* in Dower, the * *Demandant ſhall make ſurmiſe that her Baron died ſeiſed*, and otherwiſe ſhe ſhall loſe her Damages. Br. Dower pl. 78. cites 22 H. 6. 44.

* S. P. notwithſtanding *the Tenant pleaded only to the Writ*; *and in the end of the Surmiſe ſhall maintain her Writ*; For otherwiſe it can't appear upon Plea to the Writ whether the Baron died ſeiſed or not. Br. Dower. pl. 93. cites S. C.——Br. Surmiſe. pl. 18. cites S. C.

17. In Dower, the *Tenant ſaid that he has been at all Times ready to render Dower, and yet is* &c. and the *Demandant ſaid, that* he, viz. *the Baron died ſeiſed, and that ſuch a Day and Year ſhe required the Tenant to endow her at D. and he refuſed* &c. The *Tenant ſaid, that the ſame Day the Tenant offer'd the Feme to go with her to the Land and to aſſign her Dower, and ſhe refus'd abſque hoc that he refuſed*, and the Court held the Iſſue good upon the Refuſal upon this Special Pleading. Br. Dower, pl. 73. cites 13 E. 4. 7.

18. And per Brian, J. ſhe can't have ſeveral Judgments of one and the ſame Thing, but one intire Judgment; For by the firſt Plea the Demandant may recover Dower; but the other Juſtices were in a clear Opinion that *ſhe ought to have her Judgment immediately*, and H. 18 E. 3. in Dower, ſhe had Judgment to recover her Dower *and Enqueſt for the Damages.* Br. Dower, pl. 73. cites 13 E. 4. 7.

19. In Dower, the *Tenant Confeſs'd upon the Cauſe* of Dower, and *did not ſay that he has been at all Times ready* &c. by which the *Demand-*

Br. Dower pl. 49 cites S. C.

mandant pray'd Judgment had it and after ſaid, that her Baron died ſeiſed, and pray'd Damages and Writ of Inquiry of it, and had it notwithſtanding the Averment is taken after Judgment where the Tenant cannot aver any thing, ; For it was ſaid, that it ſhall be intended by his Confeſſion that ſhe is intitled to the Dower and Damages; For it is *included that the Tenant is Deforceor* ; *But* per tot. Cur' *if the Tenant had come at the firſt Day and ſaid that he has been at all Times ready* to render &c. if the Demandant cannot aver the contrary ſhe ſhall not recover any Damage. Br. Damages. pl. 79. cites 14 H. 8. 25.

20. Dower ; the *Tenant Vouched the Heir* and prayed he might be ſummoned in the ſame County, *and he was ſummoned and entred into the Warranty, and confeſſed the Dower* ; *It was moved againſt whom the Judgment ſhould be.* And the Court was in great doubt, *for it did not appear that the Heir had ſufficient to render Dower*, for it would be in vain, and a great Miſchief to the Demandant if they give Judgment for her, when perhaps the Heir had nothing, or not ſufficient to render Dower; And they commanded Precedents in this Caſe to be ſearched. Cro. E. 46. pl. 1. Paſch. 28 Eliz. C. B. Killigrew's Caſe.

After Judgment for the Plaintiff ſhe may before Execution awarded aver, that her Husband was ſeiſed, and ſo to have Damages; Per tot. Cur Godb. 212. pl. 302. Mich. 11 Jac. C. B. Porter's Caſe.——Ibid. cites 14 H. 8. 95 and 26 H. 6. 44. b.

21. In Dower the Jury aſſeſs'd Damages, as in Caſe where the Husband died ſeiſed the which *Dying ſeiſed was not found by the Verdict* ; and Exception being taken thereto, the Court ſaid that the Demandant might pray Judgment of the Lands and *releaſe Damages, or ſhe may aver that the Husband died ſeiſed, and have a Writ to inquire of the Damages*, which all the Prothonatories agreed. Le. 192. pl. 118. Mich. 29 and 30 Eliz. C. B. Butler v. Ayres.

Noy. 65. Whitley v Beſt. S. C. accordingly, and the Court ſaid that the Leaſe of B. is ſaved by the 21 H. 8. cap. 16.

22. In Dower the Tenant made Default after Default ; *B. prayed to be received for his Term made to him before the Coverture*, which was done ; Then the Queſtion was, how Execution ſhould be? It was agreed, that the *Judgment ſhould be entred generally*, that ſhe ſhould recover Seiſin of the Moiety of the Land (the Land being Gavelkind) and that the *Writ ſhould be ſpecial*, that the Sheriff ſhould not Ouſt the Termor, but he ſhould come upon the Land and demand Seiſin for the Feme, and thereby ſhe to have the Moiety of the Rent, with the Reverſion. Cro. E. 564. pl. 26. Paſch. 39 Eliz. C. B. Wheatley v. Beſt.

D. 284. a. pl. 33 ſays it is Common Experience, and the Precedents of C. B. are ſo.——

23. She ſhall recover Damages *only where the Husband ſeiſed*, viz. *of the Freehold and Inheritance* ; For tho' the Husband before the Title of Dower had made a Leaſe for Years, reſerving a Rent, ſhe ſhall recover a third Part of the Reverſion with a third Part of the Rent and Damages ; For the Words of the Statute are, De quibus Viri ſui Obierint ſeiſiti. Co. Litt. 32. b.

Yelv. 112. Mich 51 Jac. B. R. that if the *Baron aliens and retakes for Life and dies*, the Feme ſhall have Dower, but no Damages of ſuch dying ſeiſed ; For it was only of Franktenement.

24. In ſome Caſes where the Husband was ſole ſeiſed the Wife ſhan't be endow'd in ſeveralty by Metes and Bounds ; As for Example if a Man ſeiſed of Lands in Fee, took a Wife and *infeoffed eight Perſons.* a Writ of Dower was brought againſt theſe eight Perſons, and two confeſs the Action, and the other ſix plead in Bar and deſcend to Iſſue, the Demandant ſhall have Judgment to recover the third Part of the two Parts of the Land, in eight Parts to be divided, and after the Iſſue being found for the Demandant againſt the ſix, the

the Demandant ſhall have Judgment to recover againſt them the third Part of ſix Parts in eight Parts to be divided, which is worthy the Obſervation. Co. Litt. 32. b.

25. In a Writ of Dower *Ad Oſtium Eccleſiæ*, or *Ex Aſſenſu Patris*, ſhe ſhall recover no Damages, becauſe *ſhe may enter*, and the Words of the Statute are, Et Dotes ſuas habere non poſſunt ſine placito. Co. Litt. 32. b.

26. Some ſay, that the Demandant in a Writ of Dower that *delays herſelf* ſhan't recover Damages. Co. Litt. 32. b.

27. If ſhe brings a Writ of Dower againſt the Heir, and the *Heir comes into Court upon Summons the firſt Day, and pleads*, that he has been *always ready, and yet is*, to render Dower &c. If the *Wife has* * [*not*] *requeſted her Dower*, ſhe ſhall loſe the mean Values and her Damages; But if ſhe have requeſted Dower ſhe may plead it, and Iſſue may be thereupon taken. Co. Litt. 32. b.

* This word (not) is omitted in the Original, and therefore ſeems miſprinted. ——But Ld. Coke ſays it is holden in ſome Books that a Requeſt en Pais is not ſufficient, but he ſays, that the Law, and many Books are to the Contrary, and that ſo are the Words of the Statute, viz. Et Dotes ſuas habere non poſſunt ſine Placito. 2 Inſt. 32. b. 49.

28. If the Wife has Dower *aſſigned* to her *in Chancery*, ſhe ſhall have no Damages; For the Words of the Statute be, Et viduæ per Placitum recuperaverint &c. So it is if the Heir or his Feoffee aſſign Dower, and the Wife accepts it, ſhe loſes Damages. Co. Litt. 33 a.

29. The *Values and Damages* are to be recovered againſt the Tenant in a Writ of Dower, as it appears in a Record between **Benfield v. Rouſe**, where the *Tenant as to a Parcel pleaded Nontenure*, and *for the Reſidue, Detainment of Charters*, upon which Pleas they were at Iſſue, and both Iſſues *found* by the Jury *againſt the Tenant*, and found *further that the Husband died ſeiſed* ſuch a Day and Year, *and had Iſſue a Son, and that the Demandant and the Son by ſix Years after the Deceaſe of the Husband together took the Profits of the Land, and after the Son* ſuch a Day and ſuch a Year *died without Iſſue, after whoſe Deceaſe the Land deſcended to the Tenant as Uncle and Heir* to him, by Force whereof he entered and took the Profits until the purchaſing of the original Writ, and found the Value of the Land by the Year, and aſſeſs Damages for the detaining of the Dower, and Coſts, and upon this Verdict, after often debating, the *Demandant had Judgment to recover her Damages for all the Time from the Death of her Husband without any Defalcation.* Co. Litt. 33. a.

4 Le. 198. pl. 316. Mich. 8 & 9 Eliz. C. B. Belfield v. Rouſe, S. C. adjudged for the Demandant.—— Bendl. 153. pl. 215. S. C. and the Pleadings, adjudged for the Demandant, and to recover Damages from the Death of the Baron. —— Mo. 80. pl. 213. S. C. adjudged accordingly.

30. A Man ſeiſed of Lands in Fee *takes a Wife* and *grants a Rent-charge*, and after *makes a Feoffment in Fee*, and *takes back an Eſtate Tail and dies*, the *Wife recovers Dower againſt the Iſſue in Tail by Reddition*, the *Wife makes a Surmiſe that the Husband died ſeiſed*, and prayed a Writ to enquire of the Damages, and that is granted to her. In this Caſe ſhe holds the Land charged with the Rent-charge, for *by her Prayer ſhe accepts herſelf dowable of the ſecond Eſtate*, for of the firſt Eſtate whereof ſhe was dowable her Husband died not ſeiſed, *and ſo has ſhe concluded herſelf*, wherefore if the Rent-charge be more to her Detriment than the Damages beneficial to her, it is good for her in that Caſe to make no ſuch Prayer. Co. Litt. 33. a.

31. In a *Writ of Admeaſurement* of Dower the Demandant ſhall recover Damages, if the *Tenant appears not the firſt Day, and yields to Admeaſurement*, for the Iſſues in the mean Time. 2 Inſt. 368.

32. If *Tenant in Dower* be *diſſeiſſed*, and the *Diſſeiſor makes a Feoffment*, the Tenant in Dower *ſhall recover all her Damages againſt the Feoffee*, for ſhe is not within the Statute of Glouceſter cap. 1. by which every one ſhall anſwer for their Time. 2 Brownl. 31. Hill. 8 Jac. C. B.

33. After Judgment *for Part* the Demandant may be *Nonſuit for the Reſidue*, and yet have Execution of that Part for which he had Judgment. Godb. 166. pl. 231. Paſch. 8 Jac. C. B. Foliamb's Caſe.

34. Where a *Reverſion of Lands leaſed for Years, rendering Rent, is granted to the Husband in Fee*, who dies ſeiſed of this Reverſion, the *Widow ſhall be endowed of the Reverſion and the Rent*, but ſhall recover *no Damages* of the Tenant. Win. 8. Paſch. 22 Jac. C. B. Anon.

She ſhall have preſent Execution of the Land, and ſhall thereby have the

35. A. ſeiſed of Land in Fee, makes *Leaſe for Years rendering Rent*, takes Wife and dies; The Wife ſhall have Judgment to have the third Part of this Land for her Dower, and ſhall have the third Part of this Rent, but *Ceſſabit Executio for the Poſſeſſion of the Land during the Leaſe.* Jenk. 73. pl. 38.

third Part of the Reverſion, and the Rent and Execution ſhall not ceaſe; for per all the Juſtices, the Sheriff ſhall *ſerve Execution of the Land as if there was no Leaſe* for Years; for it may be that the Leaſe is void, or it may be that there is no Leaſe, and though it be pleaded the Wife cannot anſwer to it, and therefore the Execution ſhall be general; and *Leſſee may Re-enter* notwithſtanding the Recovery and the Execution of Dower; and if he be *ouſted* he ſhall have his Action. Godb. 165. pl. 231. Paſch. 8 Jac. C. B. Foliambe's Caſe.

36. Regularly where an *Husband died ſeiſed* the Wife ſhall recover her Dower, with *Damages for the whole Time after her Husband's Death*; but if he does not die ſeiſed, then after her Demand, and the Tenant's Refuſal to aſſign Dower to her, ſhe ſhall recover Damages from the Time of the Refuſal. Jenk. 45. pl. 85.

37. In Dower the Defendant *pleads Ne unque Seiſie que Dower.* It was found by the Jury that the Husband was ſeiſed, and died ſeiſed, and aſſeſs Damages to the Plaintiff generally. It was *moved in Arreſt of Judgment, that the Jurors did not enquire of the Value of the Land*, and then Ultra valorem Terræ, tax Damages, as much as is the uſual Courſe, as the Prothonotaries informed the Court, for the Statute of Merton gives Damages to the Wife, ſcil. Valorem Terræ, and the Statute of Glouc. cap. 1. gives Coſts of Suit; but the Court gave Judgment for the Plaintiff, although the Damages are given generally, and certainly intended for the Value of the Land; and there might be in the Caſe a Writ of Error. Hett. 141. Trin. 5 Car. C. B. Hawe's Caſe.

S. P. by Haughton J. cited to have been ruled accordingly. 3 Bulſt 278. * Hutt. 28. Hill. 16 Jac. Egerton v. Egerton, S. C. but S. P. does not appear.

38. If *Baron makes a Feoffment to the Uſe of himſelf for Life*, Remainder *to the Son in Tail*, this is not a Dying ſeiſed in the Baron for the Feme to have Damages in Dower; Per Curiam; And ſo it was adjudged in * **Dame Egerton's Caſe.** But the Baron *ought to die ſeiſed of Eſtate Tail or Fee Simple which may deſcend to his Heir* &c. Litt. Rep. 341. Trin. 6 Car. C. B. Anon.

39. If a *Feme* brings a Writ of Dower, and *recovers*, and the *Defendant dies*, the Feme ſhall have the *Damages againſt the Terre-tenants*; Per Glyn Ch. J. Sty. 470. Mich. 1655. Anon.

A Judgment was obtained in Dower, and a Writ of Error thereupon brought,

40. 16 & 17 *Car.* 2. *cap.* 8. *Execution ſhall not be ſtayed by* Writ of Error *upon any Judgment after Verdict in Dower, unleſs the Plaintiff in ſuch Writ becomes bound to the Defendant in ſuch Sum as the Court to whom the Writ is directed ſhall think fit, that if Judgment be affirmed, or the Writ diſcontinued in his Default, or he be Nonſuit he* will pay ſuch Coſts, Damages, and Sum, and Sums of Money as ſhall be awarded *upon, or after*

after such Judgment &c. to aſcertain which a Writ of Inquiry *ſhall iſſue to inquire of the Meſne Profits and Damages by Waſt done after the firſt Judgment; upon Return whereof Judgment ſhall be given, and Execution awarded for them, and alſo for Coſts of Suit.*

and Recognizance entered into. The Judgment was affirmed,

and then the *Demandant died* inteſtate *before the Damages aſcertained by a Writ of Inquiry.* A Sci. Fa. was brought by the Adminiſtrator, ſuppoſing that the Entering into a Recognizance to the Demandant according to the Statute veſted a Duty in her, eo Inſtanti, and conſequently the Executor or Adminiſtrator intitled, and therefore that he was regular to revive the Judgment by Sci Fa. and ſo to proceed to a *Writ of Inquiry*, and after the Inquiſition returned, and the Duty aſcertained to execute the Recognizance. But it was anſwered, that the *taking the mean Profits* after the firſt Judgment *was a perſonal Tort and in Nature of a Treſpaſs*, and ſo died with the Perſon, and here is no Judgment for any Damages given to the Inteſtate; and that as to this Matter there is no Difference betwixt a Sci. Fa. for Damages upon the *Statute of Merton*, and upon the Statute of 10 & 17 Car. 2. *for in both Caſes the Judgment Quoad the Damages ought to be compleat in the Life-time of the Parties.* And the Court was of that Opinion, and Holt Ch. J. gave another Reaſon, viz. That the *Judgment given was in the Realty* wholly, and an Adminiſtrator cannot have Execution of any Judgment but only in the Perſonalty, and Judgment accordingly. Carth. 132 Mordant v. Thorold. —— Per Holt, There can be no Suit on this Recognizance till there be a Judgment for theſe Damages, and conſequently the Recognizance does not any ways alter it. *The Sci. Fa. to aſcertain* the Damages *muſt be at the Common Law*, and the Common Law Rule is that *Actio Perſonalis moritur cum Perſona.* Show. 97. S. C. —— 1 Salk 252. pl. 1. S. C. adjudged. —— 3 Mod 281. S. C. adjornatur. —— 3 Lev. 275. S. C. and the Court inclined to that Opinion; but adviſare vult.

41. *Judgment* in Dower *by Default and a Writ of Inquiry* of Damages. A Writ of *Error was brought, and pending that Writ the Tenant in the original Action died.* The Judgment was affirmed, and Execution againſt the Lands, and a Scire Facias againſt the Heir to ſhew Cauſe why the Demandant ſhould not have Damages; Adjudged, that *no Damages ſhall be recovered becauſe the Judgment when the Tenant died was only compleat as to the Lands, and not as to the Damages, and they are diſtinct Judgments*; and when the Tenant died before Judgment given as to the Damages, this remains a Judgment at Common Law. Sid. 188. Paſch. 16 Car. 2. B. R. Aleway v. Roberts.

Lev. 38. Aleworth v. Roberts, S. C. ſtates it, that pending the Writ of Error the Tenant aliened the Land and died, and the Judgment for Damages,

was affirmed, and the Demandant brought Sci. Fa. againſt the Heir and the Alienee ſuggeſting her Husband's dying ſeiſed, but the Court agreed that the Damages being given againſt the Deforceors only by the Death of the Heir, they are loſt and are not a Lien on the Land which paſſes with it, and that the Heir, againſt whom the Judgment was had, was the Deforceor. —— S.C. cited Carth. 135.

42. *Scire Facias in a Recognizance* to pay Mean Profits if Judgment be affirmed does not lie for an Executor of Tenant in Dower. Show. 97. Trin. 2 W. & M. Mordant v. Thorold.

1 Salk. 252. pl. 1. S. C. & S. P. reſolved; but if Damages

had been aſcertained upon the Writ of Inquiry and Judgment, they had been veſted in the Inteſtate as a Debt, and the Adminiſtrator as a Debt, and the Adminiſtrator ſhould have had them; but ſhe dying before the final Judgment, and when the Damages were due to her only by way of Satisfaction for an Injury, which is in Nature of a Treſpaſs, and the Writ of Inquiry being in Nature of a Perſonal Action for them, it dies with the Perſon, and a Scire Facias lies not for the Executor or Adminiſtrator.

(P. a) Error.

1. IN Dower *Judgment* was given *upon Nihil dicit*, and becauſe the *Baron died ſeiſed* a *Writ of Inquiry* of Damages was awarded, by which it was *found, that the third Part of the Land which ſhe ought to have in Dower was of the Value of* 8 *l. a Year, and that eight Years elapſed from the Death of her Husband next before the Inquiſition, and aſſeſs Damages to* 8 *l.* and it appeared upon the Record, that after Judgment in the ſaid Writ of Dower the Demandant had Execution on Habere Facias Seiſinam, and ſo *upon the whole Record put together, it appears that Damages have been aſſeſſed for eight Years where the Demandant has been ſeiſed for part of the ſaid eight Years*; whereupon the Tenant brought a Writ of Error, becauſe Damages are *aſſigned to the Time of the Inquiſition*, whereas they ought to be but to the Time of the Judgment only; ſed non allocatur. Le. 56. pl. 71. Paſch. 29 Eliz C. B. Walker v. Nevil.

2. Another Error aſſigned was, becauſe where it is *found that the Land was of the Value of* 8 *l. a Year* they have *aſſeſſed Damages for eight Years, eo* 80 *l.* beyond the Revenue; For according to the Rate and Value found by Verdict it did amount but to 64 l. but that Error was not alſo allowed; for it may be, that by the long detaining of the Dower, the Demandants have *ſuſtain'd more Damages than the bare Revenue* &c. Le. 56, 57. pl. 71. Paſch. 29 Eliz. C. B. Walker v. Nevil.

3. Another Error was aſſigned becauſe Damages are *aſſeſs'd for the whole eight Years after the Death of the Husband*, where it appears that *for Part of the ſaid Years the Demandant was ſeiſed of the* Lands by Force of the Judgment and Execution in the Writ of Dower, and upon that Matter the Writ of Error was allowed. Le. 57. pl. 71. Paſch. 29 Eliz. C. B. Walker v. Nevil.

Cro. E. 557. pl. 14. Williams v. Williams, S. C. adjornatur. —— Ibid. 567. pl. 1. S. C. the Court divided, & adjornatur. —— S. C. cited per Cur. Cro. J. 392. that the Infant ſhould not avoid it by Error for this Cauſe; For if ſo, then ſhe never ſhould recover. —— Roll Rep 326. cites S. P. adjudged, Paſch. 35 Eliz. Williams v. Drue. —— Mo. 847. pl. 1148. cites S. P. and ſeems to be S. C. —— Cro. E. 638. pl. 36. Mich. 40 & 41 Eliz. B. R. Harvey v. Wror, S. P. the Court held it to be no Error; And Rule was given to affirm the Judgment; But it was afterwards reverſed for the Defect of Warrant of Attorney. —— Roll Rep. 326 pl. 32. S C. cited accordingly. —— Cro. J. 111. pl. 8. Hill. 3 Jac. B. R. Smith v. Smith, S. P and Judgment in C. B. affirmed accordingly Niſi. —— 2 Brownl. 118. Mich. 9 Jac Anon. S.P. adjudged accordingly in C.B. and affirmed in Error. —— 2 Le. 59. pl. 85. Mich. 32 Eliz. C. B. the S. P. holden contra; But ſays that afterwards the Judgment was reverſed.

4. Writ of *Dower* was brought *againſt an Infant and two others*, and a *Recovery had by Default*. The Infant brought Error; but the Court ſeemed that it is not reverſable, becauſe it is *not a Recovery in which he might have his Age*. Mo. 342. pl. 465. Hill. 35. and Trin. 38 Eliz. Williams's Caſe.

Cro. E. 568. pl. 1. Williams v. Williams, Trin. 39 Eliz. B. R. the S. C. and Fenner J. as to this ſecond Error held, that he might well aſſign it for Error to diſcharge himſelf of the Damages, but the other Juſtices did not ſpeak thereto; ſed adjornatur. —— S. C. cited per Cur.

5. Another *Error* was *aſſigned*, viz. *that he had nothing in the Land.* The Court doubted, becauſe the Damages were recovered to 200 l. and the *Feme Demandant being dead, her Executors brought Scire Facias againſt the Infant for thi Damages.* Mo. 342. pl. 465. Hill. 35. and Trin. 38 Eliz. William's Caſe.

Cur. Roll Rep. 326. that the Tenant being within Age at the Time of the Recovery, the Judgment was erroneous by reaſon of the Damages recovered againſt him.

6. Dower is brought *againſt an Heir being an Infant within Age.* He *makes Default.* A *Grand Cape iſſues.* He *makes Default again.* The *Demandant has Judgment.* The Infant ſhall not reverſe this Judgment, becauſe a Default is imputed to the Infant in this Caſe, and *his Infancy ſhall not ſave his Default as in other Caſes*; For if ſo, the Woman Demandant ſhall have no Suſtenance during the Infant's Nonage; For the Infant will make Default, and afterwards when ſhe has Judgment upon Default the Infant will reverſe it. By all the Judges. Regularly Infancy excuſes the Default of an Infant, but it does not hold in Dower for the Reaſon aforeſaid. Jenk. 284. pl. 16. cites Mich. 9 Jac. C. B. Rot. 1611.

7. The *Demand* in Dower *was of the third Part of two Meſſuages in three Parts to be divided*, and the *Judgment was to recover Seiſin of the third Part of the Tenements aforeſaid, with the Appurtenances, to hold to him in Severalty by Metes and Bounds*, and adjudged naught, becauſe they are Tenants in Common, and the Judgment ought to be, to hold to him together and in Common; but if it had been in three Parts divided it had been good. Brownl. 127. Hill. 13 Jac. Glefold v. Carr.

8. The *Feme ſuggeſted that her Husband died ſeiſed in Fee* of all the Lands out of which ſhe demanded in Dower. *Exception was taken that he died ſeiſed in Tail only*; but per Cur. it is not material if he died ſo ſeiſed, and that ſhe ought to have her Dower. Sty. 69. Mich. 23 Car. in Caſe of Thynn v. Thynn,

9. If the Jury *aſſeſs Damages without finding the Husband died ſeiſed*, the Demandant may pray Judgment of the Land, and *releaſe her Damages, or aver* that her Husband *died ſeiſed*, and have a Writ to inquire of the Damages. 3 R. S. L. 17.

(Q. a) Admeaſurement. In what Caſes. And for whom.

1. *Weſtm.* 2. 13 E. 1. cap. 7. *A Writ of Admeaſurement of Dower ſhall be granted to a Guardian; neither ſhall the Heir, when he comes of full Age, be barred by the Suit of the Guardian if he ſues againſt the Tenant in Dower feignedly and by Colluſion, but he may admeaſure the Dower after. And as well in this Writ as in a Writ of Admeaſurement of Paſture, more ſpeedy Proceſs ſhall be than has been uſed hitherto; ſo that when it is come unto the great Diſtreſs, Day ſhall be given, within which two Counties may be holden, at which open Proclamation ſhall be made, that the Defendant come in at the Day; at the which Day if he come in, the Plea ſhall go forward; and if he do not come, and the Proclamation be teſtified by the Sheriff, upon the Default they ſhall proceed to make Admeaſurement.*

2. The Writ of Admeaſurement of Dower *lies* where the Heir when he is within Age endows the Wife of more than ſhe ought to have Dower of, or if the Guardian endows the Wife of more than the third Part of the Land of which ſhe ought to have Dower, then the Heir at his full Age may ſue this Writ againſt the Wife, and thereby ſhe ſhall be admeaſured, and the Surpluſage which ſhe had in Dower ſhall be reſtored to the Heir, but in ſuch Caſe there *ſhall not be aſſigned anew any*

Land to hold in Dower, but to take from her ſo much of the Land *which amounts to above the third Part of all* the Land of which ſhe ought to be endowed. F. N. B. 149. (F).

3. The Lord of F. brought Writ of Admeaſurement of Dower againſt M. Tenant in Dower, who *ſaid at the Grand Diſtreſs that ſhe is ready to be admeaſured*, and the *Writ was, that ſhe had more by* 40*l. per Annum than her third Part*, and Writ iſſued to the Sheriff, who *returned that ſhe had more by* 40*s. per Annum* &c. and becauſe he *ought to have extended the Land into three Parts, and to have returned how much ſhe had beyond the third Part* therefore ill, and *Sicut Alias iſſued*; Quod Nota. This is *intended that where Iſſue is joined in this Writ*, that this paſſes by Iſſue; But where it is by *Nient Dedire*, as here, there it ſhall be by Extent by Writ before the Sheriff, and this as Miniſter, and not as Judge, for upon his Return Judgment ſhall be given of it in Bank. Br. Admeaſurement, pl. 2. cites 44 E. 3. 10.

The Writ of Admeaſurement of Dower is Vicontiel,

4. In Admeaſurement of Dower, where it is made before the Sheriff the *Sheriff is Judge*; Arg. 6 Rep. 11. b. cites 44 E. 3. 10. Per Finchden, and 44 E 3. 11. b.

and not returnable, and the Parties may thereupon plead before the Sheriff in the County; But the Pleas may be removed out of the County Court by Pone at the Suit of the Plaintiff without ſhewing Cauſe in the Writ, but if it be at the Suit of the Defendant he ought to ſhew Cauſe. 2 Inſt. 369.

Br. Scire Facias, pl. 241. cites Fitzh. Execution 165. and 22 R. 2.

5. If the *Sheriff delivers the Moiety in Execution for the third Part*, the *Heir ſhall not have Aſſiſe* by reaſon of the Recovery, *but* ſhall have *Sci. Fa.* againſt the Feme. Br. Dower, pl. 83. cites 22 R. 2.

6. If the *Sheriff returns Nihil* in Writ of Admeaſurement of Dower, yet the Plaintiff ſhall have Judgment as if the Proceſs had been returned ſerved; Quod non negatur. Br. Admeaſurement, pl. 7. cites 11 H. 6. 3.

If the *Guardian* in Knight's Service *indows the Mother* of the Ward &c.

7. If the *Heir endows his Mother within Age* of more than of the third Part, he cannot enter into the Surpluſage at full Age, but ſhall have Writ of Admeaſurement of Dower, per Kingsmill J. But per Rede Ch. J. he may enter, As upon Partition made within Age which is not equal. Quære. Br. Admeaſurement, pl. 4. cites 21 H. 7. 29.

of more than ſhe ought to have &c. The Heir when he comes at his full Age may ſue forth a Writ of Admeaſurement of Dower &c. Perk. S. 524.

If the *Heir within Age* be *out of Ward*, and *aſſigns more Dower than he ought* within Age, he may have an Admeaſurement of Dower withiu Age; for enter he cannot. 2 Inſt. 368.

If the *Heir (before the Guardian enters) endows the Wife of more than ſhe ought*, and the *Guardian aſſigns over his Eſtate*;

8. If the *Heir within Age before the Guardian enters* into the Land *aſſigns to the Wife more Land in Dower than ſhe ought to have*, then the *Guardian ſhall have the Writ of Admeaſurement* againſt the Wife by the Statute of Weſtminſter 2. cap. 7. And if the Guardian brings the Writ and purſues it againſt the Wife, yet the *Heir at his full Age by the ſame Statute ſhall have the Writ of Admeaſurement* of Dower againſt the Wife. F. N. B. 148. (F).

his Aſſignee ſhall have no Writ of Admeaſurement. Becauſe it was a Thing in Action. Co. Litt. 39. a.

9. By Bracton, Lib. 4. cap. 17. If *ſhe has Lands in Dower, in diverſe Countries*, there it ought to be Coram Juſticiariis; And note there *the Tenant ſhall have ſeveral Writs*, viz. 1ſt. *In every Writ* of Admeaſurement *all the Lands which ſhe has in the ſame County ſhall be named and admeaſured.* 2dly. If ſhe has Lands in ſeveral Counties there ſhall be *ſeveral Writs, and ſeveral Extents of all the Lands of which the Party died ſeiſed*, as it ſeems, yet he ſhall have one Count, and one Admeaſurement;

measurement; Sed Quære how it ſhall be made. 13 E. 4. Admeaſurement 17. Yet note 7 R. 2. Ibid. 4. The Defendant was to anſwer, notwithſtanding the Exception. 7 R. 2. Admeaſurement. 4. F. N. B. 148. (G) in the new notes there (d).

10. If the *Wife after the Aſſignment* of Dower *improves the Land, and makes it better* than it was at the Time of the Aſſignment; an Admeaſurement does not lie of that Improvement. But if the *Improvement* be *by Caſualty of a Mine* of Coals or of Lead, which are in the Land &c. which have been occupied in the Husband's Time, the Doubt is the more; but *ſhe cannot dig new Mines*; for that ſhall be Waſte if ſhe ſo do. F. N. B. 149. (C).

11. If a *Guardian in Chivalry aſſigns too much* for her Dower, the Heir ſhall have a Writ of Admeaſurement by the Common Law. Co. Litt. 39. a. 2 Inſt. 368. S. P.

12. So if the *Heir within Age aſſigns* before the Guardian enters into the Land *too much* in Dower, the Guardian ſhall have a Writ of Admeaſurement by the Statute of Weſtm. 2. cap. 7. and in that Caſe he himſelf ſhall have a Writ of Admeaſurement at full Age, and ſome have ſaid, That in that Caſe he may have it within Age. Co. Litt. 39. a. But in ſuch Caſe before that Statute the Guardian had been without Remedy; For no Admeaſurement of Dower, being a Real Action, lay for the Guardian at Common Law. 2 Inſt. 367.

13. The Heir ſhall have an Admeaſurement for the *Aſſignment in the Life of his Anceſtor* by the Common Law. And a Writ of Admeaſurement lies upon an *Aſſignment in Chancery*. Co. Litt. 39. a.

14. If the *Heir within Age aſſigns Dower and dies*, his Heir ſhall have the ſame Writ; but if the *Anceſtor of full Age, being Tenant in Fee-Simple, aſſigns Dower more than he ought*, his Heir ſhall never avoid it, becauſe he had full Power to aſſign as much as he would. 2 Inſt. 368.

15. Although the Words of the Writ be in the preſent Time, *Plus habet in dotem* &c. yet it *is to be taken that ſhe had more in Value at the Time of the Aſſignment* of Dower; for if by her Induſtry and Policy it be made of greater Value afterward, no Writ of Admeaſurement lies for this Improvement. 2 Inſt. 368.

16. If in Dower the *Sheriff gives Seiſin on the Habere Facias Seiſinam of more than a Moiety*, the *Heir* cannot enter, nor maintain an Aſſiſe, but *muſt have a Scire Facias to admeaſure* the Lands in the Return. 2 Ld. Raym. Rep. 1294, 1295. Arg. cites Br. Extent. 13. and Fitzh. Execution 165.

(R. a) In What Caſes Dower may be defeated.

1. 6 E. 1. *cap.* 7. *Statute of Glouceſter.* IF *a Woman ſells or gives the Land which ſhe holdeth in Dower, the Heir or other Perſon to whom the Land ought to revert after her Death, ſhall have preſent Remedy to recover the Land by Writ of Entry.*

2. *Weſtm.* 2. 13 E. 1. *cap.* 4. *If the Wife be wrongfully endow'd by the Guardian during the Minority of the Heir; the Heir when at full Age ſhall have Action to demand the Seiſin of his Anceſtor; but if ſhe can ſhew that ſhe had a Right to her Dower ſhe ſhall retain it, and the Heir ſhall be grievouſly amerced according to the Diſcretion of the Juſtices.*

3. Doner

3. Donor reſerves *a Rent upon the Tenant in Tail* and dies, Wife is endow'd of the Rent, Tenant in Tail dies without Iſſue; The Wife ſhall not have Dower any longer. But otherwiſe of an Eſtate in Fee-Simple though *Tenancy eſcheat*, yet the Wife ſhall retein her Dower of the Seigniory. Per Dyer Arg. Mo. 39. pl. 126. Trin. 4 Eliz.

4 *Wife of Feoffee on Condition* is endow'd. Condition is broken. By *Re-entry of Feoffor* Dower is defeated. Le. 299. Arg. pl. 409. Mich. 28 Eliz. C. B.

(S. a) Relief in Equity.

1. IF a Feme be *indow'd in Chancery*, and after the *Land is recover'd againſt her*, ſhe may have *Scire Facias there*, to be indow'd de novo. Br. Juriſdiction, pl. 114. cites 43 Aſſ. 32.

2. The Suit ought to be for the Dower by Petition *in the Chancery*, and not by Writ of Dower in Bank *againſt the Committee of a Ward of the King*, for the Advantage of the King. Br. Dower pl. 66. cites 4 H. 7. 1. Per Brian.

3. A Bill was *to prevent Dower* becauſe her *Husband* was *paſt Memory at the Time of Marriage*, but it was diſmiſed to Law. Toth. 81. cites 3. Jac. Pennington v. Cook.

4. In Dower, the Defendant pleaded that the Demandant was *endowed by Commiſſion out of the Court of Wards*, De dote Aſſignanda, which ſhe accepted of; It was holden by the Court to be a *void Aſſignment*, and ſhall not bind, for that the Dower *ought to be* aſſiigned *out of the Chancery by Writ De dote Aſſignanda*. Cro. E. 364. pl. 28. Mich. 35 & 36 Eliz. B. R. Stainfield v. Bynden.

5. The Lord Keeper declared that a Woman cannot have Dower of a *Truſt*, but compelled the Defendant to anſwer who is Tenant to the Land, to enable her to bring her Writ of Dower. Toth. 163. cites Mich. 2 Car. Kemp v. Lady Reresby.

6. A. before his Marriage with B. was queſtioned for Treaſon, and thereupon made a *Deed of his Lands to his younger Son*, and then marries B. A. was acquitted, and dies. B. brings a Writ of *Dower* againſt the Heir, wherenpon the ſaid Conveyance is given in Evidence to barr her; Thereupon ſhe brings a Bill here, and 'tis decreed that that *Deed ſhould not be given in Evidence*. 3 Ch. R. 94. 1653. Robinſon v. Fletcher.

S. C. cited by the Maſter of the Rolls. Paſch. 1705. that A. *on good Conſideration had promiſed to aſſure* the Lands *to B.* his eldeſt Son in Fee, but falling into Trouble he *conveyed* them to C. his Younger Son, *only to ſecure them againſt a Forfeiture.* After *A.* was free of his Trouble he *conveyed the Lands to B.* and died. *B. marries, and dies, and leaves a Widow, but no Child*, and C. was his Heir, the Widow brought Dower at Law, but upon C's. giving the Conveyance to him in Evidence, ſhe was Non-ſuited. Whereupon ſhe brought a Bill, and had a Decree, and a Commiſſion to ſet out the thirds, and his Honour ſaid, that tho' this was much conteſted, yet Equity and Juſtice prevailed Chan. Prec. 250. in Caſe of Lady Dudley v. Ld. Dudley cited it as 6 May. 1653. Fletcher v. Robinſon. ——S. C. cited by Sir Joſeph Jekyl Maſter of the Rolls, Hill. 1732. who ſaid, that he took it out of the Regiſter Books, and adds, that *C. executed a Declaration of Truſt* to A. and that the Deed to C. was decreed to be ſet aſide as againſt the Widow. 2 Wms's Rep 682 in Caſe of Sutton v. Sutton.——S. C. of Fletcher v. Robinſon cited 3 Wms's Rep. 231. Hill. 1733. in Caſe of Chaplin v. Chaplin.——And Ibid. 233. Chancellor Talbot ſaid, that this ſeem'd a ſtrange Caſe and a moſt extraordinary Truſt, for if the Father, the Ceſtuy que Truſt, ſhould have come for a Performance of that Truſt he could never have recovered, bnt the Son ſhould have held the Land diſcharged, it being a fraudulent Truſt made to protect the Eſtate againſt a Forfeiture. This probably was a ſhort Note of the Caſe for the private Uſe of ſome Gentlemen, and can be of Servlce to no other.——Chan. Prec. 250. S. C. Ld. C. Talbot in the Caſe of Att. Gen. v. Scot, calls this an obſcure Caſe.

7. *Deviſe of* Leaſes and other *Perſonal Eſtates* of a conſiderable Value *in Truſt*, that his Wife ſhould thereout have during her Life 100 l. *per Annum in Lieu and Diſcharge of her Dower*, decreed to Iſſue out of

of the Perſonal Eſtate only if ſufficient, but if not, then to be ſupplied out of the Real Eſtate. Fin. R. 134. Mich. 26 Car 2. Leſquire v. Leſquire.

7. The *Truſt of a Term to attend the Inheritance* ſhall not be *ſever'd* therefrom for Dower, or any other Conſideration, except for Payment of Debts. 2 Freem. Rep 66. pl. 77. Trin. 1681. Tiffin v. Tiffin.

8. Infant Tenant relieved where Dower was *unequally ſet forth* by the Sheriff. 2 Chan. Caſes 160. Hill. 35 and 36 Car. 2. Holby v. Holby. Vern. 218. Hoby v. Hoby, S. C.

9. Bill was to ſet aſide a partial and *fraudulent Aſſignment of Dower*, and relieved. Vern. 218. Hill. 1983. Hobby v. Hobby.

10. The *Wife joins with her Husband in a Mortgage, and levies a Fine to the Intent to Bar her Dower*, and *in Conſideration thereof the Husband agrees the Wife ſhall have the Redemption of the Mortgage*, and the *Husband afterwards mortgages this Eſtate twice more.* The Court took this agreement to be fraudulent, as againſt the ſubſequent Mortgagees, ſo far as to intitle the Wife to the whole Equity of Redemption; But in regard the Wife, in Confidence of this Agreement, had levied the Fine, and thereby barred her Dower, and the *Husband and Wife being both living, the Court decreed that after the Husband's Deceaſe, the Wife, in Caſe ſhe ſhould happen to ſurvive him, ſhould enjoy her Dower*; And whereas the Mortgagees preſſed, that the Decree might only be, that ſhe ſhould enjoy her Dower notwithſtanding the Fine, the Court thought it unreaſonable in this Caſe to put Wife to her Writ of Dower; becauſe they might convey away the Eſtate, and ſhe not know againſt whom to bring her Writ of Dower; And therefore decreed the Dower to her. Vern. 294. 295. pl. 287. Hill. 1684. Dolin v. Coltman.

11. If there be a *Mortgage* by the Anceſtor of the Baron upon the whole Eſtate, Equity will permit her to *redeem* paying her Proportion according to the Value of Thirds for Life, and there is no Precedent in Equity to the contrary; Arg. and Agreed by the other Side, and that the Reaſon is, becauſe the Mortgagee has no Intereſt but to have his Money, and Equity is to execute all theſe Agreements, but never where there is a *Purchaſor*, or where the *Intereſt of the Mortgage* is *aſſigned to the Heir* between herſelf and the Mortgagee, ſhe comes in Place of her Husband, and the Husband could redeem, and ſo may the Wife; But againſt a Purchaſor ſhe has no more Equity than her Husband had, and that is none at all. Parl. Caſes 70, 71. in the Caſe of the Counteſs of Radnor v. Vandebendy.

A Dowreſs may redeem a Mortgage and held over till ſatisfied. Ch. Prec. 137. Palmes v. Danby. —— S. C. cited by Ld. C. Talbot, Mich. 1734. Caſes in Equity in Ld. Talbot's Time 140. in Caſe of Attorney Gen. v. Scott. —— Ch. Prec. 33. Arg. —— Per Ld. Wright Ibid. 152.

12. A gives his Wife a *Legacy and deviſed to her part of his Real Eſtate during her Widowhood*, and deviſed the Reſidue of his whole Eſtate to B for Life, Remainder to his firſt Son &c. Per Somers C. this muſt be taken to be in Satisfaction of Dower, and a *Collateral Satisfaction* may be a good *Bar* to Dower in Equity, tho' pleadable at Law, and decreed accordingly; but this Decree was afterwards reverſed by Wright K. 2 Vern. 365. pl. 327. Mich. 1699. Lawrence v. Lawrence.

Deviſe of Lands to the Wife is no Bar of Dower unleſs it be *ſaid to be in Satisfaction* of her Dower. Ch. Prec. 133. Mich. 1700. Hitchin v. Hitchin.

13. Dower being an Intereſt that does not ariſe by any Contract but by Implication of Law, it *ought to ſtand or fall according to the*

Right at Law without any Aſſiſtance of a Court of Equity; Per Ld. Chancellor. 2 Freem. Rep. pl. 234. pl. 304. Mich. 1699. Browne v. Gibbs.

Chan. Prec. 97. pl. 86. S. C. and Bill diſmiſſed.

14. A. ſettled Lands *to the uſe of himſelf for Life, Remainder to Truſtees for 99 Years for raiſing 200 l. a-Piece for L. and M. Daughters of B. his Son, Remainder to the ſaid B. and the Heirs of his Body &c. Remainder to his own Right Heirs; Provided, that if the Heirs of the Body of B. pay L. and M. 200 l. a-peice at 21, or Days of Marriage, then the Term to be void. B. died leaving no Iſſue but L. and M.* The *Widow of B. brought Dower* and had Judgment, but could have no Benefit at Law till the Determination of the Term, and therefore brought a Bill in Equity to ſet aſide the Term, inſiſting that L. and M were now Heirs of the Body of B. and the Eſtate veſted in them, which was equal to the Payment of the Money, and ſo the Truſt of the Term being ſatisfied, the Term ought not to ſtand in the Way and ſo it is all one as if the Money was paid at the Time and then by the expreſs Proviſo it ought to be void; But the Court diſmiſſed the Bill without Coſts. 2 Freem. Rep. 233. pl. 304. Mich. 1699. Brown v. Gibbs.

2 Freem. Rep 212. pl. 28. S. C. accordingly. —Ld. Somers ſaid

15. In Caſe of a Term kept on Foot to protect a Purchaſe and attend the Inheritance, there is no Releif againſt a *Purchaſer*, and perhaps I could not relieve againſt an Heir; Per Ld. Somers. Ch. Prec. 65. Mich. 1696. Lady Radnor v. Rotheram.

the Court went not on the Reaſon of his being a Purchaſor. Ch. Prec. 99 ——Maſter of the Rolls thought it was decreed purely in Favour of a Purchaſor. Ch Prec. 249 Paſch. 1705.—Hill. 1732. Sir Joſ. Jekyl Maſter of the Rolls cited the Caſe of Lady Bodmin v. Vandebendy, ſince reported by the Name of Lady Radnor v. Rotheram, and that after the different Opinion of two Chancellors, (Jeffries and Somers) it was ſettled by the Judgment of this Court, and affirmed by the Houſe of Lords in that Caſe, that a Dowreſs ſhall not have the Benefit of a *Truſt-Term to attend the Inheritance* againſt a Purchaſor; And ſaid it ſeems, that by the ſame Reaſon that ſhe ſhall not have it *againſt a Purchaſor* of the legal Eſtate, ſo ſhe ſhall not be relieved againſt a Purchaſor of the Inheritance of a Truſt-Eſtate, for in both Caſes the Purchaſor ought to be ſafe. 2 Wms's Rep 639 in Caſe of Sutton v. Sutton.———Show. Parl. Caſes 69. 70. S. C. by Name of Lady Radnor v. Vandebendy.

The Maſter of the Rolls cited the Caſe of **Brown v. Gibbs** decreed by Ld. Sommers, and alſo the Caſe of **Wray v. Williams** decreed by Ld. K. Wright, tho' contrary to his own Opinion, he thinking himſelf bound by the Caſe of Lady Bodmin v. Vandebendy; And ſaid, that the ſame Queſtion came afterwards to be conſidered by the late Maſter of the Rolls, in the Caſe of **Lady Dudley v. Lord Dudley**, and that he in a ſolemn Argument, and great Deliberation, decreed for the Dowreſs; And that ſo did the Ld. Harcourt, Paſch. 1711. (not in 1710 as mentioned in Abr. Equ. Caſes 219.) in the Caſe of **Figford v. Figford**; and that upon a Bill of Review in the Caſe of **Wray v. Williams**, he was of Opinion for the Dowreſs, and over-ruled a Demurrer, and that afterwards the Defendant ſubmitting, a Decree was made by Conſent, fixing a Sum, for the Arrears of Dower, and giving her Poſſeſſion, agreeable to Ld. Hale's Opinion in Hard. 489. and to all the Reſolutions in the Caſe of Tenant by the Curteſy; So that a Dowreſs ſhall have the Benefit of a *Truſt-Term attendant* on the Inheritance *againſt the Heir*, and that this Point ſeems ſettled as to Dowreſſes and Tenants by the Curteſy. 2 Wms's. Rep 639 640. Hill. 1732 in Caſe of Sutton v. Sutton.

S. P. cited by the Maſter of the Rolls as mentioned by Ld. Sommers in the ſaid Caſe of Brown v. Gibbs. 2 Wms's. Rep. 647. in the ſaid Caſe of Sutton v. Sutton.

But where the Truſt of a Term was for raiſing Daughters Portions and Maintenance in the mean Time, and Annuities

16. By Marriage Settlement a Term was limited in Truſt for raiſing *Daughter's Portions*, proviſo on Payment by the Heir the Term to ceaſe. *The Husband dies leaving only two Daughters.* The Wife gets *Judgments* in Dower with a *Ceſſet Executio* during the Term. Ld. Somers denied to ſet aſide the Term, for that would be to relieve her againſt the very Judgment upon which ſhe founds her Right of Relief, and ſhe muſt be content with the Eſtate as the Law gives it. Ch. Prec. 97. Mich. 1699. Brown v. Gibbs.

to others for Lives; after which followed this Clauſe, That the *Truſtees may, ſhall and will permit the Perſon and Perſons who from Time to Time ſhall have Right to the Freehold of the Premiſſes, by Virtue of or under any Uſe herein before limited &c. from Time to Time to have, receive, and take to his and*

and their own Uſe and Benefit, the Reſidue of the Rents and Profits which ſhall remain over and above, or after the Performance of the ſaid Truſts &c —— Proviſo, the Term to ceaſe &c. on Payment or ſecuring &c. to the good liking of the Truſtees by the Perſon or Perſons that ſhall have Right to the Freehold &c. The Dowreſs had brought a Writ of Dower at Law and recovered, but with a Ceſſet Executio during the Term, and on a Bill by her to remove the Term, the Maſter of the Rolls decreed that ſhe ſhould have the Benefit of the Truſt of the Term, as to a third Part of the Profits, above the Charge of the Annuities during their Reſpective Continuance, and after the Determination of all a third Part of the whole Profits for Dower, and the Truſtees to account to her Accordingly, et vice verſa. Ch. Pre. 241. Paſch. 1705. Ld. Dudley, v. Lady Dudley.——Abr. Equ. Caſes 219. pl. 3. S. C.—S. C. cited by the Maſter of the Rolls, Hill. 1732. 2 Wms's Rep. 639. in Caſe of Sutton v. Sutton.——S. C. cited by Ld. Ch. Talbot Caſes in Equ in Ld. Talbot's time 140. Mich. 1735. in Caſe of Attorney Gen. v. Scott.——S. C. cited Arg. 3 Wms's. Rep. 232.

17. Chancery will not let the Heir ſet up an old *Mortgage Term that is ſatisfied* to bar the Widow of her Dower. Ch. Prec. 133. Mich. 1700. * Hitchin v. Hitchin.

* 2 Vern. 403. S. C —— S. C. cited by the Maſter of the Rolls, Hill. 1732. 2 Wms's Rep. 648. —— 2 Freem Rep 241.

18. But in ſuch Caſe, *if the Husband had aſſigned over the Term* which he had Power to do, ſhe had been barred; For there had been a Purchaſor in the Caſe. Ch. Prec. 137. Hill. 1700. * Palmes v. Danby.

* S. C cited by the Maſter of the Rolls, Hill. 1732.

and ſaid, that it was a Mortgage for Years (though not ſo reported) but that the Queſtion is there ſtated generally, Whether a Dowreſs had a Right to redeem a Mortgage? and that Ld. Keeper Wright declared ſhe had; And his Honour ſaid, that he ſaw no Reaſon for a Difference between a Mortgage in Fee and for Years as to the Dowreſs's redeeming in a Court of Equity. 2 Wms's Rep. 648, 649. in Caſe of Sutton v. Sutton.

19. Dower *cannot be aſſigned in Chancery* except it was in the Caſe of Chivalry and Wardſhip &c But if the Heir in Purſuance of a Decree there aſſigns Dower, the Wife is in by the Heir's Aſſignment, and not by the Decree. 7 Mod. 43. Trin. 1 Ann. B. R. Smith v. Angel.

20. The *Mother was Guardian of the Infant Heir*, and received the Rents and Profits of the Eſtate of which ſhe was intitled to Dower, but it was never aſſigned; But Ld. Chancellor held, that the *want of a formal Aſſignment of Dower* is nothing in Equity; For ſtill the Right in Conſcience is the ſame; And if the Heir brings a *Bill againſt the Mother for an Account of the Profits*, it is moſt juſt that a Court of Equity ſhould in the Account *allow a third* of the Profits *for the Right of Dower*. Wms's Rep. 118. to 122. Paſch. 1710. D. Hamilton v. Ld. Mohun.

21. A. the Father ſold Land to J. S. and *granted a 99 Years Term* of other Lands *as a collateral Security*. A. died. B. his Son entered and died. M. the Widow of B. recovered a third of thoſe Lands for her Dower. On a Bill by J. S. to be relieved againſt that Recovery, the Queſtion was, Whether a Dowreſs ſhall be relieved in Equity againſt a Term of 99 Years granted by her Baron by Virtue of a Power in the Deed of Settlement on his Father, who by that Deed was only Tenant for Life, Remainder in Tail to his Son (the Baron) with Power to grant a Term of 99 Years of Lands in *five Pariſhes?* Wright K. decreed Ejectment to be brought upon the 99 Years Term, and ſo the Widow would be evicted of Dower. 2 Vern. 278. pl. 342. Trin. 1700. and 2 Vern. 680. pl. 605. Hill. 1711. Williams v. Wray.

Ld. Wright held that ſhe was not Dowable. Ch. Prec. 151. Hill. 1700. S. C. —— The Caſe of Williams and Wray came by Bill of Review before Ld. Harcourt, and

on ſolemn Argument he reverſed Ld. Wright's Decree, and ordered that the Plaintiff, the Lady Williams, having recovered Dower at Law, the Truſt-Term ſet up by Sir B. Wray ſhould not ſtand in her way in Equity. Wms's Rep. 137. to 139. Hill. 1710. S. C.

22. Lands

However, that learned Argument may be conſidered as tending to prove in general, that a Woman ought to be endowed of a Truſt; yet in that particular Caſe the legal Eſtate was, by the Will of the Donor, directed to be conveyed to the Ceſtuy que Truſt at his Age of 21, and he living to that Age, according to the Principle abovementioned, his Widow was well intitled to Dower. 3 Wms's Rep. 232. in a Note of the Reporter, cites 2 Wms's Rep. 632. Banks v. Sutton.

22. Lands in Fee are *deviſed to J. S. in Truſt to pay the Deviſor's Debts and Legacies, and to educate B. until* 21 *or Marriage, and then to ſettle the ſame on B. and the Heirs of his Body.* B. after 21 married M. and ſome Years after died, the Eſtate Tail not being ſettled according to the Will. M. brought her Bill, praying the Aid of Equity to help her to her Dower, and the ſame was decreed to her by the Maſter of the Rolls. 2 Wms's Rep. 632. 651. Hill. 1732. Sutton v. Sutton, alias, Banks v. Sutton.

And the Maſter of the Rolls ſaid that he did not know, nor could find any Inſtance, where a Dower of an Equity of Redemption was controverted and adjudged againſt the Dowreſs. Ibid. 651. —— The Editor at the End of the Pag. 651. refers to the Caſe of the **Attorney-General v. Scot** & al', 12 Nov 1735, when upon a Bill for Sale of an Eſtate, the Ld Talbot determined that a Wife ſhould not have Dower of an *equitable Eſtate deviſed to the Husband who had mortgaged it* to the Defendant.

23. *And* though in the Caſe above the Lands were in Mortgage at the Death of the Deviſor to W. R. in Fee, ſo that B. was intitled to an *Equity of Redemption* only, yet the Maſter of the Rolls decreed her the Arrears of her Dower from her Husband's Death, *ſhe allowing the third of the Intereſt of the Mortgage Money unſatisfied at that Time*, and her Dower to be ſet out, if the Parties differ. 2 Wms's Rep. 632. to 651. Hill. 1732. Sutton v. Sutton.

24. The Widow of a *Tenant in Tail of a Truſt, to whom the legal Eſtate is by the Will of the Donor directed to be conveyed at his Age of* 21, and he living to that Age is intitled to Dower; Per Sir Joſeph Jekyl Maſter of the Rolls. 2 Wms's Rep. 647. Hill. 1732. in Caſe of Banks v. Sutton.

25. A Dowreſs ſhall be *aided* in Equity *againſt a Truſt-Term* attendant on the Inheritance; Per Sir Joſeph Jekyl Maſter of the Rolls. 2 Wms's Rep. 646. Hill. 1732. in Caſe of Banks v. Sutton.

26. As Dower is more favoured in Law, Reaſon and Equity, than Curteſy, therefore *every Precedent for Tenant by the Curteſy of a Truſt is an Authority for Dower of a Truſt*; Per the Maſter of the Rolls. 2 Wms's Rep. 644. Hill. 1732. in Caſe of Sutton v. Sutton.

27. A Dowreſs ſhall have the Benefit of a *Truſt-Term* againſt an Heir or Deviſee, but not againſt a Purchaſor; Per Sir Joſeph Jekyl Maſter of the Rolls. 2 Wms's Rep. 639. Hill. 1732. in Caſe of Banks v. Sutton.

28. The Lady Handby the Grandmother of P. C. being ſeiſed in Fee, conveyed divers Lands to the Uſe and Intent that certain Truſtees, in the Deed named, ſhould receive and enjoy a Rent-charge of 30 l. per Ann. to them and their Heirs, with Power to diſtrain for the ſaid Rent, and to enter and hold the Land on Nonpayment for 40 Days; and then the ſaid Rent was to be to the Uſe of P. C. in Tail Male, Remainder to the Uſe of the ſame Perſons that had the Land in Fee. P. C. to whom this Eſtate Tail was limited in the Rent died, leaving Iſſue Sir J. C. who intermarried with the Plaintiff the Lady C. and afterwards died without Iſſue Male; whereupon one Queſtion was, Whether the Plaintiff, the Lady C. was dowable of this *Rent of which her Husband died in Tail Male?* After much Debate and Conſideration, Ld. C. Talbot was of Opinion, that the Caſe of a Truſt-Term, ſet up in Oppoſition to Dower, was nothing like the preſent; for there the Judgment is, that the Plaintiff in Dower ſhall recover, but

but ceſſet Executio during the Term, and if the Truſts of ſuch Term are ſatisfied and at an End, the Term ought not to ſubſiſt in Equity to ſtop a favourite Right at Law as Dower, whereas in the Caſe of a Truſt there is no Judgment at Law that the Wife ſhall recover her Dower, for the Husband had no legal Eſtate, nor conſequently any Thing of which the Wife is dowable; And in the Caſe of a Purchaſor, nay even with Notice, the Court would not relieve a Dowreſs againſt a Truſt-Term that ſtood in her way. 3 Wms's Rep. 229. to 233. Hill. 1733. Chaplin v. Chaplin.

29. *Lands in Coparcenary deſcended upon A. and B.—A. died* in about 8 Months after, *before any Receipt of Rent or Partition made.* The Widow of A. brought a Bill againſt B. and others, charging, that Defendants had got Poſſeſſion of all the Title-Deeds, whereby ſhe was diſabled to ſue for Dower at Law, and therefore prayed to have Dower aſſigned Here. Defendants demurred, becauſe Dower is a Right merely at Law, and triable by Jury, and that no Impediment was ſuggeſted why ſhe could not recover there; and it was inſiſted, that for Detainer of Dower Damages were to be aſſeſſed by a Jury, and that ſhe was not intitled to the Poſſeſſion of the Deeds, but that they belonged to the Defendant; But Ld. Chancellor over-ruled the Demurrer upon both Points, ſaying, that in this Caſe A. dying before Receipt of Rent or Partition, ſhe could not recover without the Deeds; and that as A's Eſtate was complicated ſhe muſt here for a Partition, or elſe ſhe muſt at every ſix Months End ſue ſuch as held jointly with her and received the Profits, as well for her Share as for Damages for Detainer, which he thought abſurd and unreaſonable. Caſes in Equ. in Ld. Talbot's Time, 126. Trin. 1735. Moor v. Black.

For more of Dower in General, See **Jointreſs**, and other Proper Titles.

Droit de Recto, or [Writ of Right.]

(A) *Who* ſhall have it.

Fol. 686.

1. A Parſon **ſhall not have it, becauſe he has not any abſolute Fee. 33 Edw. 3. Aid del Roy 103.** Br. Droit de Recto, pl. 1. that Parſon nor Prebendary cannot have a Writ of Right, but a Juris Utrum. —— If a *Parſon prays Aid in Writ of Right of the Patron and Ordinary*, and *they will not join*, there, per Hill, the Parſon *may join the Miſe*, and Judgment final ſhall be given Br. Droit de Recto, pl. 56. cites 29 E. 3. 34. and Fitzh. Scire Facias, 152.—Ibid. pl. 39. cites S. C.

See pl. 1.

2. A Prebendary **ſhall not have a Writ of Right, for he has not an higher Eſtate than a Parſon.** Contra 33 Ed. 3. Aid del Roy 103.

3. A Dean of a free Chapel **ſhall have a Writ of Right, though he hath no College or Common Seal, for he has an abſolute Fee.** 33 Ed. 3. Aid del Roy 103.

4. An Abbot **ſhall have this Writ, for he hath the mere Right.** 10 Ed. 4. 16. 8 H. 6. 24. b.

5. Tenant in Fee determinable, **who has but a baſe Fee,** as **where he has an Eſtate** to him and his Heirs ſo long as J. S. ſhall have Iſſue of his Body, **may maintain a Writ of Right Patent, for he cannot have other Writ in the Right, as Tenant in Tail, or a Parſon may.**

6. If *Tenant in Tail* brings Writ of Right, the Tenant may ſay, That he has nothing but to him and the Heirs of his Body. Br. Droit de Recto, pl. 31. cites 5 E. 4. 2.

7. If *Tenant for Life*, the *Remainder over in Fee loſes by Default*, he in *Remainder ſhall not have Writ of Right*, for he *never had Poſſeſſion.* Br. Droit de Recto, pl. 41. cites Litt. lib. 3. cap. 8.

8. *But if he had entered upon Tenant for Life, and he had loſt by Default*, there he ſhall have Writ of Right upon this Poſſeſſion. Ibid.

9. *None* can ſue or maintain ſuch Writ of Right Patent *but they who have an Eſtate in Fee Simple*, as Tenant in Fee Simple, or Abbot or Prior, or Biſhop, or Maſter of an Hoſpital; and a *Body Politick* as Mayor and Commonalty, or Bailiffs and Commonalty &c. and ſuch Bodies Politick may have ſuch Writs for their Poſſeſſions. But *Parſons, Vicars*, or Chantery Prieſts, or Prebendaries, *who have Patrons and Ordinaries over them*, cannot maintain this Writ of Right Patent, but another Writ which is called Juris Utrum. F. N. B. 5. (C)

(A. 2) What ſhall be ſaid Writs of Right.

S. P. So of Writ of *Right of Land, and of Cuſtoms and Services, Quod permittat in the Debet, Right of Advowſon*, Writ of *Secta Molendini*, and Battle, or Grand Aſſiſe lies; and *e contra* of Writ of Right *of Ward, Ceſſavit, Eſcheat*, and Right *upon Diſclaimer*, which are for the Seigniory, and the ſame Law of Writ of *Meſne*, as of Ceſſavit. Br. Droit de Recto, pl. 34. cites F. N. B. — — And Writ of *Rationabili Parte* is a Writ of Right in its Nature. Co. Litt. 158. b.

1. QUO *Jure*, and *Ne injuſte vexes*, are Writs of Right Br. Droit de Recto, pl. 31. cites 5 E. 4. 2.

2. Note, That a Writ of *Formedon in Deſcender* is admitted a Writ of Right in its Nature, and ordered as a Writ of Right, and not as an Action poſſeſſory; quod nota. Br. Droit de Recto, pl. 33. cites 18 E. 4. 23.

3. *Juris Utrum* is a Writ of Right in its Nature Br. Double Plea, pl. 1. cites 19 H. 8. 7.

(B) *Againſt*

(B) *Against whom* it lies.

1. A Leſſee for Life cannot join the Miſe upon the meer Right. 20 H. 6. 46.
2. A Parſon cannot join the Miſe upon the meer Right, for the Weakneſs of his Eſtate. 20 H, 6. 46.

(C) *Of what* Things and Eſtates it lies, *and at what Time.*

Of what *Seiſin* it lies.

1. If Tenant for Life ſurrenders to the Remainder-man in Fee, (as it ſeems to be intended not in Tail) this is a ſufficient Seiſin to have a Writ of Right. 42 E. 3. 9. b.
2. If an Eſtate be to two, and the Heirs of one, and he that has the Fee (it ſeems that it ſhould be he that has not the Fee) ſurvives, and dies, and a Stranger abates, the Heir may have Right. 42 E. 3. 9 b.
3. If Tenant for Life grants his Eſtate to the Remainder-man in Fee, he may have a Writ of Right. 44 E. 3. 31. b.
4. A *Man aliened pending Præcipe quod reddat againſt him* &c. *and after loſt by Judgment*; the Feoffee has not any Remedy by Writ of Right, nor in other Manner; For the *Recovery has Relation to the Teſte of the Writ.* Br. Droit de Recto, pl. 24. cites 12 Aſſ. 41. S.P. Ibid. pl. 26. cites 50 Aſſ. 3. per ſome of the Serjeants.
5. *But* if the *Tenant brings Writ of Error, and is reſtored,* the *Alienee may enter.* Ibid.
6. Aſſiſe, if a *Man gives in Tail or in Fee upon Condition by Deed indented,* the *Condition is broken*; and after *Diſcent is had,* yet the *Do-Donor, Feoffor, or his Heir may enter*; for he has no other Remedy upon Condition but to enter; for he cannot have Writ of Right; for he *cannot join the Miſe upon the meer Right upon this Poſſeſſion*; The Reaſon ſeems to be inaſmuch as by the Feoffment the Right departs, and alſo *Condition is not a Right but a Title,* and *upon Title without Right never lies Writ of Right*; quod nota. Br. Droit de Recto, pl. 25. cites 33 Aſſ. 11.
7. The Seiſin requiſite in Writ of Right ought to be *actual Seiſin,* and not a Seiſin in Law. 4 Rep. 9. a. by the Reporter in a Nota cites 35 E. 3. tit. Droit. 30. and Litt. Lib. 3. cap. Releaſes, fol. 112. accordingly.
8. In a Writ of Right the Demandant muſt count *of a Seiſin in himſelf or his Anceſtors, and it was in the ſame King's Time as he counts in his Count.* Litt. S. 514. For if neither he nor his Anceſtors were ſeiſed within the Time of Limitation, he cannot maintain a Writ of Right; For the Seiſin of him of whom the Demandant purchaſed the Land &c. avails nothing. Co Litt. 293. a.
9. *Diſſeiſor died ſeiſed,* and *his Heir enters and is diſſeiſed by A. B.* the *firſt Diſſeiſee releaſes to the ſecond Diſſeiſor all his Right,* the *Son of the*

the first Disseisor enters, the *second Disseisor brought Writ of Right*, and yet the Entry of the Heir of the Disseisor was lawful to the Possession; but by the Release of the first Disseisee the second Disseisor got the best Right. Br. Droit de Recto, pl. 52. cites 9 H. 7. 25.

10. *Copyholds* are of so base a Nature that a Writ of Right will not lie of them; Per Cur. 1 Salk. 186. pl. 4. 7 W. 3. C. B. in Case of Brittle v. Dade. cites F. N. B. 12. * (A).

* This is misprinted, and should be 12 (B)

11. A Writ of Right does not lie of *Rent*. And. 16. in pl. 3. Mich. 10 & 11 Eliz.

Bendl. 194. pl 231. S. C. & S. P. —— But Ibid Marg. cites Trin. 3 E. 3. [35]. Fitzh. Hors de son Fee, pl. 3. that Writ of Right of a *Rent-Charge* is maintainable. —— Co. Litt. 160. a. observes that some have inferr'd from Litt. S. 236. that it lies of a *Rent-Seck*, or a Rent-Charge, though they are against common Right; but that in those Actions there mentioned, (as Assise of Mortdancestor, Writ Ayel and Cosinage, and all other manner of Real Actions) it is to be understood *after Seisin had* by some of the Demandant's Ancestors; For without an actual Seisin or Seisin in Deed none of these are maintainable. —— Fitzh. Hors de son Fee, pl. 27. cites Pasch. 15 E. 2. where it was agreed, that in Writ of Right of a Rent-Charge, the Demandant shall be received to have his Writ *without Shewing Specialty*; [which is an Admission that it lies of a Rent-Charge]. —— But Fitzh. Droit, pl. 31. cites 4 E. 3. It. Nott. that it lies not of a Rent-Seck, or Rent-Charge, nor of any Rent unless of Rent-Service. Per Herle.

12. If the *Guardian of the College which now is*, was ever seised he ought to *count upon a Seisin within* 30 *Years*; But upon the *Seisin of his Predecessor* he ought to count of a Seisin *within* 60 *Years*, as another common Person; For the change of the Teste of such a Seisin is as the dying seised, and descent of a common Person. Le. 153. pl. 212. Trin. 31 Eliz. C. B. All Souls Scholars in Oxford v. Tamworth.

13. A Writ of Right does *not* lie *of an Office*; For at the Common Law an Assise did not lie of it, but now it doth by the Statute of Westm. 2. cap. 25. for it was not Liberum Tenementum, but the Party grieved was put to his Quod Permittat; And of this Opinion was the whole Court. Le. 169. pl. 236. Mich. 30 & 31 Eliz. C. B. Salway v. Luson.

14. A Writ of Right was brought by Custos & Collegium of All-Souls in Oxon; and the *Writ was Quod clamant tenere de nobis in Liberam puram & perpetuam Elemosinam, & quod clamant esse jus & Hæreditatem suam* &c. And exeept ons were taken to the Writ. First, It ought to be in Liberam Elemosinam, and not puram & perpetuam. Secondly, It ought to be Eleemosinam with a double *ee*. Thirdly, They ought not to shew any Tenure in Spccial, but generally Tenent de nobis. Fourthly, For that they *say not in jure Collegii*; Sed non Allocatur. For the first is but Surplusage, and not material; the Second the common Course is so, and therefore it is good. Thirdly, they did well to express the Tenure; for otherwise it might be taken for a Tenure in Capite, which they do well to avoid. Fourthly, When the Writ is by Custos & Collegium, this cannot be but in Jure Collegii, as in their Incorporation; for they have no other Capacity, and the Precedents are both Ways. Cro. E. 232. pl. 1. Pasch. 33 Eliz. C. B. The Warden of All-Souls College in Oxon v. Tamworth.

15. *Lands are let to A. for Life*, the *Remainder to B. for Life*, the Remainder *to the right Heirs of A.* A. dies, B. enters and dies, a *Stranger intrudes*; the Heir of A. shall have a Writ of Right of the Seisin which A. had as Tenant for Life. Co. Litt. 281. a.

16. *Lands are let to A. and B. and to the Heir of A. A. dies, a Recovery is had against B.* the Heir of A. shall have a Writ of Right of the Whole; for every Jointenant is seised per my & per tout. Co. Litt. 281. a.

17. If *Lands* be *given in Tail* the *Remainder to A. in Fee*, the *Donee dies without Issue*, his *Wife privement enseint*, *A. enters*, the *Issue is born*, and

and *enters upon him and dies, without Iſſue.* A. ſhall have a Writ of Right of the Seiſin which he had. Co. Litt. 281. a.

16. If *Lands* be given *in Tail to A.* the *Remainder to his right Heirs, A. dies without Iſſue,* the *collateral Heir of A. ſhall have a Writ of Right of the Seiſin of A.* Co. Litt. 281. a.

(D) Proceedings. And of joining the Miſe, and by what Perſons.

1. NOTE, that *the four Knights choſe* 16 *of themſelves and of others to try the great Aſſiſe,* and the *Sheriff returned that there were not ſo many Knights there,* by which *Proceſs was directed to the four Knights to chooſe of the County next adjoining.* Br. Droit de Recto, pl. 40. cites 33 E. 1. and Fitzh. Trial, pl. 97.

2. *Right of Advowſon was brought by the King,* the *Tenant ſhall not tender the half Mark,* nor ſhall Judgment final be given againſt the King. Br. Droit de Recto, pl. 43. cites 20 E. 3.

3. *Releaſe of the Demandant himſelf, or of other Anceſtor Collateral,* is a good Bar without joining the Miſe, and Judgment final ſhall be given. Br. Droit de Recto, pl. 43. cites 20 E 3. and Fitzh. Droit 21.

4. The *Tenant before any Iſſue may tender the Half Mark* to have the Seiſin inquired. Br. Droit de Recto, pl. 37. cites 34 E. 3. and Fitzh. Judgment 256.

5. In Writ of Right the *Tenant joined the Miſe,* and *Writ iſſued to make four Knights to come to chooſe the Grand Aſſiſe returnable Quindena Martini,* and *at the fourth Day one of the four Knights came and had Day over.* Br. Droit de Recto, pl. 3. cites 42 E. 3. 14.

6. Droit *by two againſt the Baron and Feme, of a Houſe, ſix Acres* &c. and the *Baron and Feme came in proper Perſon and defended Tort and Force,* and *the Right of the Demandant all* † *attrenched and their Seiſin* &c. *all entered as of Fee and of Right* &c. *and namely of a Houſe* &c. *and put himſelf in God and the Grand Aſſiſe of our Lord the King, the which of them have the beſt Right to hold the Houſe* &c. *to them and to their Heirs in Jure Uxoris as they held, or the Demandants to have as they demanded,* and after the *Baron made Default,* and the *Feme was received and joined the Miſe,* ut ſupra; and after *ſhe made Default,* and *Judgment final was given* againſt him, *that the Demandants recover Seiſin* &c. *to hold in Common to them and their Heirs for ever,* quit of the Baron and Feme and their Heirs. And it is ſaid there that the Feme in this Caſe is ouſted of all Actions. Br. Droit de Recto, pl. 4. cites 44 E. *24.

† Quære the Meaning of the Word.

* This ſeems miſprinted for 44 E. 3. 28. a. pl. 7 — Fitzh. Judgment, pl 99. cites 44 E. 3. 28. S. C.

7. Droit; the *Defendant made Default* by which *came two at the ſecond Default and were received and vouched,* which *Vouchee* came and pleaded at the *Grand Aſſiſe,* and the *Writ iſſued to the Sheriff to return four Knights, returnable at a certain Day, at which Day the Vouchee and one of the Prayees were dead,* by which *Reſummons iſſued to the other returnable at a certain Day, at which Day he was eſſoined;* Per Culpepper, the Proceſs is diſcontinued; becauſe the Death does not come in by Return of the Sheriff, and yet he was awarded to anſwer; by which they joined the Miſe, and the *Writ iſſued to make the four Knights come,* and it was returned that there were not four Knights but Burgeſſes; and for Inſufficiency of the Return, he was amerced, and other iſſued ut ſupra, returnable &c. at which Day the Sheriff returned it, by

which *they were demanded and came to the Bar with their Swords by their Sides, and were charged well and lawfully to be twelve Knights* Gladio cinctos *of themſelves, and of others who beſt knew and could ſay true between the Demandant and the Vouchee, and* was commanded by the Juſtices *that the Parties go into a Chamber with the Knights to elect and declare their Challenge to the other choſen by the four Knights*; For after the Return of the Panel made by the four Knights, the Parties ſhall not have Challenge to the Panel nor to the Polls before the Juſtices. Br. Droit de Recto, pl. 6. cites 7 H. 4. 3. 20. and 39 E. 3. accordingly.

8. In Writ of Right upon Diſclaimer *Acceptance of Rent in Pais after the Diſclaimer* is a good Bar; Agreed Arguendo. Br. Droit de Recto, pl. 47. cites 21 H. 6. 25.

9. *Warrant of Attorney* in Writ of Right offered to Littleton *was refuſed, becauſe the Party himſelf did not come in Perſon to record it*; For he ſaid that Writ of Right was ſtronger than a Fine; for it was in Writ of Right. Br. Garrant. de Attorney, pl. 32. cites 7 E. 4 9.

10. *Tenant for Life may join* ſpecially, viz. *That he has better Right to hold for Term of Life, the Reverſion regardant to W. S.* &c. *than the Demandant has to demand* &c. Br. Droit de Recto, pl. 15. cites 9 E. 4. 36. Per Littleton.

11. A Man brought a Writ of *Droit cloſe in Ancient Demeſne*, and *made Proteſtation to ſue in Nature of a Writ of Right at the Common Law*. The *Tenant joined the Miſe upon the mere Right*, and upon that *removed the Record by Accedas ad Curiam*; but becauſe that is no Cauſe, a Procedendo was awarded to the Bailiffs. Dy. 111. pl. 47. Hill. 1 & 2 P. & M. Abbot v. Stafford.

Dal. 68. pl. 36. S. C. in totidem Verbis.

12. It was holden by the Juſtices in this Caſe, That it is a good *Challenge* in a Writ of Right *to the four Knights, that they are not Gladiis Cincti*; and a Challenge to them *muſt be made upon their Appearance*; For after they are once ſworn they are not challengeable. Alſo the four Knights are to make the Pannel, and they need not put their Names to the Return of it, as the Sheriff ſhall do, for this is not within the Statute of York; and they ought to return but twelve Perſons beſides themſelves to be of the Grand Aſſiſe. Mo. 67. pl 181. Trin. 6 Eliz. Squire v. Read.

D. 247. b. pl. 75. Hill. 8 Eliz. S. P. becau'e the Miſe is joined and prayed by him firſt.

13. In Writ of Right it was ruled per Cur. 1ſt, That *the Demy Mark ought to be tender'd at the joining of the Miſe*, and yet the Judge in the preſent Caſe took it at the Appearrnce of the Jury. 2dly, That *Tenant ought to commence in the giving of Evidence.* 3dly, The *Jury cannot give a Special Verdict.* Mo. 762. pl. 1057. Trin. 3 Jac. C. B. Andrews v. Ld. Cromwell.

Spyrtie v. Read. —— Ibid. ſays the ſame Order was obſerved between Newburgh and Thornhil in Com' Dorſet, 9 Eliz. —— Ibid. Marg. cites the ſame Order obſerved for Land in Com' Hereford, Trin. 28 Eliz. in Caſe of Haydon v. Ibgrave.

14. A Writ of Right of Advowſon a Purchaſor cannot have, without *alleging a Preſentation* in his own Time. 2 Inſt. 356.

(E) Pleading

(E) Pleadings.

1. ASsize; it was said, that in Writ of Right *of Seisin of his Ancestor*, *Last Seisin* is a good Plea. Quære if it shall be pleaded, or if the Half Mark shall be tendered to inquire of it. Br. Droit de Recto, pl. 49. cites 5 Ass. 1.

2. Recto; Præcipe in Capite *of* 20 *Acres of Land quas clamat Tenere de Rege in Capite*, the *Tenant shall not have Pleas that the Land is held of J. N. and not of the King*; but the Lord, if he be present, may demand his Count; but the Tenant may take it by Protestation and Answer. Br. Droit de Recto, pl. 9. cites 38 E. 3. 13.

3. Writ of Right *Præcipe in Capite quam clamat Tenere de Nobis in Capite*, and *does not express by what Services*, and Exceptions taken; & non allocatur. Br. Droit de Recto, pl. 50. cites 39 E. 3. 20.

4. In a Writ of Right, if the *Tenant pleads a Release of Ancestor by whom the Demandant claims*, this is only to the Assise or Battle; but if it be of an Ancestor Collateral, this is a Bar; But it seems that this is intended where the *Release* is *with Warranty*, for otherwise there is no Case Ex Parte of a Collateral Ancestor which never has Right. Br. Droit de Recto, pl. 6. cites 7 H. 4. 19.

5. In Writ of Right there are *several Defences*, *one at first*, and then may *demand Oyer of the Writ*, and then *Defence after the Count*, and may *vouch or plead in Bar*, and *after the Replication made*, *to make Defence and answer* to it; Nota, per Newton. Br. Droit de Recto, pl. 11. cites 21 H. 6. 26. Br. Defence, pl. 7. cites S. C.

6. Præcipe in Capite, the Tenant shall not say by *Plea that the Land is held of another*, *and not of the King*, but *shall take it by Protestation*, and plead other Matter. Br. Droit de Recto, pl. 19. cites 27 H. 6. 27.

7. Debt in Writ of Right the *Mise is joined*, and the *Tenant gave in Evidence a Release made in another County*, the *Grand Assise ought to find it*; For it is said elsewhere, that *nothing may be pleaded in this Action but Collateral Warranty*, but all others shall be given in Evidence. Br. Droit de Recto, pl. 48. cites 9 E. 4. 40. Br. Enquest, pl. 59. cites S. C.

8. In Writ of Right, the *Demandant counted of the Seisin of his Ancestor*, *or of himself*, this *shall not be traversed*, *but* the *Tenant may tender the half Mark to inquire of the Seisin*. Br. Droit de Recto, pl. 32. cites 10 E. 4. 9.

9. *But* if *such Recovery* in Writ of Right be *pleaded in Bar in other Action*, there the *Demandant may traverse the Seisin by way of falsifying*; Quære inde if it be against Privies. Br. Droit de Recto, pl. 32. cites 10 E. 4. 9.

10. *But* at this Day *Issue may be tendered upon the Seisin by* the new Statute of Limitation, 32 H. 8. cap. 2. Br. Droit de Recto, pl. 32. cites 10 E. 4 9.

11. *Collateral Warranty* is a good Bar in Writ of Right, and it shall not be tried by Grand Assise, but by Jury; for it is not upon the Right, but upon the Deed. Br. Droit de Recto, pl. 42. cites F. N. B. fol. 1.

12. Error upon a Judgment in Wales in a Quod ei deforceat in nature of a Writ of Right. Error assigned was, that the Issue is not well joined, because he *pleaded he has majus Jus tenendi Tenementa prædicta than the Plaintiff*, and he does *not say sibi & Hæredibus suis*, &c.

according to the uſual Courſe; for it may be that he was Tenant for Life, or Tenant in Tail, and therefore becauſe he did not ſhew in Certainty que Eſtate it was ill; ſed non allocatur; for the Court would not intend he had a leſſer Eſtate than in Fee, and if he were but Tenant for Life, it was at his own Peril to plead in that Manner, for it is a Forfeiture of his Eſtate; and it was held to be no Error. Cro. C. 178, 179. pl. 2. Hill. 5 Car. B. R. Griffith v. Jenkins.

13. In a Writ of Right there *ought to be a Double Defence*, viz. [*againſt*] *the Plaintiff's Right, and to maintain his own Right*; Arg. and ſeems admitted. Cro. C. 310, 311. Trin. 9 Car. B. R.

(F) Neceſſary or not. In what Caſes.

1. MOrtdanceſtor; Note by Award, that *where the Father dies ſeiſed*, the *Heir enters*, and a *Stranger recovers againſt him by Writ of Entry ad Terminum qui præteriit by Default*, the *Heir may have Mortdanceſtor though the Recovery was by Default, and ſhall not be put to Writ of Right*; and ſo ſee that upon every Recovery by Default a Man is not put to his Writ of Right. Br. Droit de Recto, pl. 23. cites 11 Aſſ. 17.

2. If *Præcipe quod* reddat be brought *againſt Tenant for Life who vouches a Stranger*, and the *Demandant counterpleads*, and it is *found for the Demandant*, he in the *Reverſion has no Remedy but* by Writ of Right. Br. Droit de Recto, pl. 30. cites 5 E. 4. 2.

3. *So* where the *Vouchee enters into the Warranty and loſes* by Action tried or by Default. Br. Droit de Recto, pl. 30. cites 5 E. 4. 2.

(G) Judgment Final.

1. *RIGHT of Advowſon brought by the King*; Judgment Final ſhall not be given againſt the King. Br. Droit de Recto, pl. 43. cites 20 E. 3.

2. Where the *Defendant joins the Miſe*, and *Day is given to him till the next Week*, and *he makes Default at the third Day after* &c. Judgment Final was given upon the Default. Br. Droit de Recto, pl. 43. cites Fitzh. Droit, pl. 15. ——— And this ſee in Droit in Fitzh. 27. Itin. Northt. but Judgment ſhall be that he ſhall recover. 33 E. 3. Ibid.

3. Judgment final was given *againſt a Feme Covert after ſhe was receiv'd and join'd the Miſe and made Default*, and ſhe was barr'd of Action for ever. Br. Judgment, pl. 45. cites 44 E. 3.

Ibid. pl. 35. cites S. C.— Ibid. pl. 55. cites S. C.

4. Droit, the Court was informed that the *Tenant had only in Tail*, and therefore they would not give Judgment final. And from hence it ſeems that Judgment final ſhall bind the Tenant in Tail and his Iſſue. And it was ſaid, that it was for fear of barring the Iſſue in Tail; and they took Adviſement. Br. Droit de Recto, pl. 46 cites 3 H. 6. 55.

5. In Writ of Right, the *Tenant vouch'd one who was taken and entred into the Warranty*, and the *Demandant counted*, and *he made Defence and joined the Miſe*, and the *Demandant imparled till the next Day*, at

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at which Day the *Vouchee did not come*, by which upon good Argument *Judgment final* was given for the Demandant againſt the Vouchee *to hold quit*, *but common Judgment in Value* was given *for the Tenant againſt the Vouchee*, and not Judgment final. Br. Droit de Recto, pl. 57. cites 10 H. 6. 2.

6. Writ of Right, if the *Demandant* be *nonſuited after Appearance*, *or after Miſe joined*, Judgment final ſhall be given 18 E. 2. and 10 E. 2. and 1 E. 3. & concordat 13 H. 4. 8. Fitzh. Judgment, 245. and *in other Caſes*, *Judgment final ſhall not be given unleſs they be joined*, unleſs in Special Caſes as here. Br. Droit de Recto, pl. 60. cites 11 H. 6. 9.

7. Judgment final ſhall *not* be given *againſt an Infant* within Age, per Danby and Yelverton, but Choke and Littleton contra. And Littleton ſaid that the Opinion of him and his Companions was, that if a *Feme Covert* be *received* in Writ of Right in default of her Baron and joins the Miſe, and it is found for the Demandant, yet the Demandant ſhall not have Judgment, and this for the Advantage of the Baron. Br. Judgment, pl. 46. cites 9 E. 4. 16.

8. Writ of Right *againſt an Infant within Age*, *who appear'd by Guardian*, *and vouched one who enter'd into the Warranty and joined the Miſe*, *and after made Default*. Catesby prayed Judgment final againſt the Tenant, and had it upon great Debate. Br. Droit de Recto, pl. 15. cites 9 E. 4. 36.

9. *But* it is ſaid that *if he had joined the Miſe himſelf*, Judgment final ſhould not be given againſt him. And per Choke J. *when he vouches*; he *loſes the Benefit of his Age*, as if he had pleaded in Bar. Br. Droit de Recto, pl. 15. cites 9 E. 4. 36.

Note per Danby and Yelverton, Judgment final ſhall not be given *againſt an Infant*; Contra per Choke and Littleton. Br. Droit de Recto, pl. 17. cites 9 E. 4. 16.

10. The *Tenant ſhall have Judgment final againſt the Demandant if* it paſs for him. Br. Droit de Recto, pl. 15. cites 9 E. 4. 36.

11. Droit, *Iſſue was joined upon the mere Right upon the grand Aſſiſe*, *and Niſi Prius iſſued*, *and at the Day the Tenant made Default*, and the *Demandant prayed Judgment final.* Br. Droit de Recto, pl. 28. cites 12 H. 7. 10.

12. *For if* the Demandant be *nonſuited after the Miſe joined*, the Tenant ſhall have Judgment final. Br. Droit de Recto, pl. 28. cites 12 H. 7. 10.

13. *And if* the Tenant *has Day to imparl to another Day in the ſame Term*, *and makes Default at the Day*, the Demandant ſhall have Judgment final. Br Droit de Recto, pl. 28. cites 12 H. 7. 10.

14. *But by Default of the Tenant at the Niſi Prius*, *the Demandant cannot have but only Petit Cape*, by which he ſued Petit Cape. Br. Droit de Recto, pl. 28. cites 12 H. 7. 10.

15. *And if the Tenant joins the Miſe by Champion*, *and at the Day appears*, *and his Champion not*, Judgment final ſhall be given. Br. Droit de Recto, pl. 28. cites 12 H. 7. 10.

16. And *if the Tenant at the Day of the Return of the Petit Cape cannot ſave his Default*, Judgment final ſhall be given. Br. Droit de Recto, pl. 28. cites 12 H. 7. 10.

17. And per Vaviſor *if the Demandant makes Default after the Miſe join'd* he ſhall be barr'd for ever. Br. Droit de Recto, pl. 28. cites 12 H. 7 10.

18. Note, per Fitzherbert J. Judgment final *ſhall not be given* in Writ of Right, *but after the Miſe joined.* Br. Droit de Recto, pl. 16. cites 26 H. 8. 8. Br. Judgment, pl. 44. cites S. C.

Br. Judgment, pl. 44. cites S. C.

19. *And* by him and Shelly J. *where the Tenant vouches* in Writ of Right, *and the Demandant recovers againſt the Tenant and the Tenant over in Value* the *Judgment ſhall not be final for the Tenant againſt the Vouchee*; Quod Nota. Br. Droit de Recto, pl. 16. cites 26 H. 8. 8.

Bendl. 199. pl 228. Low and Kyne v. Paramour, S. C. and the Pleadings and Judgment.

20. In a Writ of Right the *Tenant choſe Trial by Battel*, but when every Thing was prepar'd and perform'd, and the Day and Place appointed for the Battel, the *Demandants being ſolemnly call'd, made Default*, whereupon Final Judgment was againſt him. D. 301, 302. a Trin. 13 Eliz. Thevin v. Paramour.

The Reporter ſays he was of Counſel with the Demandant, and that the Nonſuit was by reaſon of an Agreement made between the Parties by the Juſtices.

21. In Writ of Right the *Iſſue was join'd on the meer Right, and when the Jury came to the Bar to give their Verdict*, the *Demandant was called, but did not appear*, whereupon the Tenant pray'd the Court to record the Nonſuit, and ſo it was done. Per Cur.. all is one as if he had appear'd; For *this Nonſuit is peremptory* for ever by reaſon that the Iſſue is join'd upon the meer Right, but had the Iſſue been join'd upon any *Collateral Point* it had been otherwiſe. Gouldsb. 90. pl. 1. Trin. 30 Eliz. Heiden v. Smithwick.

Mo. 403. pl. 536. Ap. Richard v. Penry S. C. The opinion of the Court upon Conference with ſeveral of the Juſtices of England was, that the Judgment ought to be affirmed.— Jenk. 259. pl. 56. S. C. accordingly. And ſays that a Writ of Error ſhould have been brought

22. In *Quod ei deforceat in Wales* in the Nature of a Writ of Right, according to the Courſe there the *Miſe was joined upon the mere Right*, and *Venire Facias return'd* and 12 *were Sworn, and before Verdict the Demandant was Nonſuited*, and *thereupon Judgment Final* was given. The Demandant afterwards brought another Quod ei deforceat. The Tenant pleaded the firſt Judgment in Bar. The Demandant demurr'd, and Judgment was given againſt him, whereupon Demandant brought Writ of Error, but Judgment was affirm'd. Reſolv'd, 1ſt, that tho' by the Statute of Rutland 12 E. 1. Trial in Wales in Writ of Right ſhall be by 12 Common Jurors, yet Judgment final ſhall be given as before the Statute, and tho' the Manner and Dignity of the Trial be alter'd, yet the Judgment remains. 2dly, If *Judgment final* be *given in Writ of Right where it ought not, yet it ſhall bind till it be reverſed.* 3dly, If the *Tenant after the Miſe joined makes Default*, Judgment final ſhall not be given, (as F. N. B. 6. holds) but *Petit Cape ſhall iſſue*; For peradventure he may ſave his Default. 5 Rep. 85. b. Trin. 38 Eliz. B. R. Penryn's Caſe.

to reverſe the firſt Judgment, and if it had been reverſed, yet it had not reverſed the ſecond Judgment; For the ſecond Judgment was Collateral and independent, and it is executed. And in a Writ of Right, if the Tenant before the Miſe joined loſes by Default, he may have a Writ of Right againſt the Demandant, who has Execution againſt him upon the ſaid Judgment by Default.

23. Seeing the Miſe is join'd upon the mere Right, tho' the *Verdict of the Grand Aſſize be given upon another* Point, yet Judgment final ſhall be given. Co. Litt. 295. b.

But ſee Penryn's Caſe the third Reſolution, e contra.

24. So if after the Miſe joined the *Tenant makes a Default*, or *confeſſes the Action*, or if the *Demandant* be *Nonſuit*. Co. Litt. 295. b.

9 Rep. 85. b. Trin. 38 Eliz. Penryn's Caſe. S. P.

25. The Form of the Final Judgment is *Quod tenens teneat Terram illam ſibi & Hæredibus ſuis in Pace verſus petentem & Hæredes ſuos in Perpetuum.* Co. Litt. 295. b.

26. The

26. The Statute of 34 E. 1. nor the Statute of 4 H. 7. as to Fines extends to Nonclaim upon a Judgment in a Writ of Right, and ſo the *Common Law in this Caſe remains to this Day*, viz. that Claim muſt be made within a Year and a Day after Judgment. Co. Litt. 262. a. Co. Litt. 254. b. S. P.

For more of Droit de Recto in General, See other proper Titles.

Duresſ of Impriſonment.

(A) *What* Things may be *avoided by* Duresſ.

Fol. 687.

1. A Statute-Merchant may be avoided by Audita Querela, becauſe it was made by Duresſ of Impriſonment 20 E. 3. Audita Querela. 27. See tit. Audita Querela (E) pl. 53. S. C. and the Notes there.

2. A Man ſhall avoid *Outlawry* by Duresſ of Impriſonment at the Time of the Outlawry pronounced. Br. Duresſ, pl. 21. cites 38 Aſſ. 17.

3. *Formedon in Deſcender*; the *Tenant ſaid that he made the ſame Gift by Duresſ of Impriſonment done to him by the Father of the Demandant to make the Gift*; Judgment &c. and a good Plea, by which the other ſaid, that at large and not by Duresſ; Priſt. Br. Duresſ, pl. 3. 3. cites 41 *E.* 3. 9.

4. *Feoffment by Duresſ* or Menace is not void, but voidable. Br. Feoffment de terre, pl. 48. cites 18 E. 4. 27.

5. A Man may avoid a *Bond made upon the Statute* 23 *H.* 8. *cap.* 6. *of Recognizance by Duresſ*, and yet this is matter of Record. Br. Duresſ, pl. 19. cites F. N. B. fo. 120.

6. *Declaration of Uſes (on a Fine)* by a Man in Duresſ, denied to be good; Per Anderſon. 2 Le. 159. pl. 193. 21 Eliz. in the Star-Chamber. Anon. And if Men compelled by Threatnings or Impriſonment intends ſuch ſhould be *admitted to levy Fines*, they ſhould thereby be barred, becauſe the Law Perſons are at Liberty when they acknowledge Fines, 17 Ed. 3. 52. 78. 17 Aſſ. 17. Weſt's. Symb. S. 11.

7. *Feme Covert* by Duresſ in a *Leaſe* with her Husband, the ſame ſhall bind her. 3 Le. 72. Per Manwood J. pl. 110. Hill. 20 Eliz. C. B. Northampton's Caſe.

8. N. brought *Debt upon Arrearvges of Accompt*; the *Defendant ſhewed that before the Accompt, the Plaintiff of his own Wrong did impriſon the Defendant, and aſſigned Auditors to him* being in Priſon, and ſo the Account was made by Duresſ of Impriſonment, and the ſame was holden

den a good Plea by all the Juſtices of both the Beuches; and Judg-ment was given accordingly. Le. 13. pl. 17. Hill. 25 Eliz. B. R. Northumberland's Caſe.

Againſt a Deed inroll'd a Man ſhall not take Averment that it was by Dureſs; for this is contrary to the Record. Roll Abr. 862. Eſtoppel (A) pl. 3. cites 16 H. 7 5. b.

9. *J. S. by Deed inrolled* in Chancery, *bargained and ſold a Hou and certain Lands to the Plaintiff, and after took the Goods again, an would avoid this Bargain* and Sale inrolled, *by Dureſs of Imprisonment* Godfrey ſaid, it cannot be avoided by ſuch nude Matter in Fact, cite 7 Ed. 4. 5. 39 Hen. 6. 32. 13 Ed. Eſtoppel 18. 48 E. 3. 33. For being in-rolled it is a Thing of Record. Morgan contra; and he ſaid a Deed inrolled is no Record, but a Thing recorded 16 H. 7. 5. and cited Browne and Weſton's Opinion in one Morley's Caſe accordingly. The Court ſaid the Caſe was doubtful, and they would adviſe; but after-wards they conceived it would be hard to avoid the Deed by Dureſs but no Judgment was given, becauſe the Parties agreed. Cro. E. 88 pl. 12. Hill. 30 Eliz. B. R. Hamond v. Barker.

Br. Faits Enroll, pl. 17. cites 16 H. 7. 5. S. P. per Curiam.

10. If a Party menace me, except I will *make unto him a Bond* 40 *l. and I tell him that I will not* do it, *but I will make* unto him *Bond of* 20 *l.* The Law ſhall not expound this Bond to be voluntary but ſhall rather make Conſtruction that my Mind and Courage is not to enter into the greater Bond for any Menace, and yet that I enter by Compulſion notwithſtanding in the leſſer. Bacon's Elements 81.

11. If I will *draw any Conſideration to myſelf*, as if I had ſaid I will enter into your Bond of 40 l. *if you will deliver me that Piece of Plate* Now the Dureſs is diſcharged, and yet if it had moved from the Du-reſſor who had ſaid at the firſt you ſhall take this Piece of Plate and make me a Bond of 40 l. now the Gift of the Plate had been good, and yet the Bond ſhall be avoided by Dureſs. Bacon's Elements 81.

12. A *Feoffment*, if made by Dureſs, and the *Party himſelf delivers Seiſin*; or in Caſe a *Gift of Goods* be made, *and he himſelf delivers them* the ſame are avoidable at any Time by Entry Action &c. but if they deliver it not with their Hand, as in a *Feoffment, by Letter of At-torney*, or in a *Grant of a Rent, Advowſon* &c. nothing at all paſſeth Finch's Law 102, 103.

13. A *Feoffment* by one *by Dureſs is* not void *but voidable by Entry or Action, and that only by Privies in Blood inheritable*, and not by Privies in Law or Eſtate. A *Bond* made by him cannot be avoided by Du-reſs on Non eſt factum. A *Feoffment by Letter of Attorney* by Dureſs is void, and the Feoffee a Diſſeiſor. 2 Inſt. 482, 483.

14. If *Agreement be compelled by Threats* it ſhall not bind. 3 Ca Toth. 67. Plowden v. Marſham.

15. If the Defendant is arreſted, and in Execution, and A. become bound for him to the Plaintiff, and the *Defendant gives A. a Judgme for his Counter-Security*, it is good though *no Attorney be preſent*, and is not within the common Rule of Court, becauſe not given to th Perſon himſelf but to a third Perſon; Per Holt Ch. J. 5 Mod. 14 Mich. 7 W. 3. Churchy v. Roſſe.

16. In Caſe of a pretended real *Diſcharge of the Bailiffs before Warrant of Attorney executed* by one under an Arreſt for a juſt Deb Holt Ch. J. declared he would be well ſatisfied by *Affidavits* that th Bailiffs were ſo diſcharged, as that if the Defendant had refuſed t execute the Warrant they would not come again and ſeiſe on him and that he would have Reaſon to believe before he would le the Judgment ſtand. 7 Mod. 139. Hill. 1 Ann. B. R. Gidden Drury.

17.

17. If A. be arreſted on Proceſs out of C. B. or any inferior Court, and gives a Warrant *to confeſs a Judgment* in this Court while *in Cuſtody*, no Attorney being there preſent, we can examine and ſet aſide this Judgment; otherwiſe where it is to confeſs a Judgment in another Court. 1 Salk. 402. Mich. 2 Ann. B. R. Anon.

(B) *What* ſhall be *Dureſs.*

To avoid a Thing.

[And though made on another Perſon.]

1. If a Man be lawfully in Priſon, yet if he makes an Obligation againſt his Agreement and Will, he may avoid it by Dureſs. 43 E. 3. 10. b. 6. 2. Otherwiſe if he does it of his good Will. 43 E. 3. 10. b. 11 H. 4. 6. b.

Debt upon Obligation the *Defendant* pleaded that it was made *by Dureſs*, and the *Plaintiff ſaid that he was his Receiver and Aſſigned Auditors to him to hear his Account who committed him to Gaol for Arrears, and there he made this Obligation for his Deliverance of his own Will*; and held a good Plea; by which the Defendant pleaded other Iſſue, for this is not by Dureſs. Br. Dureſs, pl. 4. cites 43 E. 3. 10.

3. If a Man makes a Deed by Dureſs done to him by taking of his Cattle, though there be no Dureſs done to his Perſon, yet this ſhall avoid a Deed. 20 Aſſ. 14. Adjudged.

S. P. awarded before the King's Council. Br. Dureſs, pl. 12. cites S. C. —— S. C. cited Arg. 11 Mod. 202, 203.

4. A Servant ſhall not avoid a Deed made by Dureſs to his Maſter. M. 7 Jac. B. per Coke.

Nor ſhall a Man avoid a Deed by Dureſs to his Servant. 2 Brownl. 276. Mich. 7 Jac. C. B. Anon.

5. But a Son ſhall avoid his Deed by Dureſs to his Father. M. 7 Ja. B. per Coke.

So a Father ſhall avoid a Deed by *Dureſs* of Impriſonment of his Son. 2 Brownl. 276. Anon. —— Per Wylde if the *Dureſs* be to a *Father or Brother* and a Son enters into Bond, this is a Dureſs to the Son and he may plead it; But per Twiſden a Man ſhall in no Caſe avoid his Deed by a Dureſs to another, let him be related How he will. Freem Rep. 351. pl. 440. Mich. 1673. in Caſe of Wayne v. Sands.

6. The Baron ſhall avoid a Deed made by Dureſs to his Wife. M. 7 Ja. B. per Coke.

S. P. per Collowe, quod fuit conceſſum. For Baron and Feme are one and the ſame Body and Perſon in the Law. Br. Dureſs, pl. 18. cites 21 E. 4 8. 14 & 15 —— 2 Brownl. 276. Anon. S P. accordingly. —— Sid. 123. S. P. cited per Cur. as adjudg'd 7 Jac. in Caſe of Luntrell v. Witherington.

[6.] A Man ſhall not avoid a Deed by Dureſs to a Stranger. M. 13 Ja. B. per Curiam. M. 13 Ja. B. where the Obligation is joint and ſeveral.

A Man cannot avoid an Obligation by Impriſonment of any other Friend than his Wife. Br. Dureſs, pl. 18. cites 21 E. 4. 8. 14 & 15. —— Ld. Raym. Rep. 357. Arg. S. P.

7. If A. and B. make an Obligation by reaſon of Dureſs done to A. B. ſhall not avoid this Obligation, though A. may, becauſe he ſhall not avoid it by Dureſs to a Stranger. H. 7 Ja. B. per Curiam, between *Montall and Woollington.*

8. If a Purſuivant of the High Commiſſion, upon a Suit, and by their Command impriſons a Man until he enters into a Bond to appear in the Court of Audience, this Obligation may be avoided by Dureſs, becauſe the Suit there was upon a Contract, of which they had not original Conuſance, and therefore the Impriſonment wrongful. H. 8 Ja. B. between *Clifford and Huntly*, per Curiam reſolved.

9. In Aſſiſe it was found that the *Conuſor upon Statute Merchant after Execution ſued againſt him takes the Conuſee by Force, and ſwears him that he ſhall render him the Land*, and *of his own Will he releaſes all Actions of Debt and Treſpaſs, and after he of his own Will ſurrender'd the Land*, and this Oath he took for fear of Death; and therefore notwithſtanding the Surrender was made at large, yet becauſe it was done by reaſon of Dureſs before, therefore Perning adjudged it a Diſſeiſin, when the Conuſee entred by ſuch Surrender. Br. Dureſs, pl. 11. cites 14 Aſſ. 20.

10. If a *Releaſe be made at D.* it is a good Plea that *a Stranger menaced him at S.* by reaſon whereof he menaced him at D. Br. Faits, pl. 81. cites 43 E. 3. 19.

11. A Writing *made by Dureſs*, and *delivered at large* was adjudged void, Anno 6 R. 2. Per Rolf. Br. Dureſs, pl. 20. (bis) cites 8 H. 6. 7.

12. Dureſs cannot be to a *Body Politick*, but may be *to a Mayor*, to do a Thing belonging to his Office; by the beſt Opinion; For he is Head of the Corporation. [And] Impriſonment of the natural Body in a Pillory is impriſonment of all the Body. For intire. Br. Dureſs, pl. 18. cites 21 E. 4. 8. 14, 15.

13. Where a Man is *impriſoned by Capias* &c. by the Law, and *makes an Obligation for his Deliverance*; this is good, and not by Dureſs. Br. Dureſs, pl. 15 cites 4 E. 4. 17.

14. In Replevin, if a *Man be condemned to me and in Execution*, and *makes to me an Obligation for his Deliverance*, this Obligation is not by Dureſs. Br. Dureſs, pl. 17. cites 12 E. 4. 7.

15. If I *menace* you *in one County* to make an Obligation of 20 *and after at another Day* I find you *in another County*, and I demand you will make the Obligation to me, and you make the Deed according to my firſt Requeſt in the firſt County, this Obligation is avoidable becauſe it has its Reſpect, and *was made by Reaſon of the firſt Menace in the other County.* Per Frowike Ch. J. Kelw. 52. b. pl 7. Tri. 19 H. 7. in Caſe of Keble v. Vernon.

16. A. is *impriſoned till he promiſes to enter into an Obligation who do it when he is at large*, yet he may plead this to be per Dureſs. D. 14 b. Marg. pl. 56. cites Mich. 23 Eliz. per Meade.

17. Debt upon an Obligation was brought by B. againſt U. and he who pleaded the Statute of 23 H. 6. and ſhewed that *U. was in Execution*, and that *the Bond was made for his Deliverance* againſt the Statute. The Plaintiff *replied*, and ſaid, *that at the Time of the making* of the ſaid Bond, *the ſaid U. fuit ſui Juris, and at large, abſque hoc that he was in Priſon tempore confectionis ſcripti prædict' modo & forma &c.* Egerton Solicitor moved, that the Traverſe was not good; for if a M

be in Priſon in Execution, and makes a Promiſe to make a Bond for which he is enlarged, and within an Hour after he makes the Bond, the ſame is within the Statute; and therefore this Iſſue is not well joined, but it ought to be *abſque hoc, that it was pro deliberatione* &c. And of ſuch Opinion was Fenner and Gawdy Juſtices. 2 Le. 107. pl. 136. Paſch. 32 Eliz. B. R. Bows v. Vernon. See Dive v. Manningham. 4 E. 6. Plo. Com. 68, 69. Acc.

18. Debt upon Obligation, the Caſe was, A. *Sheriff* of C. *by* Virtue of *an Attachment under the Seal of the Court of Requeſts, took the Defendant, and for his Enlargement he made* this *Obligation to appear before the Queen's Council attending the Court of Requeſts* at Weſtminſter; It was the Opinion of the Court, that this was not lawful, but taken by Dureſs, and ſo avoidable, becauſe *that Court had not any Power by the Statute, or by the Common Law*; It was adjudged for the Defendant. Cro. E. 646. pl. 58. Mich. 40 & 41 Eliz. Stepney v. Lloyd. 2 And 122. pl. 66. S. C. adjudged — 4 Inſt. 97. cap. 9. S. C.

19. Debt by a Sheriff on a *Bond for the Appearance of T.* &c. the Defendant *pleaded, that W. ſued out a Capias which was deliver'd to the Plaintiff (Sheriff of Oxford) who made a Warrant to the Bailiff* of the Liberty of H. to arreſt the ſaid T. *and that one J. S. put his own Name in as a ſpecial Bailiff to arreſt him*; *and* that he *did arreſt him at D. in the ſaid County, and carried him to R.* in the County of Berks, *and there kept him till he and T. gave the ſaid Bond*; adjudged an ill Plea, for though the Bond was made by Dureſs as all the Court agreed, and that the Defendant might well have pleaded it and relied upon it, yet it is not within the Statute 23 H. 6. nor is the Defendant aided thereby. For T. never was in the Sheriff's Cuſtody after the Arreſt; And the Bond taken out of the County is by Dureſs, but not within the Statute. Cro. E. 745, 746. pl. 23. Hill. 42 Eliz. B. R. Brown v. Adams.

20. If a Man menace me, that he will impriſon or *hurt in Body my Father*, or my *Child*, *except I make ſuch an Obligation*, I ſhall avoid this Dureſs as well as if it had been to my own Perſon. Bacon's Elements 66. Becauſe *Perſona Conjuncta æquiparatur Intereſſe proprio.*

21. Anciently there was a Writ of *Dum fuit in Priſona*, where an Alienation was made by Dureſs, and that for the party himſelf. 2 Inſt. 482.

22. *Every Reſtraint of a Man's Liberty* is an Impriſonment, tho' he be not within the Walls of any Common Priſon. 2 Inſt. 482.

23. Dureſs *per minas aut Cauſa metus* are ſufficient to avoid a Man's own Act in four Caſes, viz. 1ſt, For fear of Loſs of Life. 2dly, Of Loſs of *Member*. 3dly, *Of Mayhem*, and 4thly, *Of Impriſonment*; otherwiſe it is for fear of *Battery*, which may be very light, or *burning of his Houſes*, or *taking away or deſtroying of his Goods*, or the like, for there he may have *Satisfaction* by Recovery of Damages. 2 Inſt. 483.

24. Dureſs is where a Man is compelled to do a Thing by Impriſonment, or *Fear of ſome bodily Hurt threatned to himſelf*, * *not to his Father, Mother* &c. as Loſs of Life and Member, or though it be but of *Impriſonment*; for Impriſonment is a corporal pain, and one may bee impriſoned that he may dye of it. Otherwiſe it is of a *Menace to break or burn down ones Houſe*, for that is but the Loſs of one's Goods. Finch's Law. 102. * See pl. 5.

25. If a Man be *impriſoned by Order of Law*, the *Plaintiff may take a Feoffment* of him, *or a Bond for his Satisfaction, and for the Deliverence of the Defendant* notwithſtanding that Impriſoment, for this is not by Dureſs, becauſe he was in Priſon by Courſe of Law; for it is not S. P. as to a Bond obtain'd; and if in ſuch Caſe Dureſs

be pleaded the other may ſay that of his own Accord ſine Duritia Impriſonamenti without ſaying abſque hoc that it was per Duritiam Impriſonamenti. Le. 239. pl. 330 Mich. 32 Eliz. C. B. Knight v. Norton. And Ibid. ſays it was ſo hold in B. R.

not accounted in Law Dureſs, but where either the Impriſonment or the Dureſs that is offered in the Priſon, or at large is tortious and unlawful, for *Executio Juris non habet Injuriam.* 2 Inſt. 482.

In Debt on an Obligation, the Defendant *that one R. was bound with him, and that R. enter'd into the Bond by Dureſs*, but it ſeemed to the Court that it was no Plea; For a Man

26 Debt on an Obligation of 40 l. conditioned to pay 24 l. The Defendant pleaded, that W. R. was impriſoned by Covin of the Plaintiff, and detain'd there in Danger of his Life, againſt Law, until the ſaid W. R. ſhould pay the ſaid 24 l. or become bound with ſurety for Payment thereof; whereupon, to inlarge the ſaid W. R. and to avoid Danger of his Life, he and the ſaid *Defendant as Surety* for the ſaid W. R. *entred into the ſaid Bond* &c. Adjudg'd to be no *Plea for the Surety*, tho' it had been a good Plea for W. R. For none ſhall avoid his own Bond for the Impriſonment or Danger of any but of himſelf only. Cro. J. 187. pl. 8. Mich. 5 Jac. B. R. Huſcombe v. Standing.

ſhall *not avoid his own Bond by a Dureſs to another*, tho' he be but a Security. Freem. Rep. 351 pl. 440. Mich 1673. Wayne v. Sands.

27. *Mayor and Commonalty* may avoid a Deed ſealed, by Dureſs of Impriſonment of Mayor. 2 Brownl. 276. Mich. 7. Jac. C. B. Anon.

28. A Man may avoid Seiſin for Payment of *Rent* by Coertion *of Diſtreſs*, but not his Deed. 2 Brownl. 276. Mich. Jac. C. B. Anon.

And the Impriſonment in ſuch Caſe to avoid the Deed *muſt be ſuch as was made for the making the Deed* &c. See Perk. 9 S. 17. 18. cites 8. Aſſ. pl. 25.

29 If a Man be impriſoned upon a formal Suit, tho' there was no juſt Cauſe of Suit yet if he give a Bond for his Releaſe he ſhall not avoid it by a Dureſs; For 'tis *Incarceratio Legitima*, that is by Law, tho' the Plaintiff did untruly procure it. Hob. 266. pl. 352. in Caſe of Waterer v. Freeman.

30. An Agreement for *ſurrendering of a Copyhold* (tho' *made* when the Party was *in Priſon*) upon Bonds for Performance thereof. Toth. 66. 3 Car. Wadbroke v. Cheeke.

31. In Debt upon a Bond of 10 l. and by Dureſs pleaded, the Caſe upon Evidence was, that the Plaintiff *charged the Defendant with Felony* for ſtealing a Horſe, and procured a Warrant to a Conſtable, whereby he was taken, and being in Cuſtody, upon Promiſe of the Plaintiff to diſcharge him ſealed the Bond, and was thereupon immediately diſcharged, and it appeared that the Horſe was the Defendant's Horſe; And Roll directed the Jury, that theſe Proceedings being but to *cover the Deceit*, the Bond was gotton by Dureſs, whereupon the Plaintiff was nonſuited. All. 92. Mich. 24 Car. B. R. Anon.

32. A *Man having no good Cauſe of Action cauſes another to be arreſted, and to be detained in Priſon until he made a releaſe, with Menaces that he ſhould lye there and rot if he would not Seal* a Releaſe, upon which a Releaſe was executed, and the Man was diſcharged. On Evidence at Guildhall Bridgman Ch. J. held, that the Party here being in Cuſtody by the King's Writ, this was no Dureſs to be pleaded in Avoidance of a Deed, and being arreſted without Cauſe he may have an Action, but he offered to have it found ſpecially if Baldwin the Counſel would pray it but he did not, and ſo the Jury gave their Verdict

Verdict that it was a good Releaſe. Lev. 68. 69. Trin. 14 Car. 2. at Guildhall. Anon.

33. If a *Bond* be *given by Force or Terror, tho' not ſo as to make it to be per Duresſ*, it ought to be ſet aſide, or at leaſt not carry'd into an Execution; Per Wright K. 2 Vern. 497. pl. 447. Paſch. 1705. in Caſe of Attorney Gen. ad Relationem Coſſart & Dutrie Sorbon.

34. A Man cannot avoid a Bond by Duresſ of *Impriſonment of a Stranger*; Arg. Ld. Raym. Rep. 357 Trin. 10 W. 3.

35. A Man arreſted and under Confinement of the Bailiff gives a Warrant of Attorney to confeſs a Judgment, and *no Attorney by*, it is always taken to be by Duresſ; But if a Man that has been *long in Gaol*, voluntarily confeſſes a Judgment to his Creditor that comes to him, that Judgment is good, though no Attorney is by; And if one *impriſoned in B. R.* confeſs Judgment or Action to another, it is good, As if Declaration be delivered to one in Cuſtody of the Marſhal, and he confeſſes the Action and gives Judgment, though no Attorney by, yet it is good; Per Holt Ch. J. 7 Mod. 115. Mich. 1 Ann. B. R. Anon.

36. A *Barge was attach'd on the Thames by Proceſs out of Windſor Court*, and the Manager or *Governor of the Barge gave a Bail Bond for his Maſter to appear* in Windſor Court, to anſwer in a Plea of Treſpaſs. The Queſtion was, whether this was a Bond obtained by Duresſ, and therefore void, but the Bond was adjudged good. 11 Mod. 201. Hill. 7 Ann. B. R. Sumner v. Ferryman.

37. A Bond ſhall never be avoided by Duresſ but when the *Perſon is put in ſome Terror*. and So when his Goods and Chattels are taken illegally or irregularly, but in ſuch Caſes he may avoid his Bond; Arg. 11 Mod. 202. Hill. 7 Ann. B. R. But ibid. Powell J. ſaid, that a Man cannot avoid a Bond by Duresſ to his *Goods, but only to his Perſon; But the Reporter adds a Quære.

* Becauſe he may have an Action for them if taken. Perk. S. 18

(C) *By whom* being *made.*

A *Stranger.*

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1. DURESS by a Stranger by Procurement of the Party that ſhall have the Benefit, **is a good Cauſe to avoid** &c. 43 E. 3. 6. Br. Duresſ, pl. 20. cites S. C. ——— S P. but the Opinion of Rede and others was, that this is no Plea without making the Obligee a Party to this Duresſ. Keilw. 154. a. pl. 3. Mich. 1 H. 8.

2. **Duresſ of Impriſonment** by the Maſter to his Servant, to make an Obligation to the Obligee, **is good Cauſe to avoid the Deed. 6 H. 4. 5. adjudged.**

(D) Pleadings.

Br. De ſon tort &c. pl. 8. cites S. C.

1. WRIT of *Error upon a Judgment in Re-diſſeiſin given againſt him at the Suit of the Father of the Defendant*, and the *Defendant pleaded a Releaſe of all the Right, and of all Actions and Demands made to his Father*; And the *Plaintiff ſaid, that this was made by Dureſs of Impriſonment*; and the *Defendant ſaid, that he was impriſoned by Virtue of the ſame Condemnation, and made the Releaſe for his Deliverance, abſque hoc that he was otherwiſe impriſoned*; Priſt; Judgment &c. and the *other ſaid, he impriſoned him De ſon tort Demeſne, and without ſuch Cauſe till he made the Releaſe* &c. Priſt. and the other e contra. Br. Dureſs, pl. 6. cites 11 H. 4. 6.

2. Where a Man *avoids a Deed by Dureſs at D. in another County*, it is no Plea nor Evidence for the Party to *ſay that he never came to D.* for the Place is [not] traverſable there; For if it be by Dureſs *in any Place it is ſufficient*. Br. Traverſe per &c. pl. 53. cites 14 H. 4. 35.

3. If a Man *makes Writing by Dureſs or Menace*, and *makes Defeaſance of it at large*, there the Defeaſance eſtops him to ſay that it was made by Dureſs &c. by the beſt Opinion. Br. Defeaſance, pl. 17. cites 3 H. 6. 16. and 35 H. 6. 18.

4. Debt upon Obligation; Chock ſaid, the Plaintiff *took and impriſoned him at T. and from thence brought him in Priſon to C. by Force of which* Impriſonment he made the Obligation &c. Thoſe two Impriſonments are double; Quod Curia conceſſit. Br. Dureſs, pl. 7. cites 38 H. 6. 13.

S. P. per Moile, but per Laicon contra; for Impriſonment was determined before.

5. *By which he ſaid, that he took and impriſoned him at T.* ut ſupra, *till he agreed to make to him the Obligation, by Force of which Impriſonment he made the Obligation at C.* and a good Plea; Per Moile. Br. Dureſs, pl. 7. cites 38 H. 6. 13. Br. Double Plea, pl. 79. cites S. C.

6. *Debt upon Obligation upon a Covent Seal*, it is no *Plea that A. B. C. D.* &c. *Eight Perſons, Chanons* &c. *made the Covent tempore* &c. *who were impriſoned by the Abbot at D. till they ſealed it, and ſo by Dureſs* &c. For this is double; For it is ſeveral Impriſonments in each of them; *But* it is a good Plea *to ſay that the Abbot impriſoned the Covent till they made the Deed, and* if they ſealed it againſt their Will, or not knowing, this is not the Deed of the Covent; and the *other ſaid that they ſealed it at large, and not by Dureſs*; Quære as to the Doubleneſs, if there be a Diverſity between Menace by ſpeaking of one and the ſame Words to them altogether, and Impriſonment of them in one and the ſame Place. Br. Dureſs, pl. 8. cites 38 H. 6. 27.

Br. Expoſition, pl. 27. cites S. C. that (ibidem) ſhall be intended at D. quod nota bene.

7. Debt upon Obligation; the *Defendant ſaid, that the Plaintiff impriſoned him at D. and the Defendant ibidem per duritiam Impriſonamenti fecit Obligationem*, and the Plaintiff challenged it, inaſmuch as this Word *(ibidem)* is not certain, but becauſe this ſhall have Relation to D. and alſo this is the uſual Entry, therefore well. Br. Dureſs, pl. 15. cites 4 E. 4. 17.

8. In Replevin, if a *Man condemned to me, and in Execution*, and *makes to me an Obligation for his Deliverance*, this Obligation is not by Dureſs, per Brian. Per Littleton, if the *Defendant pleads that it was by Dureſs*, and the *Plaintiff traverſes it*, it ſhall be found againſt him, but *he ſhall ſhew*

ſhew the Matter by Replication, that the Obligation made for his Deliverance &c. and then well. Br. Dureſs, pl. 17. cites 12 E. 4. 7.

9. Where it is alleged in Count or Bar that Obligation or Deed was made at D. in Com' M. yet the other may allege that it was made at N. in Com' E. by Dureſs &c. Br. Dureſs, pl. 18. cites 21 E. 4. 8. 14, 15.

10. If a Man ſeals and delivers a Deed by Dureſs, he *cannot plead Non eſt Factum*; For it is his Deed at the Time of the Action brought, and *ought to be avoided by ſpecial Pleading, and conclude Judgment ſi Actio.* 5 Rep. 119. a. Reſolved per Cur. Trin. 2 Jac. C. B. in Whelpdale's Caſe.

Where a Marriage may be avoided by Dureſs, See Baron and Feme (A) pl. 5. and the Notes there, and ſee Tit. Marriage (H. a) per totum.

Ejectment.

(A) How conſidered.

SOlicitor and Agents in Ejectment were committed till they *find a Plaintiff able* to pay the Coſts, or pay the Coſts themſelves. 2 Lev. 66. Mich. 24 Car. 2. B. R. Henloe v. Peters.

2. Ejectment *is a mixt Action*; it is Real in reſpect of the Lands, and Perſonal in reſpect of the Damages and Coſts; Per Holt J. Cumb. 450. Paſch. 6 W. & M. in B. R. Barwick v Fenwood.

3. The Court will take Notice that an Ejectment *is only a fictitious Proceeding* for recovering the Poſſeſſion which cannot be well obtained otherwiſe, and the Entry laid in the Declaration, or confeſſed by the Defendant, is not an Entry that is real, for it ſhall neither avoid a Fine nor be ſufficient Evidence to ſupport Treſpaſs for the mean Profits. 1 Salk. 246. Paſch. 6 W. & M. in B. R. Smart v. Williams.

4. It is a *great Abuſe* in Ejectments that People make *nominal Leſſees*, Perſons *not in Rerum Natura*, or at beſt not known to the Defendant, that thereby he may loſe his Coſts; and per omnes, the Attorney that does ſo ought to pay *Coſts*, and in the principal Caſe an *Attorney* was put to anſwer Interrogatories for ſuch Practice per Cur. 6 Mod. 99. Mich. 3 Ann. B. R. Anon.

(B) What

(B) What is, or ſhall be ſaid to be an Ouſter.

1. TAKING the whole Profits by one *Tenant in Common* is no Ejectment, but if he drive out of the Land any of the Cattle of the other Tenant in Common, or not ſuffer him to enter or occupy the Land, this is an Ejectment or Expulſion, whereupon he may have a Ejectione Firmæ for the one Moiety, and recover Damages for the Entry, but not for the mean Profits Co. Litt. 199. b.

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2. Ejectment of *Part* of a *great Cloſe* is Ejectment of *all*. Lat. 82 Paſch. 1 Car. Cally v. Fiſher.

3. Where a Leaſe is to try a Title if my *Cattle come upon the Ground* and are permitted by me to *reſt there* a long Time I ſhall be an Ejector, otherwiſe if a ſmall Time. Clayt. 29. pl. 50. Aſſiſa Mar. 1 Car. Vernon Judge. Rawcliff v. Booth.

4. *One Room*, or *a third Part of a Manor*, is good finding enough Mar. 98. pl. 168. Trin. 17 Car. C. B. Juxon v. Andrews.

Ejectment by Mortgagee was argued to be an admitting himſelf to be out of Poſſeſſion, for the Ejectment *complains of a tortious Entry and an Ouſter*, and this being a Matter of Record he is eſtopped to ſay e contra; non allocatur; For firſt, per Cur. an Ejectment as it is by common Practice *is but a feigned Action*, to which the *Leſſor* of the Plaintiff, who is a principal Perſon, is *not a Party*; and not being a Party, this cannot be given in Evidence as an *Eſtoppel* againſt him and therefore he cannot maintain an Action for the mean Profits, without an actual Entry, but the Leſſee may. Skinn. 424. Paſch. 6 W. & M. in B. R. Andrew Newport's Caſe.

(C) Of bringing Ejectment by Way of Leaſe.

See Clayt. 6. Braadhead v. Beamond. —— But Entry into two of the ſeveral Parcels of Lands, or into two ſeveral *Houſes, and leaving the former Occupiers upon the Land* &c. and then entering into the third Houſe &c. and there ſealing a Leaſe for Years unto another Man of that *third Houſe, and not the two other Houſes &c.* this is good only for the third, and not for the two other Houſes in which the Leaſe was not delivered; for the Entry or Continuance of the Occupier defeated the Entry of the Leſſor. Godb. 72. pl. 87. Mich. 28 & 29 Eliz. B. R. Earl of Kent's Caſe.

1. WHEN a *Leaſe* is made to bring an Ejectment *of Land in diverſe Men's Hands*, they muſt enter into one of the Parcels and leave one in that Place, then he muſt go to another and leave one there, and ſo on, and when he has made the *laſt Entry*, he *ſeals and delivers the Leaſe*, and then thoſe that were left there muſt come out of the Land, and this is a good executing the Leaſe. Brownl. 12 Weeks v. Meſey.

2. Leaſe by *Copyholder* for more than one Year, without Licence or Cuſtom, is not good to try a Title in Ejectment, but he will be Non ſuit on his own Evidence, and ſuch Leſſor will be taken to be a Diſſeiſor; Per tot. Cur. Brownl. 133. Paſch. 8 Jac. Cramphorn v. Freſhwater.

3. L

3. *Leaſe by two Husbands and their Wives* to try a Title in Ejectment, and the ſame executed by Letter of Attorney &c. they muſt be ſealed by the Wives as well as the Husbands, and the Entry by the Attorney ought to be in all their Names. 2 Bulſt. 13. Mich. 10 Jac. Chamberlain v. Ewer.

4. When a *Leaſe is to be executed by Letter of Attorney*, the Courſe is this, that the Leſſor do ſeal the Leaſe only and the Letter of Attorney, and delivers the Letter of Attorney but not the Leaſe, for the Attorney muſt deliver that upon the Land. Brownl. 130. Paſch. 12 Jac. Pettiſon v. Reel.

5. By the *Antient Law*, Lands and Tenements were never recovered in any perſonal Action, but antiently the Writs of *Entry* and *Aſſize* were the uſual Means for the Recovery of the *Poſſeſſion*, and theſe lay only againſt the *Freeholder*, becauſe the Eſtate for Years was heretofore only a precarious Poſſeſſion, and therefore to have Actions againſt ſuch Perſons was to no Purpoſe, becauſe ſuch *Terms* were generally defeated or determined before any intricate Title could be decided; beſides theſe Poſſeſſions being ſo precarious, the *Poſſeſſors* were not truſted with the Defence of the Intereſt of the Land, and if they were ouſted they could only have recovered Damages for the Loſs of their *Poſſeſſions*, and if ouſted by their Leſſors they could ſeek only a Remedy from their *Covenants*.

Thus the Law continued till the 14 *H.* 4. and then it began to be reſolved that an *Habere Facias Poſſeſſionem* would lie to recover the *Term* itſelf.

It ſeems that the long Terms about this Time had their Beginning, and that ſince ſuch Leſſees could not by Law recover the Land itſelf, therefore they uſed to go into Equity againſt the *Leſſors* for a *Specifick Performance*; and againſt Strangers, to have *Perpetual Injunctions* to quiet their Poſſeſſions; This drawing the Buſineſs into the Courts of *Equity* obliged the Courts of *Law* to come to a Reſolution, that they ſhould recover the Land itſelf in an *Habere Facias Poſſeſſionem*.

But this Reſolution brought on a new Method of *Trial* unknown before to the *Common Law*, for then it became uſual for a Man that had Right of *Entry* into any Lands to ſeal *Leaſes of Ejectment* on the Lands, and then any Perſon that next entered on the Freehold was an Ejector; and the Conveniency that aroſe from this Method was, They could try the Title *toties quoties*; whereas, if the Plaintiff was barred in an Aſſize, he was put to his Writ of Right, but this was a Means of turning a Man out of Poſſeſſion becauſe ſuch Plaintiff would recover his Term without any Notice to the *Tenant in Poſſeſſion*, and therefore the Courts of Juſtice would not ſuffer that they ſhould loſe their Poſſeſſions without any Opportunity to defend them; wherefore the Court made it a ſtanding Rule, that no Plaintiff ſhould proceed in Ejectment to recover his Lands againſt ſuch a *caſual and titular Ejector*, without delivering the Tenant in Poſſeſſion a Declaration, and making him an Ejector and proper Defendant if he pleaſed.

This was a proper Rule of Court and in its Power to form; for otherwiſe the Court would be made inſtrumental in doing an Injury to a third Perſon, becauſe a Declaration might otherwiſe be delivered to a Stranger, a faint Defence be made, and a Verdict, Judgment and Execution obtained without the Tenant's having any Notice of it; but it is not to be doubted but that ſuch Actions were brought at firſt againſt the real Ejectors that reſided in the Poſſeſſion; but becauſe any Perſon that came into the Land *Animo Poſſidendi*, was equally an Ejector with him that reſided, the Action in Strictneſs of Law might be brought againſt him, but becauſe this (as has been ſaid) turned to the Injury of the reſiding Poſſeſſor, the Rule was made that he

ſhould have Notice of it, and therefore they would not give Judgment in Ejectment unleſs an Affidavit was made, that the Tenant in Poſſeſſiou was ſerved with a Copy of the Declaration. But the Antient Cuſtom was, that ſuch Leaſes were actually to be ſealed and delivered, becauſe otherwiſe the Plaintiff would maintain no Title to the Term, and were alſo obliged to be ſealed on the Land itſelf, becauſe it was Maintenance to convey out of Poſſeſſion, and therefore in relation to the Quickneſs of the Remedy the *Aſſize* had the Advantage, becauſe none of this Preparation was required before-hand, for the Writ of *Aſſize* came down to the Aſſizes and the Jury was there warned, the *Cauſe* tried and *Judgment* given, yet the Method in Ejectment from the Conveniency of the repeated Trials notwithſtanding the previous Preparations, was generally preferred.

Thus it ſtood till the Time of the Lord Ch J. Rolls, and he invented the Rule now in Uſe, which is that if the Defendant comes into the Room of the *caſual Ejector*, he ſhould enter into a Rule to conſeſs *Leaſe*, *Entry* and *Ouſter*, and ſhould ſtand upon the *Title* only. This Rule was reaſonable, becauſe when the Plaintiff had made his *Leaſe* upon the *Land* any third Perſon that came upon the Land *Animo poſſidendi* in Strictneſs of Law, was an Ejector, therefore when any other Ejector was placed in his Stead, it was very reaſonable in the Court to impoſe Terms upon him, and therefore the proper Terms were, that he ſhould not ſtand on the Proof of an *actual Entry*, *Demiſe*, *and actual Ouſter*, becauſe this was no more than a Form of bringing the Title in queſtion, it was not fit that the Plaintiff ſhould be nonſuited for want of proving the formal Demiſe ſet forth in the Declaration when the caſual Ejector would have let the Judgment go by Default. Ld. Ch. Bar. Gilb. Law of Ejectments 2.

(D) Rules.

1. EXception taken in Ejectment becauſe the *Original bore Teſte the ſame Day the Ejectment was made*, and adjudged good per tot. Cur. Brownl. 129. Trin. 13 Jac. Beamont v. Coke.

Eſpecially after a Trial at Bar. 7 Mod. 156. Hill. 1 Ann. B. R. Grovenor v. Fenwick.

2. In Ejectment we rarely grant a *New Tryal*, for they may try the Title over-again; Per Withers. J. Cumb. 18. Paſch. 2 Jac. 2. B. R.

3. Fifteen Days between *Teſte and Return* need not be in a *Scire Facias* on a Judgment in Ejectment becauſe an Ejectment is a mixt Action. Cumb. 68. Mich. 3 Jac. 2 B. R. Cart v. Mogg.

4. In Caſe of Ejectment it is always deny'd to *amend the Memorandum*; Per Thomſon. Cumb. 74 Hill. 3 & 4 Jac. 2. B. R.

S. P. Carth. 401. Puleſton v. Warburton —— 1 Salk. 48. S. C. —— 5 Mod. 332. S. C.

5. The Demiſe being laid before the Leſſor of the Plaintiff had any Title, the Court was *moved for Leave to* amend the Declaration and *alter the Time of the Demiſe*, ſed non allocatur; For the altering the Time will make it a new Demiſe. Carth 178. Hill. 2 & 3 W. & M. in B. R. Bennet v. Gandy.

6. *But* where a Demiſe was made *by the Rector and Scholars of Exeter College* generally, which was to try they Right of the Rectorſhip, but which could not be done upon that Declaration, and ſo not good, it

it was ordered upon Motion *to alter the Demiſe* in the Declaration, *and lay it to be made by Painter Rector of Exeter, and the Scholars of the ſame.* Carth. 180. Hill. 2 & 3 W. & M. in B. R. Philips v. Bury.

7. Tho' the *Leſſor* is Principal by the Courſe of the Court, yet legally *he is a Stranger eo the Record*, and therefore cannot be *eſtopp*'d ; Per Holt Ch. J. Cumb. 249. Paſch. 6 W. & M. in B. R. Smartle v. Williams.

8. In Ejectment for *empty Houſes*, a Leaſe was ſealed upon the Land, and a Declaration delivered to the caſual Ejector, and Judgment and Execution had, yet becauſe they had *not moved for a peremptory Rule to plead*, the Judgment was ſet aſide, and in ſuch Caſe there *muſt be affidavit of the Sealing of the Leaſe, Entry* &c. 1 Salk. 255. pl. 3. Hill. 8 W. 3. B. R. Smartley v. Henden.

9. *And* where a Judgment in Ejectment was *by Confeſſion*, an Amendment of the Time of the Demiſe was made in the Declaration cited Carth. 401. Paſch. 9 W. 3. B. R. as the Caſe of **Parr v. Cawley**; But that being a Judgment by Conſent of Parties, was held no Authority in the principal Caſe of Puleſton v. Warburton.

10. *Ligni* was denied to be *amended and made Boſci*, cited by the Reporter. Carth. 402 Paſch. 9 W. 3. B. R. as the Caſe of Thompſon v. Leech.

11. After a whole *Term elapſed* without doing any Thing the Plaintiff muſt give *new Notice.* 1 Salk. 257. pl. 9. Trin. 10 W. 3. B. R. Anon.

12. No Body can complain of an *Irregularity* in an Ejectment but the Tenant in Poſſeſſion, or the Landlord. 1 Salk. 256. pl. 7. Hill. 11 W. 3. C. B. Holligworth v. Brewſter.

13. The Court will not make a *Rule for naming a good Leſſor* in Ejectment, unleſs there were a Nonſuit or Verdict againſt Plaintiff in a former Trial. 12. Mod. 445. Hill. 12 W. 3. Anon.

(E) As to the Delivery.

1. IT is ſufficient upon an Action of Treſpaſs and Ejectment brought, to try the Title of Land, if the *Tenant in Poſſeſſion of the Land, have a Copy of the Declaration in* Ejectment *delivered to him or his Wife*, altho' he be but an Under-Tenant of the Land, and altho' no Notice thereof is given to the proper Tenent, or to the Owner of the Land, whoſe Title is concerned. 23 Hill. Car. B. R. and Paſch. 24 Car. B. R. For the *Poſſeſſion of the Land is only recoverable in this Action*, and that doth chiefly concern the Tenant in Poſſeſſion of it ; and it is the Property in Law that is to defend the Title. 21. L. P. R. 237.

2 *Declaration* in Ejectment *delivered to a Servant* is ill in B. R. but it is allow'd in C. B. Cumb. 47.—Such Service and *Acknowledgment* of the Tenant that he receiv'd it, is ſufficient 1 Salk. 255. Hill. 10. W. 3. B. R. Anon.

3. Declaration in Ejectment had been delivered *to one to whom the Keys were given to let the Houſe*, and Per Cur. not good, becauſe it ſhould be to the Tenant in Poſſeſſion, and he is only a Servant, and Plaintiff is not without Remedy, for he may ſign a Leaſe on the Land. 12. Mod. 313. Mich. 11 W. 3. Anon.

(F) As

(F) As to the Term expiring.

1. IN Ejectment, if the Term *expires, pending the Suit*, the Plaintiff shall go on to *recover Damages*; For though the Action is at an End quoad the Poſſeſſion, yet it continues for the Damages after the Term ended; Arg. 3 Mod. 249. cites 1 Inſt. 285.

2. Tenant for Years has Judgment in Ejectment, and the Term incurs, then he brings a *Scire Facias quare Executionem habere non debet of the Land and his Damages and Coſts*, and a Demurrer to the Scire Facias, and the Court held the Scire Facias ill; For though he may have a Scire Facias for Damages and Coſts, yet this being for the Term likewiſe which was incurred it was ill, and a *new Scire Facias* ought to be. Afterwards, in the next Term, it was argued by Holt, that the Scire Facias was good for the Damages, but not allowed. A new Scire Facias was granted. Skin. 161. pl. 10. Hill. 35 Car. 2. B. R. Sedgwith v. Grofton.

Carth. 3. Dickens v. Greenvill, S. C. ruled accordingly.

3. The Court compelled the Defendant to conſent to the *Enlargement of a Term* in an Ejectment Leaſe. Comb. 50. Paſch. 3 Jac. 2. B. R. Dighton v. Greenvill.

—— S. C. cited Carth. 400. —— Denied to be enlarged without Parties Conſent, where the Par was hung up by Injunction, ſo that the Term expired. 1 Salk 257 pl. 8. Paſch. 12 W. 3. B. Anon. —— After a Special Verdict in Ejectment the Term expired, and the Court refuſed to inlarge it without the Defendant's Conſent. Carth. 402. Paſch. 9 W. 3. B. R. cites it as the Caſe of Hutchins v. Baſſet, but that in the Caſe of Dighton v. Greenvill, the Term was inlarged though the Defendant refuſed to conſent.

4. Leaſe for five Years, and Verdict for Plaintiff, but he was delayed of Judgment and Execution by *Injunction* out of Chancery till the *Term expired*. Upon Motion to *renew the Term*, it was ſaid to have been done in the Caſe of **Dangdell v. Greenvill**, and it was frequently done in the Exchequer, and Gould J. ſaid, that in **Sir John Roll's Caſe**, they held it might be done by Conſent, but not otherwiſe. But the Motion was deny'd. 6 Mod. 130. Paſch. 3 Ann. B. R. Anon.

(G) Where a ſecond &c. Ejectment is brought.

Ibid. 106. Tredway v. Herbert, S. P. —— Plaintiff recovered but had no *Coſts*, then Defendant brought Ejectment; The Plaintiff in the firſt Action prayed his Coſts before he pleaded, but denied, becauſe he had no Vexation, the Verdict being for him; but had the Verdict been againſt him, or he had been nonſuited, he muſt have paid Coſts before he brought a new Action. 4 Mod. 379. Hill. 6 W. & M. in B. R. Roberts v. Cook.

1. MOTION to ſtay Proceedings on a *ſecond Ejectment*, the Coſts of the firſt not being paid; Per Cur. we never grant this without an Affidavit that it is the ſame Land, the ſame Leſſor, and the ſame Title. Comb. 59. Trin. 3 Jac. 2. B. R.

2. It is a known Maxim in Law, that *a Man may try his Title as often as he pleaſes in an Ejectment*, and therefore Lord Cowper denied to grant a perpetual Injunction (after ſeveral Trials) to ſtop all further Proceedings in Law. 10 Mod. 1. Trin. 8 Ann. in Canc. Anon.

3. Where a Plaintiff *brought a ſecond Ejectment*, it was ordered he ſhould not proceed unleſs he paid the *Coſts of the firſt*. 8 Mod. 226. Hill. 10 Geo. Crundell v. Bodily.

(H) Of altering the Defendant or Plaintiff.

1. IF *one moves* that the Title of Land belong to him, and that the Plaintiff made an Ejector of his own, and thereupon prays that giving Security to the Ejector to ſave him harmleſs *he may defend the Title*, this Court of C. B. will grant it, but not compel the Plaintiff to confeſs Leaſe, Entry, and Ouſter, except he will be Ejector himſelf; But it is otherwiſe in B. R. for there in both Caſes they will compel him to confeſs Leaſe, Entry and Ouſter; Per Pinſent Prothonotary. But quære &c. Sty. 368. Hill. 1652. C. B. Anon.

2. After Declaration delivered, and *before Plea pleaded*, he that had the Title moved the Court to *alter the Plaintiff*, he being a Witneſs in the Cauſe, and the Court agreed on Payment of Coſts, and giving Security for new Coſts, and this as it ſeems without Imparlance. Sid. 24 pl. 5. Hill. 12 Car. 2. C. B. Anon.

3. No Man is to be *admitted Tenant* or Defendant in Ejectment, by the Common Rule, unleſs he has been in Poſſeſſion, or received Rents, and not a meer Stranger; Per Holt Ch. J. Cumb. 209. Trin. 5 W. & M. in B. R.

4. *Landlord* may be joined a Defendant if he requires it, but is not compellable. 1 Salk. 256. pl. 6. Trin. 11 W. 3. B. R. Underhill v. Durham.

5. It is due of Right to *Tenant in Poſſeſſion*, or Landlord, to be made Defendants, and ſo a *pretended Wife*, but who denied the Marriage was made Defendant. 7 Mod. 70. Mich. 1 Ann. B. R. Fenwick v. Gravenor.

6. *Truſtees* are not to be joined with the Tenant as Defendants in Ejectment without their Conſent. Cumb. 332. Trin. 7 W. 3. B. R. Jones Leſſee of Pride v. Carwithen.

7. A *Peer intereſted* made Defendant in Ejectment with Tenant in Poſſeſſion, which the Court thought reaſonable, and ſaid there may be ſeveral Coſts notwithſtanding. Cumb. 339. Trin. 7 W. 3. B. R. Jones Leſſee of Pride v. Carwithen.

8. 11 *Geo.* 2. *cap.* 19. *S* 13. *Landlord may make himſelf Defendant by joining with the Tenant to whom ſuch Declaration in Ejectment ſhall be delivered, in Caſe he ſhall appear; but in Caſe ſuch Tenant ſhall refuſe or neglect to appear, Judgment ſhall be ſigned againſt the caſual Ejector for want of ſuch Appearance; but if the Landlord of any Part of the Lands, Tenements &c. for which ſuch Ejectment was brought, ſhall deſire to appear by himſelf, and conſent to enter into the like Rule that, by the Courſe of the Court, the Tenant in Poſſeſſion, in Caſe he had appeared, ought to have done, then the Court where ſuch Ejectment ſhall be brought, ſhall and may permit ſuch Landlord ſo to do, and order a Stay of Execution upon ſuch Judgment againſt the caſual Ejector, until they ſhall make further Order therein.*

Where the Act ſays, that in Caſe Judgment in Ejectment be had againſt the Tenant in Poſſeſſion on his refuſing or neglecting to appear (no Notice being given to the Landlord) the Landlord may move, that Execution may be ſtayed on entering into a Rule to become Defendant himſelf in another

other Ejectment &c. yet in Case *Judgement is signed so late in the Term that the Landlord cannot apply for a Stay of Execution*, yet upon Application by the Landlord as soon as may be, the Court will set aside the Execution, upon this Judgment, although the Words are only (Stay Execution) M. 12 Geo. in B. R. in Case of Sir Wm. Clayton v. Boone.

Before this Act the Rule of Court upon the *Tenant's, in Possession, refusing or neglecting to appear* was, that the Landlord might be made *Defendant una cum the Tenant, but not alone*, till this Act, and the Case in 12 Mod. 211. cited to the contrary was denied to be Law; Per Cur. M. 12 Geo. B. R. in Case of Sir Wm. Clayton v. Boone.

(I) Ejector. Who.

1. IF a *Feme Covert* eject one, and after the *Husband assents*, yet the Husband is no Ejector; For an Ejectment *is made in an Instant* and hath not a Continuance. Otherwise of a Disseisin; Per Anderson Noy 52. Broth v. Archer.

Yelv. 145. S. C. 2. *A Servant dwelling with the pretended Owner* of a House, of which Ejectment is brought, is a sufficient Trespassor or Ejector against whom to bring the Ejectment. Brownl. 143. Mich. 6 Jac. Wilson v. Waddell.

(K) Of what it lies.

1. EJectment *does not lie of the Heir*, but Ravishment of Ward. B. Ejectione &c. pl. 13. cites 30 E. 3. 11.

Hardr. 58. Arg. cites 16 E 2. Warrantia Chartæ. [Garrante de Charters, pl. 31.] 2 Ejectment lies *de Pastura ad Centum Oves*; Per Wray and Southcote; For if Præcipe quod reddat lies as is held in 27 H. 8. he may have Ejectment. Dal. 95. pl. 20. Anno 15 Aliz. B. R. Anon. that Ejectment lies not de Pastura.

3. Lessee for Years of Tythes shall have Ejectment of *Tithes set out and afterwards carried away*; For by the setting out the Property is in the Parson. Ow. 84. Mich. 14 & 15 Eliz. Tottenham v. Bedingfield.

4 A Lease was of a *Garden containing three Roods of Land.* Lessee brings Ejectment, and *declares for three Roods of Land.* Meade and Windham J. but Dyer e contra held the Declaration good; For this Action is in Nature of Trespass, and the Party may elect to declare as here he does, or of the Ejectment of a Garden; For a Garden may be used at one Time for a Garden, and at another Time be plowed and sown with Corn; but they conceived the better Order of Pleading had been to have declared, that he was ejected of a Garden containing three Roods of Land, as in the Lease is specified. Godb. 6. pl. Hill. 23 Eliz. C. B. Anon.

5. Ejectment *de quadam Fabrica* was held good; Hardr. 58. mentions it as a Case cited by Wray Ch. J as adjudg'd 29 Eliz.

Cumb. 101. S. P.— Ejectment was brought of an House, the Jury found the Defendant Guilty of two Parts of it; Per Manwood Judgment ought to be for the Plaintiff; For Omne Majus continet in se Minus: But per Shute if the Co

6. A *Chamber* may be demanded by the Name of a House, and Part of a Messuage by Name of a Messuage. Per Walmsley. Le. 152. pl. 210. Trin. 31 Eliz. C. B. in Case of Hayes v. Allen.

had been of two Parts of an Houſe, and the Defendant had pleaded Not Guilty, and the Jury had found him Guilty, the Plaintiff ſhould not have Judgment. Sav. 27 pl. 65. Paſch. 24 Eliz. Anon. ——— If a *Man has Title but to Part of a Houſe*, he may well *declare for the Whole* in an Ejectment, and the Jury ought to find ſuch Part or ſo many Foot of the Houſe, and he ſhall have Judgment and Execution accordingly; Per Pollexfen, and not denied per Cur. Comb. 101. Mich. 4 Jac. 2. B. R. Anon.

7. Ejectment doth lie of a *Copyhold Eſtate*; it lies of a Leaſe made by a Copyholder, but not of a Demiſe made by the Lord of a Copyholder by Copy of Court Roll. Cro. E. 224. pl. 9. Paſch. 33 Eliz. B. R. Cole v. Wall and Burnell. —Le. 328. S. C.

8. It was adjudged than an Ejectione firmæ lies not *of a Cloſe*, although a Name be given unto it, but it ought to be demanded by a certain Number of Acres; And for this Cauſe a former Judgment was reverſed. Cro. E. 339. pl. 3. Mich. 36 & 37 Eliz. B. R. Jordan v. Cleabourn.

9. Ejectment was brought *de una Virgata terræ*, but adjudged that it does not lie. Cro. E. 339. at the End of pl. 3. in a Nota cites Paſch. 38 Eliz. in Cam. Scacc. Penn v. Merevill.

10. Ejectione firmæ *de una Pecia terræ vocat. M.* furlong. una Pecia terræ vocat. Aſhbrokee, *uno Gardino vocat. Minching-Garden*, quæ omnes & ſingulæ parcellæ terræ jacent in W. It was aſſigned for Error that Pecia terræ is uncertain, and ſo the Declaration not good. And 2dly, Becauſe no Place certain is alleged in which the Garden is; and for theſe Cauſes Judgment in B. R. was reverſed in Cam. Scacc. Mo. 702. pl. 976. Trin. 39 Eliz. Palmer v. Humfrey. Ow. 18. S. C. and Judgment revers'd in the Exchequer Chamber.—Hetl. 176. has a Note that it was

ſaid that an Ejectione firmæ does not lie de una Pecia Terræ although it was added, Containing by Eſtimation half an Acre of Land vocat' &c. it is not good, but he ought to ſhew the Longitude and Latitude.

11. If it lies of *a Park* Quære? without ſaying ſo many Acres. 1 Sid. 417. D. 115. b. at 67. Marg. Trin. 43 Eliz. B. R. Merideth v. Brow.

12. It lies *de Cottagio*; adjudged. Cro. E. 818. pl. 9. Paſch. 43 Eliz. B. R. Hill v. Giles. Cotagium is a Word known at

Common Law. Cro. C. 555. per Jones and Brampſton, in pl. 10. ——— An Ejectment does lie of a Cottage, becauſe the Deſcription of the Thing by that Name is ſufficient, and certain enough to ſhew the Sheriff of what to deliver the Poſſeſſion of; yet it was ſaid that a Recovory lies not of a Cottage. Sty. 215. Paſch. 1649 Hamond v. Ireland ——— Lev. 58. Hill. 13 & 14 Car. 2. S. P. accordingly per Cur. in Dacre's Caſe.

13. Ejectione firmæ *de pomario*. After Verdict it was moved, That an Ejectione firmæ lies not thereof, nor more then a Præcipe quod reddat. Sed non allocatur; for this Action is but Perſonal, wherein Damages are the Principal; And although it is uſual in this Caſe to award an Habere Facias Poſſeſſionem, yet it is well enough, and compriſes ſufficient Certainty. Wherefore it was adjudged for the Plaintiff. Cro. E. 854. pl. 15. Trin. 43 & 44 Eliz. B. R. Wright v. Wheatley. Noy. 37. S. C. and adjudg'd well brought; For it need not be demanded by the Name of a Garden as a

Præcipe ought to be. And Popham ſaid, that 18 Eliz. an Ejectment was brought de Pomario, and well brought. ——— Cro. J. 654. pl. 3. Hill. 20 Jac. B. R. **Royſton v. Eccleſton.** S. P. adjudged accordingly; For an Ejectment is but an Action of Treſpaſs in its Nature. ——— S. C cited Roll Rep. 55. in pl. 29. ——— Lev. 58. S. P. mention'd as reſolv'd upon View of Precedents in C. B.

14. Ejectment lies not of a *Copyhold*, unleſs the Plaintiff declare the Cuſtom, the Leaſe and the Ejectment. Mo. 679. pl. 927. Hill. 45 Eliz. C. B. Gregory v. Harriſon. Le. 100. pl. 128. Paſch. 30 Eliz. B. R. Rumny v

Eve, e contra, for that ſhall come of the other Side ——— In ſuch he ought to ſhew the Eſtate of his Leſſor, and the Licence of Leſſor, and the eſpecial Cuſtom to warrant it. Cro. E. 469. pl. 20. Hill. 38 Eliz. B. R. Wells v. Partridge.

15. Ejectment

15. Ejectment was brought of *Land, and a Colepit in the ſame Land*, and though it was objected that it was *bis petitum*, yet it was held good. Becauſe it is a Perſonal Action, and he demands nothing certainly. Cro. J. 21. pl. 1. Hill. 1 Jac. B. R. Harbottle v. Peacock.

Noy 121. Comyn v. Wheatly. S. P. accordingly, and ſeems to be S. C. ——

16. In Error of a Judgment in Durham of an Ejectment of a *Cole-Mine* it was reſolved that it well lies thereof. Cro. J. 150. pl. 9. Hill. 4 Jac. B. R. Commyn v. Kineto.

S. C. cited 2 Roll Rep. 483. as adjudg'd. —— S. C. cited Hardr. 57. in pl. 3.

S P. and there was no Doubt of its lying. Noy 132. Sanders v. Patridge.

17. Ejectment lies of *Boyllary of Salt*; cited by Tanfield. Cro. J. 150. Hill. 4 Jac. B. R. in pl. 9. as adjudg'd in B. R. in Wyld's Caſe.

—— Sid. 161. pl. 16 Mich. 15 Car. 2. B. R. Smith v. Barret. S. P. admitted, the Caſe there being of eight Boylaries out of 372 and found for the Plaintiff. —— Lev. 114. Smith v. ..... S. C.

Ejectment lies not of a *Watering Curſe*, but it lies of *Terra Aqua cooperta*; Arg. Poph. 167. cites 11 H. 7. 4. and Mich 6 Jac. Challoner v. Moor.

18. Ejectment was brought *de Aquæ Curſu, called Lothar in L.* and *declares upon a Leaſe made by D. de quodan Rivulo & Aquæ curſu*; and by the Opinion of the whole Court the Judgment was reverſed, for Rivulus ſeu Aquæ curſus lie not in the Demand, nor doth a Præcipe lie of it, nor can Livery and Seiſin be made of it, for it cannot be given in Poſſeſſion; but it appears by 12 H. 7. 4. the Action ought to be of ſo many Acres of Land Aqua cooperta. Brownl. 142, 143. Mich. 6 Jac. Challenor v. Thomas.

——Lat. 153. S. C. cited is adjudg'd becauſe it is not a thing fixed but always Errant. —— It lies *de Aquæ Curſu*. Godb. 157. pl. 213.

19. An Ejectment will well lie of a *Stange*, for a Præcipe lies of them, and a Woman ſhall be endowed of the third Part of them, as it is in 11 E. 3. But if the Land under the Water or River do not pertain to the Plaintiff, but the River only, then upon a Diſturbance his Remedy is only by Action upon the Caſe, upon any Diverſion of it, and not otherwiſe. Quod nota. Brownl. 143. in S. C.

3 Keb. 738. pl. 36 Hill. 28 & 29 Car. 2. B. R. in Caſe of Barton v. Hampſhire,

20. Ejectment lies not of *Common of Paſture* or of *Sheep-gate*. Brownl. 129. in Caſe of Weekes v. Meſey ſays it was ſo Adjudged. Paſch. 9 Jac.

it was admitted by Twiſden and Cur. that Ejectment would not lie of Common alone, but it being after Verdict it ſhall be intended Appurtenant and ſo well enough. ——Tho' an Ejectment will not lie of a Common by itſelf, yet when Land is join'd in Ejectment it ſhall be intended appurtenat to the Land; Arg. and to this the Court inclin'd; Et adjornatur. Freem. Rep. 447. pl. 608. Hill. 1676. Anon.

Palm. 337. S. C. adjudged accordingly, ——

21. Ejectment lies *de una Domo*. Cro. J. 654. pl. 3. Hill. 20 Jac. B. R. Royſton v. Eccleſton.

S. C cited Per Cur, 3 Lev. 97. Hill. 34 Car. 2. C. B.——Ejectment does not lie *de Una Domo*; Agreed, becauſe it may be either a Dove-Houſe or a Dwelling Houſe; and ſo the Sheriff has no certainty as to making Execution. 2 Roll Rep. 483. Mich. 22 Jac. B. R.—S. C. cited Arg. Hardr 76. as the Caſe of Warren v. Walker——But Ejectment de Una Domo *vocat. Holts* &c. it was adjudg'd good and certain enough. Hardr. 76. Arg. cites Paſch. 1650. B. R. Fry v. Petchey.

Domus

Domus eſt Nomen Collectivume contains many Buildings, as Barns, Stables &c. 4 Le. 16. pl. 56. ;; Eliz. B. R. Hore v. Briddleworth.——2 Le. 184. pl. 230. Mich. 32 Eliz. B. R. Hore v. Wriddlesworth, S. C. in totidem Verbis.

23. An Ejectment lies of *Underwood*, tho' a Præcipe does not. 2 Roll Rep. 482, 483. Mich. 22 Jac. Warren v. Wakely.

24. An Ejectment cannot be of a *Manor* becauſe there cannot be an Ejectment of the *Services* but if they do expreſs farther *a Quantity of Acres* it is ſufficient. Per Richardſon and Hutton J. Het. 81. Paſch. 4 Car. C. B. cited by them to be Hurtſton's Caſe.

Tho' an Ejectment lies of a Manor or of the *Moiety of a Manor* if Attornment of the Tenants may be proved yet it is not ſafe to bring Ejectment of a Manor. Het. 146. Mich. 5 Car. C. B. Warden's Caſe.

25. Ejectione Firmæ of a Leaſe *of Tithes appertaining to ſuch a Chappel*; It was ſaid it did not lie of Tithes only, but that it might of ſuch a Rectory, or ſuch a Chapel, and of the Tithes thereunto belonging, ſo as he may be ejected from a Thing in Poſſeſſion whereof an Habere Facias Poſſeſſionem may be, but not of Tithes only; Curia adviſare vult. But afterwards adjudg'd for the Plaintiff. Cro. C. 301. pl. 4. Paſch. 9 Car. B. R. Baldwin v. Wine.

Jo. 321. pl. 6 Badwyn v. Wine, S. C. but ſtated that the Ejectment was for Tithes belonging to the Rectory of D. in R. and A and that after Verdict for he Plaintiff it was moved that the Declaration was not good, becauſe it did not allege that the Tithes were appertaining to the Rectory of D. and for Cauſe it was adjudg'd per tot Cur. quod Querens nil capiat per Breve.——Mar. 32. in pl. 66. Trin. 15 Car. Jones J. ſaid, it had been adjudg'd that an Ejectment will lie of Tithes.

26. A Judgment in B. R. in Ireland in an Ejectione Firmæ, brought there *de Piſcaria in ſuch a River*, was reverſed in B. R. here, becauſe an Ejectione Firmæ lies not thereof, no more than of a Common Apprender, or a Rent; Arg. and the Court held that Ejectment would not lie of a Fiſhery. Cro. C. 492. pl. 17. Mich. 13 Car. B. R. Herbert v. Laughluyn.

Cro. J. 146 Hill. 4 Jac. B. R. in Caſe of Molineux v. Molineux. S. P. doubted.——An Ejectment will not lie of a Fiſhery, nor in any Caſe but where there may be an Entry and Expulſion; and that cannot be of a Fiſhery, eſpecially in this Caſe, where it was of a Fiſhery *in the River Tyne*, which cannot paſs by the Name of ſo many Acres Aqua co opert', becauſe it is not like a Pond, where the very Soil is the Property of another; but this is only a Freedom to Fiſh in that River. 8 Mod. 277, 278. Trin. 10 Geo. in Caſe of Waddy v. Newton.

27. In Ejectment it was doubted whether it well lie *de uno Croſto*, becauſe it is a Word of uncertain Signification. Sty. 30. 364. Trin. 23 Car. and Hill. 1652. Aſhworth v. Staley.

But Sty. 194. Hill. 1649. Roll. Ch. J. ſaid, that Ejectment would lie de uno Croſto.——Per Twiſdem. J. tho' an Ejectment will not lie of a Croft, yet it will lie de uno Croſto call'd Black-acre; For this is certain enough to be delivered in Execution, and ſo he ſaid it was adjudg'd in one Fairbeard's Caſe. Lev. 51. Hill. 13 & 14 Car. 2.

28. An Ejectment lies not of 3000 *Acres of Waſte*, becauſe the Word Waſte is uncertain, and may contain Land of of any Quality, and the Sheriff will be at a Loſs what Land to deliver; Adjudg'd. Hardr. 57, 58. Paſch. 1658. Hancock v. Price.

29. Ejectment was brought inter alia *de uno Stabulo*. It was moved that it did not lie, but upon View of Preſidents, in C. B. of Recoveries ſuffered de Stabulo, it was reſolv'd that it well lies. Lev. 58. Hill. 13 & 14 Car. 2. Dacres's Caſe.

Keb. 236. pl. 65. Whitacre v. Dacres, S. C. and held that it lies.

30. Ejectment will not lie of a *Free Warren*. Keb. 500. pl. 55. Paſch. 15 Car. 2. B. R. Tremain v. Sands.

31. An Ejectment lies not *de Pannagio*, which is but a Privilege to take Pannage; Adjudg'd. Lev. 212. Hill. 16 & 17 Car. 2. Pemble v. Stern.

Palm. 338. S. P. per Cur that it

32. Ejectment lies *of a Close* if a Name be given to it; Per Cur. Cro J. 654. in pl. 3. Hill. 20 Jac. B. R.

lies of a Close containing 3 Acres of Land, and that so it has been adjudg'd here, because it is sufficient for the Sheriff to give Possession upon; but that otherwise it lies not. ——If it does not say how many Acres it is ill. Sid. 229. at the End of pl. 26. cites it as adjudg'd. Mich. 18 Car. 2.

33. Where a *Statute is extended* it cannot be tried in an Ejectment if it be *satisfied or not*, but the only Remedy is by Scire Facias ad Comp. or Bill in Chancery; but where Land is extended on an *Elegit* the Debt and yearly Value appears on Record, and it may be well known when the Debt is paid, and may come in Evidence on a Trial in Ejectment. Vern. 50. pl. 49. Pasch. 1682. Arg. E. of Huntington v. Greenvill.

34. Ejectment lies not *De Tenemento*. Cro. E. 116. pl. 20. Mich. 30 & 31 Eliz. B. R. in Case of Austin v. Courtney.

1 Salk. 255. pl. 2 Whittingham v. Andrews, S. C and because it was the constant Course in Durham that Judgment was affirmed

35. *De Mineris Carbonum* in Parochia de D. &c. generally *not saying How many* Mines &c. Upon Error brought the Court inclined that the Judgment was erroneous; but then the Plaintiff produced several Precedents in Durham, and *alleged that all the Entries in Durham* in Ejectments for Coal Mines *were the same as in this Case*; so the Judgment was affirmed. Carth. 277. Pasch. 5 W. & M. in B. R. Andrews v. Whittingham.

—— 4 Mod. 143. S. C. and Judgment affirmed for the same Reason. —— Comb 201. Ambrose v. Whittingham, S. C. Holt Ch. J. hæsitavit; but the Judgment was affirmed. —— Show. 364. S. C. but no Judgment,

36. An Ejectment was brought in the Exchequer *de minutis Decimis*, and upon Not Guilty pleaded, Verdict for the Plaintiff; And Mr. Cheshyre, about five or six Years ago, moved in Arrest of Judgment, that an Ejectment would not lie for small Tithes, 1st, Because Eggs are small Tithes, and it is absurd to say, that an Ejectment would lie of an Egg. 2dly, Because the Sheriff does not know of what he is to deliver Possession upon an Habere Facias Possessionem, sed non allocatur; because it has been adjudged, that an Ejectment lies *of Wool*, being Tithe, and by the same Reason for an Egg; And therefore by all the Barons Judgment was given for the Plaintiff and cited 11 Rep. 25. Ex Relatione M'ri Cheshire. 2 Ld. Raym. Rep. 789. Trin. 1 Ann. Camell v. Clavering.

(L) Of what it lies. By what Name or Description.

1. Ejectment *of Ward lies not of the Body, but* only of the *Land*, and *Raviſhment of Ward and Body*. Br. Ejectione, pl. 10. cites 14 E. 3.

2. An Ejectione Firmæ was brought *de uno Cubiculo*, and Exception was taken to it; but the Exception was disallowed. The Declaration was Special, viz. Of a Lease unius Cubiculi, per nomen unius Cubiculi, being in such a House in the middle Story of the said House. And the Declaration was holden good enough; and the Word Cubiculum is a more apt Word than the Word Camera; and such was the Opinion

Opinion of Wray Ch. J. 3 Le. 210. pl. 275. Trin. 36 Eliz. B. R. Anon.

3. And it was ſaid that Ejectione Firmæ brought *de una Rooma* had been adjudged good in this Court. 3 Le. 210. in S. C.

4 Ejectione Firmæ; The Declaration was *De uno Meſſuagio ſive Tenemento* and four Acres of Land to the ſame belonging; The Court held clearly that no Judgment ſhould be given for the Meſſuage, and Land cannot be properly ſaid to belong to an Houſe; yet it was good for the four Acres. The Plaintiff releaſed his Damages, and Judgment was given accordingly. Cro. E. 186. pl. 8. Trin. 32 Eliz. B. R. Wood v. Payne.

3 Le. 228. pl. 306. S. C. and held that as to the four Acres it is certain enough; For the Words (to

the ſame belonging) are meerly void; and Plaintiff recovered Damages and had Judgment. ——— Ejectment de Meſſuagio ſive Tenemento is not good for the Uncertainty. Poph. 197. Mich. 2 Car. Anon. ——— S. P. and a Judgment in C. B. was reverſed for the Uncertainty. Noy 86. Rocheſter v Keckhouſe. ——— Cro. J. 125. in pl. 9. cites S. P. to have been adjudged ill. ——— Sid. 295. pl. 17. Trin. 18 Car. 2. B R. Burbury v. Yeomans S. P. ruled accordingly. And it was ſaid per Curiam, that, as this Caſe is, the Plaintiff cannot aid himſelf by releaſing of the Party as perhaps he might if there had been Lands alſo in the Declaration. But Twiſden ſaid, that if it had been de uno Meſſuagio ſive Tenemento vocato the Black Swan &c. it had been good; becauſe that would have aſcertained it. ——— 2 Keb. 82. pl. 81. S. C. ——— 3 Mod. 238. Trin 4 Jac. 2. B R. Hexham v. Coniers, S P. adjudged accordingly; for Tenement is a Word of an uncertain Signification; it may be an Advowſon, a Houſe or Land, but Meſſuagium ſive Tenementum called the Black Swan, would be good. ——— So *de Burgo ſive Tenemento* is not good any more than de Meſſuagio ſive Tenemento; adjudged. Popn. 203. Mich. 2 Car. B. R. Rocheſter v Rickhouſe. ——— But *pro uno Meſſuagio ſive Burgagio* in Hay infra muros the Court held it to be good, and that an Ejectment lies well de Burgagio; and that Meſſuagium & Burgagium ſignify the ſame Thing in a Borough. Hardr. 173. pl. 2. Mich. 12 Car. 2. in Scacc. Danvers v. Wellington.

5. Ejectione Firmæ *of ſeven Cloſes, one called Green Mead, and ſo gave to the other ſeveral Names*; is well enough; for when a Name is given to every Cloſe, although *the * Contents of the Acres are not mentioned*, viz. So many of Land, ſo many of Paſture &c. it is ſufficient, though it were more formal to expreſs the Acres; and it is aided by the Statute of Jeofails, and the Court is aſcertained of the Truth. And Popham Attorney ſaid, he had known it thrice ſo adjudged; and the Plaintiff had Judgment. Cro. E. 235. pl. 1. Paſch. 33 Eliz. in Scacc. Jones v. Hoel.

* Cro E. 339. pl. 3. Mich. 36 & 37 Eliz. B R. Jordan v. Cleabourne, S. P. but the Court was divided tho' the Cloſe had a Name

given to it, & adjornatur. ——— Godb. 53. pl. 66. Mich. 28 & 29 Eliz. B. R. the Number of Acres ought to be ſet forth; and ſays that ſo it was adjudged iu a Shropſhire Caſe ——— In Ejectment of a Cloſe if he does not give it a Name, nor declare of what Nature the Land is, it is not good; Per Roll Ch. J. Sty. 193, 194 Hill. 1649. Meers v. French.

6. An Ejectment lies not *de Coquina, (Anglice a Kitchen)* becauſe of the Uncertainty, for any Room by Uſage may be made a Kitchen. Adjudged, though a Caſe in 2 Jac. was cited, where it was adjudged that it lay pro Coquina. Noy 109. Trin. 2 Jac. Ford v. Lerk.

It was ſaid at Bar that 3 Jac. in C. B. an Ejectment de Coquina was

held not good, but that it has been adjudged here by Bill to be good enough; but Coke ſaid it ſeems to be good enough by Writ. ——— S. C. cited Roll Rep. 55. in pl. 29. to have been adjudged not good.

7. An Ejectment lies not of *a Cloſe containing three Acres without ſhewing of what Nature* the Acres are, as Land, Meadow, Paſture, Wood &c. becauſe the Poſſeſſion is to be recovered by Habere Facias Poſſeſſionem, and muſt follow the Form of other Writs of like Nature, as a Writ of Right, of Ward, Ejectment de Gard &c. Adjudged, and Judgment arreſted accordingly, though the Name of the Cloſe was inſerted in the Declaration. 11 Rep. 55. Mich. 12 Jac. Savill's Caſe.

Roll Rep. 55. pl. 29. Hammond v. Savil, S. C. adjudged againſt the Plaintiff —— The Name and Quantity will not

ſerve without the Quality, and Certainty ought to be compriſed, becauſe the Poſſeſſion is to be recovered

31. An Ejectment lies not *de Pannagio*, which is but a Privilege to take Pannage; Adjudg'd. Lev. 212. Hill. 16 & 17 Car. 2. Pemble v. Stern.

Palm. 338. S. P. per Cur that it

32. Ejectment lies *of a Close* if a Name be given to it; Per Cur. Cro J. 654. in pl. 3. Hill. 20 Jac. B. R.

lies of a Close containing 3 Acres of Land, and that so it has been adjudg'd here, because it is sufficient for the Sheriff to give Possession upon; but that otherwise it lies not. —— If it does not say how many Acres it is ill. Sid. 229. at the End of pl. 26. cites it as adjudg'd. Mich. 18 Car. 2.

33. Where a *Statute is extended* it cannot be tried in an Ejectment if it be *satisfied or not*, but the only Remedy is by Scire Facias ad Comp. or Bill in Chancery; but where Land is extended on an *Elegit* the Debt and yearly Value appears on Record, and it may be well known when the Debt is paid, and may come in Evidence on a Trial in Ejectment. Vern. 50. pl. 49. Pasch. 1682. Arg. E. of Huntington v. Greenvill.

34. Ejectment lies not *De Tenemento*. Cro. E. 116. pl. 20. Mich. 30 & 31 Eliz. B. R. in Case of Austin v. Courtney.

1 Salk. 255. pl. 2 Whittingham v. Andrews, S. C and because it was the constant Course in Durham that Judgment was affirmed

35. *De Mineris Carbonum* in Parochia de D. &c. generally *not saying How many* Mines &c. Upon Error brought the Court inclined that the Judgment was erroneous; but then the Plaintiff produced several Precedents in Durham, and *alleged that all the Entries in Durham* in Ejectments for Coal Mines *were the same as in this Case*; so the Judgment was affirmed. Carth. 277. Pasch. 5 W. & M. in B. R. Andrews v. Whittingham.

—— 4 Mod. 143. S. C. and Judgment affirmed for the same Reason. —— Comb 201. Ambrose v. Whittingham, S. C. Holt Ch. J. hæsitavit; but the Judgment was affirmed. —— Show. 364. S. C. but no Judgment,

36. An Ejectment was brought in the Exchequer *de minutis Decimis*, and upon Not Guilty pleaded, Verdict for the Plaintiff; And Mr. Cheshyre, about five or six Years ago, moved in Arrest of Judgment, that an Ejectment would not lie for small Tithes, 1st, Because Eggs are small Tithes, and it is absurd to say, that an Ejectment would lie of an Egg. 2dly, Because the Sheriff does not know of what he is to deliver Possession upon an Habere Facias Possessionem, sed non allocatur; because it has been adjudged, that an Ejectment lies *of Wool*, being Tithe, and by the same Reason for an Egg; And therefore by all the Barons Judgment was given for the Plaintiff and cited 11 Rep. 25. Ex Relatione M'ri Cheshire. 2 Ld. Raym. Rep. 789. Trin. 1 Ann. Camell v. Clavering.

(L) Of what it lies. By what Name or Description.

1. *Ejectment of Ward lies not of the Body, but* only of the *Land*, and *Ravishment of Ward and Body*. Br. Ejectione, pl. 10. cites 14 E. 3.

2. An Ejectione Firmæ was brought *de uno Cubiculo*, and Exception was taken to it; but the Exception was disallowed. The Declaration was Special, viz. Of a Lease unius Cubiculi, per nomen unius Cubiculi, being in such a House in the middle Story of the said House. And the Declaration was holden good enough; and the Word Cubiculum is a more apt Word than the Word Camera; and such was the Opinion

Opinion of Wray Ch. J. 3 Le. 210. pl. 275. Trin. 36 Eliz. B. R. Anon.

3. And it was ſaid that Ejectione Firmæ brought *de una Rooma* had been adjudged good in this Court. 3 Le. 210. in S. C.

4. Ejectione Firmæ; The Declaration was *De uno Meſſuagio ſive Tenemento* and four Acres of Land to the ſame belonging; The Court held clearly that no Judgment ſhould be given for the Meſſuage, and Land cannot be properly ſaid to belong to an Houſe; yet it was good for the four Acres. The Plaintiff releaſed his Damages, and Judgment was given accordingly. Cro. E. 186. pl. 8. Trin. 32 Eliz. B. R. Wood v. Payne.

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held not good, but that it has been adjudged here by Bill to be good enough; but Coke ſaid it ſeems to be good enough by Writ. ——— S. C. cited Roll Rep. 55. in pl. 29. to have been adjudged not good.

7. An Ejectment lies not of *a Cloſe containing three Acres without knowing of what Nature* the Acres are, as Land, Meadow, Paſture, Wood &c. becauſe the Poſſeſſion is to be recovered by Habere Facias Poſſeſſionem, and muſt follow the Form of other Writs of like Nature, as a Writ of Right, of Ward, Ejectment de Gard &c. Adjudged, and Judgment arreſted accordingly, though the Name of the Cloſe was inſerted in the Declaration. 11 Rep. 55. Mich. 12 Jac. Savill's Caſe.

Roll Rep. 55. pl. 29. Hammond v. Savil, S. C. adjudged againſt the Plaintiff ——— The Name and Quantity will not

ſerve without the Quality, and Certainty ought to be compriſed, becauſe the Poſſeſſion is to be recovered

covered Bridgm. 56. cites S. C. —— S C. affirmed for Law by Holt Ch J. 1 Salk. 254 in pl. 1. Paſch. 4 W. & M. in B R —— Cro. J. 124, 125 in pl 9. S. P. per Cur that both the Certainty of the Land ought to be ſhewn and in what Place it lies.

8. *De una pecia* Paſturæ *continen.* 201 *Acras Terræ ſive plus ſive Minus jacent' inter terras B.* This after Verdict given was held ill, & nihil Capiat per Billam. Jo. 400. pl. 9. Mich. B. R. Anon.

2. An Ejectment did not lie *de* 50 *Acris Montani*, becauſe that may contain Arable, Wood, Paſture, or other Species. Upon a Writ of Error upon a Judgment out of Ireland, it was for this Reaſon reverſed. Palm. 100 Paſch. 17 Jac. Stafford v. Macdonnough.

See this Caſe denied to be Law in Caſe of Kildare v Fiſher. (Sup. pl. 19)

12. A Judgment in Ejectione Firmæ was reverſed, becauſe the Declaration was *of a Meſſuage, and of* 40 *Acres of Land, Meadow and Paſture thereto appertaining*, and it was *not ſet forth how much* there was *of each* of them. Cro. C. 573. pl. 13. Hill. 15 Car. B. R. Martin v. Nichols.

Mar 96. pl. 166. Sprigg v. Rawlenſon, S. C. adjudged accordingly.— Cro C. 554. pl. 10 S. C. it was objected that

13. Ejectment *de uno Repoſitorio* was found for the Plaintiff. Upon Error bronght Crooke and Berkley held, that Repoſitorium ſhould be intended a Warehouſe, but Brampſton and Jones held that it was uncertain, and the greater Opinion of the Juſtices at Serjeant's-Inn was, that it was not good, whereupon Berkley retracted his Opinion, and the Judgment was reverſed. Jo. 454. pl. 2. Paſch. 16 Car. B. R. Sprigg v. Rawlſon.

Repoſitorium is a Cupboard as well as a Warehouſe, and a Cupboard is a Perſonal Thing, of which Ejectment will not lie. The Court was divided, and would adviſe, and they continuing afterwards divided, the Defendant in Error commenced a new Action, and conſented that this Judgment ſhould be reverſed —— S. C. cited Mar. 134. by Brampſton Ch. J. but he ſaid it would have been good if it had been ſaid Anglice a Warehouſe.

14. Ejectment was brought *de qnatuor Molendinis, without expreſſing whether* they were *Wind-Mills or Water-Mills.* Hales ſaid, that it is well enough; the Precedents in the Regiſter are ſo. Mod. 90. pl. 55. Mich. 22 Car. B. R. Fitzgerald v. Maskal.

15. The Ejectment likewiſe was *of ſo many Acres Jampnor' & Bruer', not expreſſing how many of each.* Cur. That has always been held good. Mod. 90. pl. 55. Mich. 22 Car. 2. B. R. Fitzgerald v. Maskal.

16. An Ejectment lies *de quodam Loco vocat' the Veſtry in D.* for this is a ſufficient Deſcription, ſo that Execution may be had thereof; Adjudged. 3 Lev. 96, 97. Hill 34 Car. 2. Hutchinſon v. Puller.

17. Ejectment *of five Cloſes of Arable and Paſture, called* con*taining* 20 *Acres in D.* Upon Not Guilty pleaded Verdict was for the Plaintiff, but Judgment was arreſted, becauſe Ejectment lies not of 20 Acres of Arable and Paſture, *without ſhewing how much of the one, and how much of the other*, and Clauſum does not help the Matter; *Furlinga* is a known Meaſure, ſo is *Bovata, Hida, Caruca*, but Clauſum is not ſo certain in Law, and the adding a Name to the Cloſe is nothing, and Holt Ch. J. affirmed Savil's Caſe for Law. 1 Salk. 254. pl. 1. Paſch. 4 W. & M. in B. R. Knight v. Syms.

18. The Court ſeemed clear of Opinion, that a *Church* is demandable *by the Name of a Meſſuage*, but ſaid they would hear the Counſel again as to that. 1 Salk. 256. pl. 7. Hill 11 W. 3. C. B. Hollingworth v. Brewſter.

19. A Writ of Error was brought upon a Judgment given in an Ejectione Firmæ in Ireland, and it was aſſigned for Error, that the Ejectment was brought (inter alia) *of* 4000 *Acres of Montan'*, which Word

Word it was ſaid was of an uncertain Signification, and did only denote the Situation, and not any particular Sort of Land, and after divers Arguments at the Bar, the Judges of this Court wrote to the Judges of Ireland to inform them, 1ſt. Whether Mountain-Land ſignified only Land ſo ſituated, or that it ſignified any particular Sort of Land. 2dly, Whether Land had uſually been demanded in a Præcipe by that Name, and Fines uſually levied of Land by that Name. 3dly, Whether Ejectments had been uſually brought of Land by that Name; to which Letter the Ch. J. of B. R. and the Ch. J. of C. B. and the Ch. B. of the Exchequer, and ſeveral others of the Iriſh Judges, ſent back an Anſwer, and to the firſt Quære ſaid, that Mountain-Land did not only ſignify Land ſo ſituated, but alſo coarſe barren Land, whether it was covered with Furze, Heath, or Stony; and the Lord Chancellor of Ireland, in Anſwer to a Letter which Parker Ch. J. wrote to him upon this Matter ſaid, that Mountain-Land ſignified coarſe barren Land, whether it was Mountainous or not, and that he knew ſome ſuch Land called by that Name, which was no High Grounds. To the ſecond Quære the Judges anſwered, that Fines had been levied, and Recoveries ſuffered of Land by that Name, in the Reign of Jac. 1. and in every ſucceeding Reign, none of which had been called in Queſtion, and ſent over very many Precedents of the ſame. And to the third Quære they anſwered, that Ejectments had been frequently brought of Land by that Name, many Precedents whereof they alſo ſent over, upon which Reaſons this Court affirmed the Judgment given in Ireland, and denied the Judgment of Reverſal in **Macduncock's Caſe**, 2 Roll Rep. 189. to be Law. MS. Rep. Mich. 4 Geo. B. R. Earl of Kildare v. Fiſher.

(M) For whom it lies.

1. IF *A. ejects B.* and *after C. ejects A.* there B. ſhall not have Writ of Ejectment againſt C. the ſecond Ejector, Per Kyrk, which Thorp agreed; For the firſt Owner *ſhall not have Treſpaſs againſt the ſecond Treſpaſſor.* Br. Ejectione &c. pl. 8. cites 38 Aſſ. 9.

2. Ejectment of Ward, where *he who ejects me aliens to another*, yet *I ſhall have Ejectione Cuſtodiæ againſt him who ejects me*; Per Hank. quod non negatur, and yet a Man ſhall recover the Land by Ejectment of Ward. Br. Ejectione, pl. 2. cites 12 H. 4. 10.

3. If a *Leaſe for Years be made at Lammas to commence at Michaelmas*, the Leſſee cannot have Ejectione Firmæ before Michaelmas. Br. Surrender, pl. 21. cites 37 H. 6. 17.

5. *Leſſee for Years of Copyholder* may have Ejectment *before Admiſſion of Leſſor*, or any Preſentment that he is Heir. N. B. in this Caſe 19 Years were incurred in Infancy, and after the Court was not held in ſeveral Years, and then the Steward refuſed to admit. Le. 100. pl. 128. Paſch. 30 Eliz. B. R. Rumney v. Eves.

If Copyholder makes a Leaſe for Years, his Leſſee may maintain an Ejectment.

Mo. 539. pl. 709 Hill. 39 Eliz. B. R. Stoper v. Gibſon. —— Ruled, that the Leaſe was good before Admittance, but otherwiſe of a Surrender before Admittance. Mo. 596. pl. 813. Paſch. 35 Eliz. Bullock v. Dibley.

6. If a *Stranger enters on the Queen's Farmer*, he gains an Eſtate for Years, and if he makes a Leaſe to another, his Leſſee may maintain an Ejectment. 3 Le. 206. pl. 265. Paſch. 30 Eliz. in the Exchequer, Anon.

If the King's Copyholder be ouſted, and the *Intruder makes a Leaſe for Years*, this

7. *Copyholder of Inheritance* of a Manor in the Hands of the King *is ouſted*; It was held, that he has not gained an Eſtate ſo as he may make a Leaſe for Years, upon which his Leſſee may maintain an Ejectment, but he hath but a Poſſeſſion againſt all Strangers. 3 Le. 221. pl. 294. Paſch. 30 Eliz. B. R. Anderſon v. Heyward.

Leſſee ſhall not have Ejectment if ouſted, but he ſhall have Action of Treſpaſs againſt any Stranger, Cited per Gawdy J. Owen 16. as adjudged, 34 Eliz. in the Caſe of Badington v. Hale.

8. *Leſſee of the King* may bring an Ejectment, though the King be not put out of Poſſeſſion; Per Fenner, to which Popham agreed. Cro. E. 332. pl. 9. Trin. 36 Eliz. B. R. in Caſe of Lee v. Norris.

8. A Declaration of a Leaſe made *by Reverſioner during the Life of a Jointreſs*, as appeared by the Special Verdict, for the Leaſe was made the 11th of January, *habend' from Mich. before*, and the Jointreſs died after Mich. Reſolved that the Declaration was good; For being by Indenture (as it was found) it is good between the Parties, and the Jointreſs being dead, it ſhall be ſaid to begin according to the Time limited by the Indenture, and he cannot declare in any other Manner, but if it had been without Deed, peradventure it had been otherwiſe. Cro. E. 322. pl. 10. Paſch. 36 Eliz. B. R. Read and Morpeh v. Errington.

Yelv. 1. Paſch. 44 Eliz. B R. Wilſon v. Rich, S. P. held e contra. —

4. *Husband and Wife had Right to enter* into certain Lands *in the Right of the Wife*, and a Deed of *Leaſe* for Years is written *in the Name of the Husband and Wife*, to one A. for to try the Title, and alſo a *Letter of Attorney to B. to enter* into the Land, and to deliver *the ſaid Deed of Leaſe* to the ſaid A. *in the Name of the Husband and Wife*, and as well the Letter of Attorney as the ſaid Deed of Leaſe, are ſealed by the ſaid Husband and Wife with their Seals, and Entry and Delivery is made accordingly; The ſaid A. enters, and upon Ejectment brings an Ejectione Firmæ, and the whole Matter aforeſaid was found by Special Verdict, and the Plaintiff had Judgment to recover, for the ſpecial Matter found by Verdict, i. e. the Deed of Leaſe, and the Letter of Attorney, do maintain the Declaration well enough, and here is a Leaſe made by Husband and Wife, according to that the Plaintiff hath declared. 2 Le. 200. pl. 253. Mich. 26 Eliz. B. R. Cooper's Caſe.

Baron may bring Ejectment of the Lands of his Wife. 2 Mod. 270. in Caſe of Froſdick v. Sterling.

Cro. 2. 676. pl. 4. Spark's Caſe S. C. & S. P. by Popham, quod Gawdy conceſſit.

9. If *Copyholder* makes Leaſe for a Year warranted by the Cuſtom, Leſſee ſhall maintain an Ejectment, and per Popham, he ſhall maintain it tho' the *Leaſe was not warranted* by the Cuſtom. Mo. 569. pl. 776. Trin. 41. Eliz. B. R. Sparke's Caſe.

It was ruled by Holt Ch. J. at Ryegate in Surry, Summer Aſſiſes, 10 W. 3. upon Caſe in Mo. 682. pl. 939. is not Law.

10. Ejectione Firmæ; A Leaſe was made *by two Coparceners*, the Declaration was, Quod *demiſerunt*; Ruled not good, becauſe it is ſeveral Leaſe of each of them for his Part. Mo. 682. pl. 939. Mich. 42 & 43 Eliz. B. R. Milliner v. Robinſon.

Evidence at a Trial, that Coparcener's may join in Ejectment and Holt ſaid that th

Ld. Raym. Rep. 726. Boner v. Juner.

11. Lan

11. Land deviſed to Perſons in Truſt to let Leaſes, and diſtribute the Profits to twenty of the pooreſt Kindred of Deviſor, the *twenty poor Kindred* have only a *Confidence, and not an Intereſt*, ſo the have no Power to make Leaſe to try Title in Ejectment. Mo. 753. pl. 1040. Mich. 2. Jac. Griffith v. Smith.

So where the Deviſe was that the Truſtees ſhould *have the letting and ſetting of his Land during the Minority of his Heir*, the Truſtees cannot make a Leaſe to try the Title; Per Whitlock J. Lat. 39. cites it as Reſolved 41 Eliz. Piggot's Caſe ——— Cro. E 678. 734. Piggot v. Garnis ——The Reaſon is becauſe they have *an Authority only, and not an Intereſt*. Per Whitlock J. Lat. 135.

12. If a *Copyholder without Licence* makes a Leaſe for Years, the Leſſee which enters by Colour of that is a Diſſeiſor, and a *Diſſeiſor* cannot maintain Ejectment. 2 Brownl. 40. Hill. 8 Jac. C. B. in the Caſe of Petty v. Evans.

13. *Leſſee of a Guardian in Socage* ſhall have Ejectione Firmæ. Hutt. 16. Paſch. 16 Jac.

And held good tho' *not ſhewn in the Writ that the Heir was within Age at the Time* &c. But note, that the Nonage of the Heir *appear'd in the Declaration*, and Judgment affirmed. Noy. 135. Simmonds v. Barham.

14. Leaſe in Writing is delivered upon the Land, and it was *Hand' a Die Datus*, now when the Leſſee is upon the Land afterwards in the *ſame Day*, it it a *Diſſeiſin*, but his Continuance there the next Day by Virtue of that Leaſe *purges* the Diſſeiſin, and now he is rightfully in of the Leaſe only, and ſo may maintain an Ejectment. Clayt. 27. pl. 47. Aug. 10 Car. Crawley J. Metcalf v. Stavely.

See 8 Mod. 53. Sheers v. Lammas. —8 Mod, 54. Adjudged. Mackdonell v. Welden.

15. Ejectment lies for *Infant*; Per Mallet J. Mar. 143. Mich. 17 Car.

It lies for *Leſſee of an Infant*. Noy. 130 Rames v. Machlin. ——If Infant makes a Leaſe to try a Title it is a good Leaſe; Per Glynn Ch. J. 2 Sid. 110. Mich. 1658.

16. Diſſeiſee *after Seiſure* for the King *on Outlawry* of Diſſeiſor may. Hardr. 176. pl. 2. Hill 12 & 13 Car. 2. in Scacc. Hammond's Caſe.

17. *Tenant at Will* cannot. Raym. 137. Trin. 17 Car. 2. B. R. cites Blunden v. Baugh.

Sty. 380 Trin. 1652. it was ſaid in the Caſe of Homes v. Bingley that Tenant at Will may make a Leaſe for Years to try a Title of Land. —— S P. by Popham, which Gawdy agreed. Cro. E. 676. pl. 4. Trin. 41 Eliz. B. R. in Spark's Caſe. —— Hetl. 73. Hill. 3 Car. S. P. by Hutton.

18. *Leſſee for Years makes a Leaſe at Will; Leſſee at Will is Ouſted*; Leſſee for Years may maintain Ejectione Firmæ, cites 9 H. 7. otherwiſe if Leſſee for Years makes a *Leaſe for Years*, and Leſſee is Ouſted. Per Bridgman. Ch. J. Cart. Paſch. 18. Car. 2. C. B.

Roll Rep 3. pl. 5 Paſch. 12 Jac. B. R. Stone v Grubham S. P. reſolved e Contra as to Ouſter of Leſſee at Will. ——2 Bulſt. 217. S. C. and Coke Ch. J. ſaid it had been ſo rul'd; and ſays that clearly upon a Poſſeſſion in Law, a Man ſhall never maintain an Ejectment but he muſt have an actual Poſſeſſion.

19. *Conuſee of a Statute-Staple* can bring no Ejectment before the Liberate. Vent. 42. Mich. 21 Car. 2. B. R. Anon.

But after he may; Arg. 8how. 40. Trin. 2 W. & M. in Caſe of Dighton v. Greenvill. ——But in Caſe of a *Statute Merchant* it is otherwiſe; For there is no need of a Liberate; Per Cur. Vent. 41. S. C.

20. *Vendee of Commiſſioners of Bankrupts* cannot maintain Ejectment by his Leſſee before Inrolment, tho' the Deed be inroll'd after the Action

Vent. 360. S. C. adjornatur, but

afterwards adjudg'd accordingly.

Action brought. 2. Jo. 196. Paſch. 34 Car. 2. B. R. Perry v. Bowers.

——Skinn. 30. pl. 6. S. C. argued, and ſays it was held afterwards that Sale of Lands by Commiſſioners muſt be by Deed inroll'd, and is void if otherwiſe.——2 Show. 156. pl. 142. Berris v. Bowyer S. C. adjudg'd accordingly.

It was ſo Ruled at a Trial at Bar. Mod. 217. Ogrel v. Ld. Arlington.

21. Tenant by *Elegit* before Actual Entry may have Ejectione Firmæ or Treſpaſs; Arg. Show. 40. Trin. 1 W. & M. in Caſe of Dighton v. Greenvill.

22. *Aſſignment of a Term by Commiſſioners of Bankruptcy* was made to a Creditor, who before Inrollment of the Deed of Aſſignment, made a Leaſe to the Defandant, and then the Deed was inrolled; Per Cur. ſuch a Leſſee cannot maintain an Ejectment, becauſe the Leaſe could not have been before the Inrollment; the Words of the Statute are, that Commiſſioners may ſell by Deed inrolled, ſo *without inrollment* no Sale. Vide tamen. 2 Co. 26. a. 12 Mod. 3. Mich. 2 W. & M. Elliot and Danby.

(N) Againſt whom it lies.

1. IF the *Heir himſelf enters and ouſts his Guardian of the Land*, Writ of *Ejectment of Ward lies not, but Writ of Intruſion of Ward.* Br. Ejectione &c. pl. 11. cites 32 E. 3.

2. Where *Diſſeiſor makes a Feoffment reſerving Rent*, this Rent ſhall not make him Parnor of the Land; quod nota Per Cur. Br. Parnor de Profits, pl. 15. cites 39 H 6. 44.

3. If *Maſter* of the Cattle appoint his *Servant* to look to the Cattle being there, the Maſter and not the Servant ſhall be the Ejector, but where no Servant is ſo appointed, if a *Stranger* come over the Ground while my Cattle are there he ſhall be the Ejector. Clayt. 29. pl. 50. Aſſiſa Mar. 10 Car. Vernon J. Rawcliff v. Booth.

4. Ejectment lies *not for Leſſee* for Recovery of his Term *againſt Feoffee*, becauſe he came to the Land by Title of Feoffment, and not by Tort, but Quare Ejecit infra Terminum is given by Stat. W. 2. cap. 24. per Vaughan Ch. J. Vaugh. 127. Paſch. 21 Car. 2. C. B. in Caſe of Hayes v. Bickerſtaff.

(O) In what Caſes it lies.

1. WITHOUT *Poſſeſſion at the Time of the Ouſter* a Man ſhall not have an Ejectment. Kelw. 130. a. pl. 99. Caſus incerti Temporis.

2. In an Ejectione Firmæ there ought to be a *Right in Fact*, and it is not ſufficient to be by *Eſtoppel.* Per Anderſon. Godb. 15. pl. 22. Paſch. 25 Eliz. C. B. in Skipwith's Caſe.

3. In an Ejectione Firmæ it was obſerved by the Court for an infallible Rule, That *what may be reduced by a real Action, may* be reduced *by an Entry*, (as *in one Acre in the Name of more*). Noy. 108. Trin. 2 Jac. C. B. Nichol's Caſe.

4. *Rent*

4. *Rent* granted in Fee with *Proviſo* the Grantee may *enter and retein* till he be ſatisfied of the Profits, he may make Leaſe to try the Title in Ejectment. Lev. 170. Trin. 17 Car. 2. B. R. Jemmot v. Cooly. Saund. 112. S. C.— Sid. 223. S. C — Raym. 135. 158. S. C.

5. If a *Sheriff ſells a Term on a Fieri Facias* he cannot and muſt not put the Perſon out of Poſſeſſion and the *Vendee* in, but the Vendee muſt bring his Ejectment, per Cur. 2 Show. 85. pl. 74. Hill. 31 & 32 Car. 2. B. R. The King v. Dean and Bird.

(P) What is Title ſufficient.

1. WRIT of Ejectment of Ward lies of *Rent without Poſſeſſion or Seiſin*; For there is *Poſſeſſion in Law*, becauſe it cannot be received till the Rent-Day. *Contra of Land.* Br. Ejectione &c. pl. 9. cites 11 H. 4. 64, 65.

2. If Parſon leaſe his *Rectory* for Years by Parol it is good, and Leſſee ſhall have Tithes and Offerings as Incident, and it is good though there is no Parſonage Houſe, and but only Church and Church-Yard, and if ſuch Leſſee be ouſted he ſhall have Ejectione Firme. Br. Leaſe, pl. 15. cites 15 H. 7, 8. And the ſame Law is of a *Hundred.* Ibid. cites Trin. 6 H. 8.

3. Upon Evidence it was agreed, that if a *Leaſe for Years* be *made to A. and delivered to B. to the Uſe of A.* and *B. enters to the Uſe of A.* If B. be ejected, A. may have an Ejectione Firmæ. Noy. 43. Purrell v. Biſhop.

4. Ejectment of a Leaſe of *Tithes* and *ſhews it not by Deed*; and becauſe Tithes cannot paſs without Deed, after Verdict for the Plaintiff Exception was taken for this Cauſe and ruled to be Ill, and Judgment for the Defendant. Cro. J. 613. pl. 3. Paſch. 19 Jac. B. R. Swadling v. Piers.

5. *Grantee of a Rent* with *Power to enter and take the Profits* till ſatisfied of Arrears may maintain Ejectment. Raym. 158. Trin. 18 Car. 2. B. R. Jemmot v. Cooley. Saund. 112. S. C —Lev. 170. S. C — Raym. 135. 158. S. C

but all theſe Books ſtate it as a Rent granted in Fee; But Sid. 262. Jenet v. Cowley, S. C. ſtates it as a Rent for Years.

6. A. *Leſſee for three Years demiſes to B. for five Years* who brings an Ejectment, and *declares againſt the firſt Leſſor for five Years*; and upon the Evidence it appeared, that he had Right but for three Years, becauſe A. that leaſed to him had no more; and the Court were of Opinion, that the Plaintiff could have no Judgment. Freem. Rep. 400. pl. 522. Trin. 1675. Roe v. Williamſon. 2 Lev. 140. S. C. and Hale held this Verdict againſt the Plaintiff; For the Judgment

ſhall be, That the Plaintiff recover Terminum ſuum prædictum, which is five Years, and the Leſſor's Intereſt does not continue ſo long. And perhaps the Defendant may be the Reverſioner after the three Years ended, and ſo the Leſſor of the Plaintiff will recover for two Years more than he has Right to hold it. Wylde held accordingly, but Twiſden ſeem'd e contra. Et adjornatur ——— 3 Keb 490. pl. 31. S. C. the Court held the Declaration ill, and that the Plaintiff can have no Judgment.

7. *Payment of Rent* to the Leſſor or to any for his Uſe is a *ſufficient Title* for the Plaintiff, if the Defendant has no Title at all but Poſſeſ-

 ſion.

ſion.; Held per Scroggs Ch. J. 2 Show. 126. pl. 105. Trin. 32 Car. 2. B. R. Anon.

8. If a *Leſſee holds over his Term*, an Action of Treſpaſs cannot be brought without an *actual Entry*. 5 Mod. 384. Hill. 9 W. 3. B. R. Anon.

9. If *H. has Poſſeſſion of Land for* 20 *Years uninterrupted, and B. gains Poſſeſſion*, upon which H. brings Ejectment; though H. is Plaintiff yet his Poſſeſſion for 20 Years will be a good Title for him, as well as if H. had been then in Poſſeſſion; becauſe Poſſeſſion for 20 Years now by Virtue of the Statute of 21 Jac. 1. cap. 16. is like a Deſcent at Common Law which tolls the Entry. Ruled by Holt Ch. J. Summer Aſſizes at Lincoln 11 W. 3. 1699. and at Aylesbury. Ld. Raym. Rep. 741. Stocker v. Berney.

10. *Ceſty que Truſt* of a Remainder executed by the Statute 27 H. 8. of Uſes has Eſtate ſufficient to make a Leaſe. Gibb. 11. 18. Paſch. 1 Geo. 2. B. R. Shaw v. Weigh.

(Q) Pleadings. Declaration.

1. IF a *Leaſe* is *dated the* 28*th* Day, and it is *ſealed on the Land* after the Commencement of the Term, viz. *the* 29*th Day*, and *the Ejectment is ſuppoſed and laid to be the* 30*th Day*, this is well enough, though the Leſſee did not enter on the 30th Day but the Day before; Per Dyer. Dal. 105. pl. 47. Anno 15 Eliz. Covert v. Leonard.

2. The Plaintiff counts of a Leaſe of the *fourth Part of a Houſe* in N. in four Parts to be divided, by Force of which he entered in *Tenementa Prædict'* and was inde Poſſeſſionatus until the Defendant did eject him *de Tenementis prædict'* and held good. Cro. E. 286. pl. 2. Trin. 34 Eliz. B. R. Rawſon v. Maynard.

3. Exception to a *Declaration* in an Ejectione Firmæ becauſe it *was a Poſſeſſione ſua* (*inde*) *ejecit*; where it ought to be according to the Suppoſal of the Writ. *Quod a Firma ſua ejecit*, all the Juſtices held that the Word *(inde) had Relation to the Farm*, and ſhall be as much as if he had ſaid, a Poſſeſſione Firmæ; and the Declaration was ruled to be good notwithſtanding the Exception. Godb. 71. pl. 85. Mich. 28 & 29 Eliz. B. R. Anon.

4. Alſo it was *of three Cloſes, naming them* with a, viz. *containing by Eſtimation* 30 *Acres*, which was objected did contain no Certainty, where he ought to have alleged in Fact, that they did contain ſo many Acres. But it was holden by all the Juſtices, that although he does not put in the Declaration the Certainty of the Acres, if he *gives a certain Name to them, as Green-Cloſe &c.* that it is good. Godb. 71. in S. C.

5. In an Ejectione Firmæ Exception was taken becauſe the *Plaintiff in his Declaration did not ſay extra tenet*; for in every Caſe where a Man is to recover Poſſeſſion he ought to ſay extra tenet. But all the Juſtices agreed, that in an Ejectione Firmæ thoſe Words were not material; for if the Defendant put out the Plaintiff it is ſufficient to maintain this Action. And Kempe Secondary ſaid, that ſo were all the Antient Precedents; although of late Times it has been uſed to ſay in the Declaration extra tenet; and the Declaration was holden to be good without thoſe Words. Godb. 60. pl. 72. Mich. 28 & 29 Eliz. B. R. Anon.

6. In

6. In Ejectment the Plaintiff declared, Quod cum R. D. *per Indenturam ſuam gerent. dat.* 20 *Maii dimiſit* &c. Exception was taken that he ought to have ſaid iiſdem Die & Anno; For though the Indenture bears Date as above yet, it may be, it was delivered at another Day, and then it begins to be a Demiſe. But Judgment was given for the Plaintiff. 2 Le. 117. pl. 157. Paſch. 30 Eliz. B. R. Cony v. Cholmley.

Cro. E. 773. Mich 42 & 43 Eliz. B. R. Hall v. Denbigh, S. P. reſolv'd per tot. Cur. to be well enough, for when he declares that he let by Indenture of ſuch a Date, it ſhall be always intended to be delivered at the ſame Time whereon it bare Date, if it be not ſhewn with a Primo Deliberatum at another Day; and he who pleads a Deed of ſuch a Date, cannot by Replication, or other Pleading, maintain to be delivered at another Time, for it would be a Departure, as 5 H 7. 26. Dy. 167. 221. Wherefore it was adjudged for the Plaintiff. —— Ibid. 890. pl. 7. Trin. 44 Eliz. B. R. Houſe v. Laxton, S. P. by all the Juſtices præter Gawdy.

7. Ejectione Firmæ by H. againſt C. The Plaintiff declared upon a *Leaſe for Years, to have and to hold* to him *from the Sealing and Delivery* of it; and *declared that the Sealing and Delivery was* 1 *May, and the Ejectment the ſame Day*; and this Matter was moved in Arreſt of Judgment, that the Ejectment could not be ſuppoſed the ſame Day, for the Leaſe did not begin till the next Day enſuing the Sealing &c. But the Exception was not allowed by the Court; for where the Leaſe is to begin from the Time of the Sealing and Delivery, or by theſe Words, for 21 Years next following the Ejectment may be well ſuppoſed to be the ſame Day; for the Beginning of the Leaſe is preſently upon the Sealing and Delivery, and ſuch a Leaſe ſhall end the ſame Time and Hour as it began. 4 Le. 144. pl. 255. Trin. 31 Eliz. B R. Higham v. Cooke.

8. Ejectione Firmæ *of a Leaſe made* 20 *Aug. from Mich. then laſt Ante datum hujus Indenturæ*, and he *ſhews neither the Indenture nor the Date of it*, which was ſaid to be not good, becauſe it does not appear when the Leaſe began; But the Court held it good, and the Words Ante Datum Indenturæ ſhall be void, and the Beginning of the Leaſe appears certain enough, and Judgment for the Plaintiff. Cro. E. 626. pl. 5 Paſch. 40 Eliz. B. R. Darrel v. Middleton.

9. Ejectione Firmæ; The Plaintiff *declared of a Leaſe for Years, Habendum a die Datus virtute cujus* dimiſſionis he entered and *was poſſeſſed until the Defendant ejected him.* It was moved in Arreſt of Judgment, that the Declaration was not good, becauſe the *Time of the Entry was not alleged*; for if he entered on the Day of the Demiſe he is Diſſeiſor, and then the Action not maintainable; Adjornatur; but afterwards it was reſolved that for that Cauſe the Declaration was ill, and adjudged for the Defendant. Cro. E. 766. pl. 4. Trin. 42 Eliz. and Trin. 43 Eliz. B. R. Douglaſs v. Shank.

10. In Ejectment the Plaintiff *declared of a Leaſe for Years of a Houſe and* 30 *Acres of Land in D. and that J. S. did let to him the ſaid Meſſuage and* 30 *Acres, by the Name of his Houſe in B. and* 10 *Acres of Land there five plus five minus*; It was moved in Arreſt of Judgment, becauſe that 30 Acres cannot paſs by the Name of 10 Acres five plus five minus, and ſo the Plaintiff has not conveyed to him 30 Acres; for when 10 Acres are leaſed to him five plus five minus, theſe Words ought to have a reaſonable Conſtruction to paſs a reaſonable Quantity, either more or leſs, and not 20 or 30 Acres more. Yelverton agreed; for the Word 10 Acres *five plus five minus, ought to be intended of a reaſonable Quantity*, more or leſs by a Quarter of an Acre, or two or three at the moſt; but if it be three Acres leſs than ten the Leſſee muſt be content with it; Quod Fenner and Crook conceſſerunt; and Judgment was ſtaid. Ow. 133. Trin. 43 Eliz. C. B. Day v. Fynn.

12. In

Cro. J. 96. pl. 25 Mich. 3 Jac. B. R. S. C & S. P. held by three Juſtices, abſente Popham. —— Cro J. 429. in pl. 3 cites S. P. and intends S. C and ſays that a Precedent was then ſhewn thereof. ——— S. C. cited Freem. Rep. 146. pl. 166. Paſch. 1674. in Caſe of Dexton v. Brand, where the Point was, that the Plaintiff declared of a Leaſe made the 10th January, Habend' a primo Januarii, by Virtue whereof he entered, and that the Defendant Poſtea, viz. Primo Januarii ejected him The Queſtion was, if the viz. being repugnant was not void as in the Principal Caſe cited; Sed adjornatur. ——— Sid. 8 has a Nota at the End of the Caſe there that the Ch. J. ſaid he did not apprehend any Reaſon for ſuch Judgment in the ſaid Caſe of Adams v. Gooſe.

11. In Ejectment the Plaintiff *declared of a Leaſe the 6th September and that he was poſſeſſed, and that Poſtea ſcilicet 4 September the Defendant ejected him.* This Declaration was held good by three Juſtices, and that it is ſufficient that he declared of his Poſſeſſion Virtute Dimiſſionis, and that he was afterwards ejected, and *the viz. the 4 September is void and repugnant.* Arg. Sid. 8. cites it as Cro. J. 96, 27. Adams v. Gooſe.

12. Ejectione Firmæ was brought upon a *Leaſe made 1 Jan. 3 Jac. Habend. a datu Indenturæ* prædict. and the *Ejectment was the ſame Day.* Reſolved, the Date is the Time of the Delivery, and it differs from the Time or Day of Delivery, wherefore the Ejectment alleged poſtea the ſame Day, is good enough; Adjudged for the Plaintiff. Cro. J. 135. pl. 10. Mich. 4 Jac. B. R. Osborn v. Rider.

13. The *Leaſe was dated 8 May, 7 Jac.* and the *Ejectment was laid 13 May, 7 Jac.* and the *Action was brought in Eaſter Term following.* Adjudged that if the Ejectment is proved at any Time after the Leaſe and before the Action brought, it is ſufficient, though it was laid at a certain Time which the Plaintiff could not prove; but becauſe the Plaintiff failed to prove this the Plaintiff was Nenſuit. Bulſt. 122. Paſch. 9 Jac. Hall v. King.

2 Bulſt 29. Mirril v Smith, S C. and the whole Court held the Declararion good, and ſo a Judgment in C. B. was affirmed in B. R. —— Jenk 325. pl. 41. S. P. cites S. C.

14. In Ejectione Firmæ, the Courſe of C. B. is, where the Defandant appears, then to Count, and after Imparlance to make a ſecond Count by way of Recital; but the firſt ought to contain the Subſtance of the Matter. In the firſt Count in this Caſe the *Leaſe is alledged to be made 25 Mar. 6 Jac. and* afterwards *the Ejectment the ſaid 6 Jac. without mentioning the Day of the Ejectment*; The ſecond Count mentions the Ejectment to be the 26th of March 6 Jac. and the Ejectione Firmæ was brought in the 7 Jac. The Plaintiff had Judgment affirmed in Error; *A certain Day of the Ejectment is not neceſſary to be alledged in the Count; It will ſerve to ſay Poſtea* &c. Jenk. 341. pl. 98. cites Cro. J. 311. pl. 11. Mich. 10 Jac. Merrel v Smith.

Mo 837 pl. 1130. Worrall v. Harper. S. C. no Judgment was given, becauſe the Declaration was faulty ——S. C. cited accordindly, Palm. 101. by Dodderidge J. Paſch. 17. Jac. B. R.

15. An Ejectment lies not *de omnibus & omnimodis Decimis in W. without ſaying Garbarum, Fœni, Lanæ, Agnellorum, or ſome other Certainty of the Nature or Quality of the Tithes,* ſo that a certain Judgment may be given, or Execution by Habere Facias Poſſeſſionem be had thereof; and tho' the certain Number thereof ſhall not be expreſſed (for the Fruitfulneſs or Barrenneſs may be more or leſs) yet the certain Kinds ought to be ſhewed, and all the Tithing may conſiſt in Modo Decimandi by Payment of an Annual Sum in Satisfaction thereof, of which no Ejectment lies; for the Statute of 32 H. 8. cap. 7. which gives the Action for Tithes, gives it as they ſhould or might do for Land; and in an Action for Lands, the Plaintiff ought to ſhew the Quality or Nature thereof, as arable Land, Meadow, Paſture &c. adjudg'd, 11 Rep. 25 b. Trin. 12 Jac. Harpur's Caſe.

16. Original in Ejectment was *againſt A. and three others*; Plaintiff counts againſt 3 of the Defendants, and *no Simul-cum againſt the fourth*; Judgment was ſtaid; Per tot. Cur. Brownl. 129. Trin. 13 Jac. cites Goodhall v. Hill.

17. Ejectione

17. Ejectione Firmæ of a *Leaſe 21 Oct. 4 Jac. Et quod poſtea ſcilicet eodem 21 Oct. Anno 3. Jac. ſupradict. he ejected him.* It was moved, that the Ejectment being alledged to be a Year before the Leaſe is void, but three Juſtices, Tanfield e contra, held it to be good, becauſe the Words be, Poſtea ſcilicet eodem 21 Die Oct. and therefore there needed not any Year to be mentioned, and the Addition of a Year not mentioned before, and repugnant to the Day mentioned is Idle, and ſhall be taken for null. Cro. J. 154. pl. 4. Paſch. 5. Jac. B. R. Brigate v. Shork.

S.C cited Lat. 201. — Ejectment was *on a Leaſe of the 6th May. 7 Jac.* and that the Plaintiff enter'd, and was poſſeſſed, untill the *Defendant afterwards*, viz. *18th Day of the ſame Month of May, Anno 6 ſupradicto, ejected him*; After Verdict for the Plaintiff it was objected, that the Declaration was not good, becauſe the alledged a whole Year before the Leaſe was made, for the Leaſe was on the 6th May 7 Jac. and the Ejectment was ſuppoſed to be Anno 6 Jac. but adjudged it was good, and that *the Word* (Sexto) *was void*; for the Day of the Ejectment being laid to be *ejuſdem Menſis Maii*, it *cannot be intended to be of another Year than that in which the Leaſe was made.* Yelv. 182 Mich. 6 Jac. B. R. Davis v. Pardy. ——Brownl. 146 S. C. in totidem Verbis.

If a *Leaſe* be *made 1ſt Feb. 5 Jac. and ſo laid, & Quod poſtea, 1ſt Feb. 4 Jac. the Ejectment was*, this is good, and 4 *Jac void*, and the Word *Poſtea guides all, and agrees with the Leaſe.* Judged and affirmed in Error Superflua non nocent. Jenk 325. pl. 41. ——2 Bulſt. 29 in Caſe of Mirril v. Smith, cites the Caſe of Moyl v. Ewers S. P. and adjudged the Poſtea to be good, and the (viz.) to void for the Ejectment.

18. Ejectione Firmæ *of two Cloſes, called the Higher G. and the Lower G. containing three Acres of Land*; It was ſaid the Words containing three Acres of Land were uncertain, and **Savil's Caſe**, 11 Rep. was vouched; But adjudged by three Juſtices, contra Houghton that the Ejectione Firmæ did lie, and this Caſe differs from Savil's for there neither the Quantity nor the Quality of the Land is mentioned; But here, the ſaying containing three Acres of Land, and the Cloſes being named it is certain enough what Nature of Land it is, and altho' the Cloſes do contain more then three Acres, he ſhall recover the whole Cloſes. Cro. J. 425. pl. 4. Mich. 15 Jac. B. R. Wikes v. Sparrow.

S. C. cited 2 Roll Rep. 167.

19. In Ejectment, the Plaintiff *declared on a Leaſe* made to him *by one J. C. dated 1ſt Jan. 15 Jac. and ſealed and delivered 5th Jan. following, to hold from Chriſtmas laſt paſt for two Years*; The Jury *found* the Leaſe and a Letter of Attorney to execute it, (viz.) that the Leſſer was ſeiſed in Fee of the Lands, and being ſo ſeiſed, *he made, ſign'd, and ſeal'd an Indenture of Demiſe in hæc Verba &c. but did not deliver it as his Deed to the Plaintiff on the 5th Day of Jan. but by a Letter of Attorney bearing Date on that Day he gave full Power to M. M. his Attorney to enter* on the Lands in his Name, and after Poſſeſſion taken to deliver the ſaid Indenture to the Plaintiff, by Virtue whereof he entred, and immediately afterwards delivered the Leaſe to the Plaintiff as the Deed of the Leſſor. It was objected, that this Declaration was ill, for the Plaintiff declared on a Leaſe made to him by J. C. which if ſo, then the Letter of Attorney had been idle, and to no purpoſe; but adjudged good, and that it was the Leaſe of the Leſſor. Brownl. 128. Trin. 16 Jac. Hill v. Scales.

20. Ejectione Firmæ *of a Leaſe of Tithes*, and does *not ſhew that it was by Deed*, and becauſe Tithes cannot paſs without Deed, after Verdict for the Plaintiff, Exception being taken for this Cauſe, it was ruled to be ill, and adjndged for the Defendant. Cro. J. 613. pl. 3. Paſch. 19 Jac. B. R. Swadling v. Piers.

21. Ejectione Firmæ *of a Leaſe made by the Lady Morley to the Plaintiff, 1ſt Maii 14 Jac. for five Years, if ſhe is ſo long lived, and that he enter'd and was poſſeſsed, and that the Defendant poſtea, viz. 6 Maii, entered upon him and ejected him a termino ſuo prædict' non-dum*

Palm. 267. S. C. adjudged accordingly in B. R. — Ibid.

327. Mead v. Arundel, Hill. 20 Jac. Judment affirm'd una voce in the Exchequer.

dum finito. It was ſaid the Declaration was not good, becauſe *there is not any Averment of the Life of the Leſſor at the Time of the Action brought.* Three Juſtices contra, Chamberlain held it good enough, for he ſhewing that the Defendant ejected him a termino nondum finito, implies the Lady was alive; Judgment was for the Plaintiff, and the Judgment affirmed in Error brought. Cro. J. 622. pl. 13. Mich. 19 Jac. B. R. Arundel v. Mead.

22. If in Ejectment the Plaintiff *of a Leaſe the 22d May 20 Jac. habend' a primo Die Maii for three Years, Virtute cujus he entred and was poſſeſſed quouſque poſtea, ſcilicet eiſd' Die & Anno the Defendant ejected him*, this is well enough, for his Entry being laid to be Virtute Dimiſſion', the *poſtea eiſd' Die &c. refers to the Day of the Leaſe made*; Adjudged in B. R. and that Judgment affirmed in Cam. Scacc. upon a Writ of Error accordingly; tho; it was objected, that the eiſd' Die &c. referred to the laſt Antecedent, and ſo the Ejectment was laid before the Leaſe commenced. Cro. J. 662. pl. 12. Hill. 20 Jac. Rutter v. Mills.

23. Judgment was for the Plaintiff in Ejectment brought in Ireland, and Error aſſigned was, that the Plaintiff had *declared on a Leaſe made to him to commence at a Day to come, Virtute cujus he entred and was poſſeſſed, and did not ſhew when he* entred, *either before or after the Day* on which the Leaſe was to commence. Sed non allocatur, becauſe he ſaid Virtute cujus &c. But Ley Ch. J. ſaid that if he had ſaid Prætextu cujus it had been otherwiſe. 2 Roll Rep. 466. Mich. 22 Jac. B. R. Wakely v. Warren.

24. If the *firſt Declaration* in the Common Pleas *is vitious*, and the *ſecond is as it ought to be*, the firſt is not amendable in this Caſe; For the firſt Declaration is the Foundation, and the ſecond is only by way of Recital. Jenk. 325. at the End of pl. 41.

And ſo it was between Bell and March, and this ſame Term between Spark, and ..... where it was ſhewed quod conceſſit per eandem Indent' ſpoke of any

25. B. brought an Ejectione Firmæ againſt J. and *declared upon a Leaſe* of Land *Habend. a Die dat' Indentur' prædict.* And *does not ſpeak of any Indenture before*, and for that the Declaration adjudged naught. Hetl. 63. Mich. 3 Car. C. B. Brady v. Johnſon.

where he had not Indenture before. Ibid.

26. It was reſolved, that an Ejectione Firmæ *of* 40 *Acres of Land by Eſtimation* is not good, for the Demand ought to be certain. Ley 82. Mich. Car. in Caſe of Row v. Ocam.

27. The Declaration was *of a Meſſuage and* 40 *Acres of Land, Meadow and Paſture* thereto appertaining, and it was *not diſtinguiſhed how much* there was in Land, how much in Meadow, and how much in Paſture, therefore the Judgment was reverſed. Cro. C. 573. pl. 13. Hill. 15 Car. B. R. Martyn v. Nichols.

S. P. but if the Plaintiff declares of a Leaſe of the firſt of Decemb. Habendum a Die datus, the Ejectment cannot be alleged the ſame Day; but if the Leaſe be made the firſt of Decemb. *Habend. henceforth*, the Ejectment may be alleged the ſame Day; wherefore it was adjudged accordingly. Cro. J. 258. pl 18. Mich. 8 Jac. B. R. Lewelyn v. Williams.

28. In Error of a Judgment in Ireland, the Error aſſign'd was, that the Plaintiff *declared upon a Demiſe made 12 Junii* &c. *Habendum a Prædicto duodecimo Die Junii*, (which muſt be the 13th Day of the ſame Month) Uſq; &c. virtute cujus quidem Dimiſſionis he entred &c. *and that the Defendant poſtea ſcilicet eodem duodecimo Die Junii, did eject him* &c. So that it appears upon the Face of the Declaration that the *Defendant entred before the Plaintiff had a Title*; for the Leaſe commenced on the 13th of June, and the Entry was on the 12th of that Month; Per Curiam, the *Plaintiff entred as a Diſſeiſor by his own ſhewing*, and thereupon Judgment was reverſed. 3 Mod. 198. Paſch. 4 Jac. 2. B. R. Evans v. Crocker.

If the *Leſſor of the Plaintiff entered before the Term began*, he was a Diſſeiſor; Per Bridgman Ch. J. Cart. 160. Mich. 18 Car. 2. C. B. at the End of the Caſe of Foot v. Berkley, and cites Dyer 89. * Clifford's Caſe. ——— * D. 89. a. pl. 111. Trin. 7 E. 6. in Writ of Error brought in B. R. Clifford v. Warren. ——— Lev. 46. Mich. 13 Car. 2. C. B. per Bridgman Ch. J. in delivering the Opinion of the Court. Hennings v. Brabazon.

29. *A. B. and C.* Jointenants *join* in the Leaſe of a *Houſe to J. S. to commence from Michaelmas laſt*, afterwards *on the ſame Day B. and C.* without A. *demiſe the ſame Houſe to J. S. to commence from the ſame time, and for the ſame Number of Years* as in the Leaſe made by all three, and in Ejectment by J. S. he declares upon both theſe Leaſes. Reſolv'd, that the Declaration was not *Double*, for when the three demiſed the Whole, and afterwards two of them demiſed all the ſame thing, this is a *Surrender* of the firſt Leaſe, and a new Leaſe of their two Parts, and the old Leaſe continues as to the third *Part* of A. and ſo J. S. entred, and was poſſeſſed by both Leaſes, viz. of the third Part of A. by the *firſt Leaſe*, and of the two Parts of B. and C. by the *ſecond Leaſe*. 3 Lev. 117. Paſch. 34 Car. 2. in Cam. Scacc. Turbervill v. Stockton.

30. In Ejectment the Plaintiff declared that Frances Ford, and Elizabeth, dimiſerunt, and put no Sur-name to Elizabeth. After Verdict for the Plaintiff it was moved, that this was a joint Demiſe, and no Sur-name being given to one of the Parties the Declaration was void; and the Court held it void for the Uncertainty, and ſo Judgment was arreſted. Freem. Rep. 146. pl. 167. Paſch. 1674. Carter v. Weſt.

31. *Declaration* in Ejectment mentions the Demiſe to be for 11 Years Habendum *from the ſame Day on which the Entry is alledg'd to be*, and ill. Cumb. 83. Paſch. 4 Jac. 2. B. R. Stephens v. Croker.

32. *Declaration recited an Original*; and an *Original was produced Teſte 2 Novembris, which was after the Demiſe.* And the Prothonotary informed the Court, that this was frequently allowed, and that no Memorandum of the Originals bearing Teſte within the Term was uſed to be made upon the Record. 2 Vent. 174. Paſch. 2 W. & M. C. B. Tunſtall v. Brend.

33. A Fine was levied in Hillary Term, and an Ejectment brought upon the Title, and the *Demiſe was laid before the Fine took Effect*, and upon Motion it was ordered, that the Demiſe be laid of Lady-Day laſt. Cumb. 290. Trin. 6 W. & M. in B. R.

A Leaſe by an Aſſignee of a Bankrupt's Eſtate *before Inrolment*, by which nothing paſſed till Inrolment, and upon which an Ejectment was brought, was denied to be amended; and per Holt Ch. J. it is *not amendable*, becauſe no other Leaſe than what was laid was confeſſed. Show. 206. Paſch. 3 W. & M. Bennet v. Gaudy.

34. Two or three *ſeveral Demiſes from ſeveral Perſons* may be laid in one Declaration in Ejectment. Cumb. 290. Trin. 6 W. & M. in B. R.

And though there is *but one Habendum*, viz. Habend' Tenementa prædicta ſo demiſed by the aforeſaid ſeveral Parties for ſeven Years, and lays in his Declaration, that the Defendant entered into all the aforeſaid Tenements *& ipſum* (the Plaintiff) *a firma ſua prædicta* (in the Singular Number) *ejecit, expulit &c.* Per Cur. it is well enough, Reddendo ſingula ſingulis. Carth. 224. Paſch. 4 W. & M. in B. R. Furſden v. Moor.

35. Error on a Judgment in C. B. in Ejectment. The Error aſſigned was, that the *Declaration was on two Demiſes*, and there was but one *Habend' in the Firſt, but* afterwards the *ſecond Demiſe was Habend' Tenementa prædicta*, which as it was urged, did not extend to both the Demiſes, nor would it be good in Caſe of a Grant, and the Judgment is intire quod recuperet Terminos prædict'; but per Cur. it is well enough,

Carth. 224 Furſden v. Moor. S. C. the Count was of ſeveral Demiſes by

several Parties; and per Curiam it is well enough, reddendo singula singulis. enough, and the Judgment was affirmed. Comb. 190. Pasch. 4 W. & M. in B. R. Moor v. Parndon.

2 Vent. 214. Moor v. Furſdon. S. C. and the Plaintiff alſo ſet forth, that he entered into the Premiſſes demiſed to him by J. S. and J. N. in Forma prædicta; And the Court held, that this is an Averment that all was demiſed for five Years; For that is the Forma prædicta, and adjudged for the Plaintiff in C. B. and that Judgment affirmed in B. R. ——— It was held that two *Tenants in Common* Leſſors muſt make *ſeveral Leaſes* in Ejectment. And *Quod Cum* is well enough becauſe the Ejectment is poſitive. Show. 342. Mich. 5 W. & M. Moor v. Furſden.

Per three Juſtices he ought to declare upon ſeveral Leaſes of their ſeveral Parts; but Williams J. contra. Cro. J. 166 Mantle v. Wollington.

36. If two *Tenants in Common* are diſſeiſed, their Leſſee in Ejectment muſt declare upon *two ſeveral Demiſes*. Cumb. 213. Trin. 5 W. & M. in B. R. Per Eyres J.

37. The *Demiſe was on the Eſſoin Day* of Hill. Term, and the *Declaration was of the ſame Hill. Term*, both which relate to the firſt Day; and ſo the Action was brought before the Title accrew'd, or at leaſt on the very ſame Day, which cannot be, becauſe the Law allows no *Fractions of Days*. But per Cur. this being after a Verdict the Ch. J. ſaid, that if the Plaintiff in Error would take Advantage of this Matter he ſhould have alledg'd *Diminution*, and procured the original Writ to be certified, and if that was returnable before the Plaintiff's Title it would have been *Error*. Carth. 288. Mich. 5 W. & M. in B. R. Cook v. Darbyſon.

38. Ejectment was *brought as of the laſt Term*, and the *Demiſe was laid in October*, the Tenant does not appear. Holt ſaid, he *would not grant a Rule for Judgment* againſt the caſual Ejector, *where it appears upon the Record, that the Ejectment was brought before Title accrued*, though the Practice may have been ſo. Comb. 345. Mich. 7 W. 3. B. R. Clayton v. ———.

Carth 390. Patrick v. Ball. S. C. and per Cur. ſince the Caſe in 2 Cro. 613. the Law is altered as to this Point concerning Declarations in Ejectment. For now they are grounded on Fictions only.

39. Ejectment of Lands in Suffolk *upon the Demiſe of the Corporation of Bury*. Upon Not Guilty pleaded a Verdict was given for the Plaintiff. But it was moved in arreſt of Judgment in C. B. that it does *not appear upon the Record that the Leaſe was by Deed*. And the Prothonotaries there certified, that the Practice was (notwithſtanding the common Rule, of confeſſing Leaſe, Entry, and Ouſter in Ejectment) for Things Incorporeal, as Tithes, or upon Demiſes of Corporations to lay the Demiſe by Deed. But it was adjudged in C. B. that it was aided by Verdict. And Judgment was given there for the Plaintiff. Upon which Error was brought in B. R. and that Judgment was affirmed. And Holt Ch. J. ſaid, that at this Day the Caſe of 2 Cro. 613. **Swadling v. Piers** is not Law. Ld. Raym. Rep. 136. Hill. 8 & 9 W. 3. Partridge v. Ball.

And Plaintiff had Judgment and affirmed in Error.

40. In Ejectment the Plaintiff *declared upon two ſeveral Demiſes habendum Tenementa prædicta* &c. *by Virtue whereof he entered and was poſſeſſed, quouſque the Defendant entred in Tenementa, and the Plaintiff expulit et amovit a termino ſuo prædicto inde nondum finito* &c. Mr. Northey moved in arreſt of Judgment, that Tenementa prædicta was uncertain, and therefore ill, for it did not appear which. The ſame of Termino ſuo prædicto inde nondum finito, which makes the former Objection the ſtronger, becauſe it complains but of one. But the Court held the firſt to be well enough, and that it would extend to both; And as to the other, if it had been omitted, the Declaration had been well enough, and

and therefore it would not hurt it. Judgment for the Plaintiff. Ld. Raym. Rep. 561. Paſch. 12 W. 3. Slabourne v. Bengo.

41. Per totam Curiam, by the Courſe of this Court *there can be no Alteration in the Declaration in the Iſſue from the firſt Declaration delivered, only in the Defendant's Name.* And a Rule was made, that the Iſſue ſhould be made according to the Declaration delivered againſt the caſual Ejector. Ld. Raym. Rep. 1411. Mich. 12 Geo. in Caſe of Baſs v. Bradford.

42. In Ejectment the Plaintiff declar'd *of the Manor of Queenborough, with the Appurtenances,* 400 *Acres of Land, and Common of Paſture for all Manner of Cattle, and for the Rectory and Advowſon, with the Appurtenances, and for all, and all Manner of Tithes,* and held good. Hill. 6 Geo. 2. B. and affirm'd in Error in the Exchequer Chamber Trin. 8 & 9 Geo. 2. and afterwards in the Houſe of Lords 10th March 1735. Doe (on the Demiſe of Savil) v. Borlace.

43. In Ejectment the Plaintiff declared *of* 100 *Acres of Marſh, and one Beaſt-gate,* with the Appurtenances; After Judgment a Writ of Error was brought, and the Error aſſign'd was, that the Declaration was ill for the Uncertainty what is meant by the Word *(Beaſt-gate;)* On the contrary a Caſe was cited, where ſo many Acres of (Alder-Carves) in the County of Norfolk was held good, becauſe it was a Term well known in that Country. And in the Caſe of **Metcalf v. Roe.** Mich. 9 Geo. 2. *Ten Acres of Paſture and Cattle-gates* was held good. The Court held the Ejectment was well laid, and ſaid there was no Difference between Cattle-gate in the Caſe of **Roe v. Metcalf,** and Beaſt-gate in the preſent Caſe. And that any Name well underſtood in the particular Place to denote a certain Sort or Quantity of Land is good; And per Lee Ch. J. ſo many Acres of (Mountain) in Ireland is good. And the Judgment was affirm'd. Hill. 11 Geo. 2. B. R. Benington v. Goodtitle.

(R) Plea. Replication.

1. EJectione cuſtodiæ *by the Lord,* the *Defendant ſaid, that he is Tenant by the Curteſy of the ſame Land, by which he enter'd* &c. the *Plaintiff ſaid that the Land was ſpecially tailed to the Feme and her firſt Baron, and to the Heir of their two Bodies,* and a good Replication. Br. Ejectione &c. pl. 12. cites 46 E. 3. 5.

2. It is a good Plea in Abatement that the Plaintiff has *other Ejectione* Firmæ *pending* for the ſame Land in the Common Pleas. Mo. 539. pl. 710. Trin. 39 Eliz. Digby v. Vernon.

3. *Ancient Demeſne* is a good Plea. 5 Rep. 105. Hill. 43 Eliz. C. B. Alden's Caſe.

4. In Ejectment a Man ſhall *not give Colour,* becauſe the Plaintiff ſhall be adjudged in by Title; Adjudged per tot. Cur. Godb 159. pl. 221. Mich. 7 Jac. B. R. Piggot v. Godden.

5. *Concord with Satisfaction* is a good Plea in Ejectment. Brownl. 133. Trin. 9 Jac. Pats v. Chitty. 2 Brownl. 128. Peto v. Checy,

S. C. & S. P adjudged. —— Godb. 149. pl. 193 S. C. adjudged accordingly. —— 9 Rep. 77. b. Peyton's Caſe, S. C. adjudged accordingly.

6. *Expiration of the Term* is no Plea in Ejectione Firmæ ; Per Jermin. Lat. 206. Trin. 3 Car. Dale v. Penhalerick.

7. In Ejectment by A. againſt B. the Court was moved for C. that he will ſave B. harmleſs, and prays that giving B. Security to do ſo, B. may be *ordered by Rule of Court to plead as C. ſhould direct B.* and that B. be not ſuffered to confeſs a Judgment ; Per Roll Ch. J. it is out of the way for you to give ſuch Security, for there yet appeared no *Colluſion*, but you ſhall be *made a Party to defend the Title*, and then move again. Sty. 382. Paſch. 1653. Ricot v. St. John.

8. If Judgment in Ejectment be ſigned in a Country Cauſe for *want of Plea*, but no Poſſeſſion delivered, a Judge in his Chamber at any Time before the Aſſiſes, may compel the Plaintiff to accept a Plea, but if Poſſeſſion is delivered he is without Remedy ; Per Holt Ch. J. 2 Salk. 516. pl. 9. Mich. 9 W. 3. B. R. Anon.

9. In Ejectment *Plea of Ancient Demeſne* was allowed to be well, *without an Affidavit* to verify the Fact, and ſuch Plea had been before allowed to be good in **Earl Contingsby's Caſe.** 2 Ld. Raym. Rep. 1418. Trin. 12 Geo. B. R. Goodright v. Shuffil.

(S) Bar.

1. A Recovery in one Ejectment *is a Bar* in another ; Per Anderſon Ch. J. eſpecially (as Periam J. ſaid) if the Party relies on the Eſtoppel. 3 Le. 194. pl. 242. Mich. 29 Eliz. C. B. Anon.

2. Declaration of a *Park* containing 60 Acres, and the Jury find but of 30, adjudged againſt the Plaintiff for the whole. N. B. The Park was *a Thing intire.* D. 115. b. pl. 67. Marg. cites 29 Eliz. Baskervill's Caſe.

4 Le. 77. pl. 163. Paſch. 28 Eliz. C. B. Spring v. Lawſon, S. P.

3. A Bar *in one* Ejectione Firmæ *is* a Bar *in another* for the ſame Ejectment, but not for another or new Ejectment. Mar. 59. pl. 92. Mich. 15 Car. Anon.

Such Releaſe not allowed. Raym. 93. Hill. 15 & 16 Car. 2. B. R. Keyes v. Bradon.

4. If the *Plaintiff dies*, the Court will ſuppoſe any other Perſon of the ſame Name to be the Plaintiff, and they take Notice judicially that the Leſſor of the Plaintiff is the Perſon intereſted, and therefore they puniſh the Plaintiff if he *releaſe the Action* or the Damages. Mod. 25. Trin. 29 Car. 2. C. B. Addiſon v. Otway.

(T) Abatement.

1. IF Ejectment of Ward be brought *againſt* two, and the *one* dies yet the Writ is good againſt the other, per Thirn, and Hull the ſame Opinion ; For *this is in Nature of Treſpaſs* ; Quod Nota ; which Skrene who pleaded this Matter imparled. Br. Ejectione & pl. 2. cites 12 H. 4. 10.

2. Ejectio

2. Ejectione Cuſtod' *of Land in E.* the *Defendant ſaid that the Land is in C. and not in E.* Judgment of the Writ, and Plaintiff prayed Leave to inquire a better Writ. Br. Ejectione &c. pl. 4. cites 14 H. 4. 16.

3. In Ejectione Firmæ, the *Omiſſion* of this Clauſe, *Et Bona & Catalla querentis ad valen'* &c. is not material, and the Writ is good without this Clauſe. Thel. Dig. 94. lib. 10. cap. 6. S. 17. cites Plowden Fol. 199, 228.

4. *Leſſee for Years brings an Ejectione Firmæ; The Leſſor being but Tenant for Life dies, pending the Writ*; The Writ does not abate. The Plaintiff may have Judgment and a Writ of Execution. Jenk. 293. pl. 38.

5. If an Ejectment be brought *againſt two*, and *Iſſue be joined*, and then *one of them dies*, and a *Venire is awarded as to the two Defendants, and a Verdict againſt two*, yet upon Suggeſtion of the Death of one of them upon the Roll, the Plaintiff ſhall have Judgment for the Whole againſt the other; cites Cro. J. 330. 274. 2 Keb. 845. becauſe *this Action is grounded upon Torts, which are ſeveral in their Nature, and and one may be found Guilty, and the other acquitted*; Per Cur. Lord Raym. Rep. 717. Hill. 13 W. 3. in Caſe of Gree v. Rolle and Newell.

(U) Verdict. How the Jury may find.

1. EJectione Firmæ; The Plaintiff *declared of Ejectment of* 100 *Acres* of Land, and *in Evidence ſhewed a Leaſe of* 40 *Acres only*; It was ruled to be good for ſo much as was comprized in the Leaſe, and for the Reſidue the Jury may find the Defendant not guilty. Cro. E. 13. pl. 4. Hill. 25 Eliz. C. B. Guy v. Rand.

2. In Ejectment, *ſuppoſing the Ejectment of ten Acres*, and the *Jury find the Circumſtance but of four Acres*, the Plaintiff recovered thoſe four Acres. D. 115. b. Marg. pl. 67. cites it as adjudged Trin. 43 Eliz. B. R. Meredith v. Brown.

But where an Aſſiſe was brought *of a Park containing* 60 *Acres*, and the *Jury found* the Diſſeiſin *of* 30 *only*; it was adjudged againſt the Plaintiff for the Whole. But the Reporter ſays nota here, that the Park was a Thing intire. D. 115. b. Marg. pl. 67. cites 29 Eliz. Lady Baskervill's Caſe.

3. In Ejectment the Plaintiff declared on a *Leaſe of a Meſſuage, ten Acres of Land*, 20 *Acres of Meadow*, 20 *Acres of Paſture, by the Name of one Meſſuage and* 10 *Acres of Meadow, be it more or leſs*, and upon Not Guilty pleaded had a Verdict, but Nil capiat per Billam entered, cauſe upon the Matter diſcloſed by the Plaintiff himſelf in the Declaration he cannot have his Execution of the Quantity found by the Verdict; For in the Leaſe there are only 10 Acres demiſed, and thoſe Words (more or leſs) cannot in Judgment of Law extend to 30 or 40 Acres, it being impoſſible by common Intendment, and the rather becauſe the Land demanded by the Declaration is of another Nature than what is mentioned in the Per Nomen, which goes only to the Meadow, and the Declaration to the Arable Land or Paſture. Yelv. 166. Mich. 7 Jac. B. R. Anon.

4. The *Declaration was of a fourth Part of a fifth Part in five Parts to be divided*; and *the Title of the Plaintiff upon the Evidence was only of the third Part of the fourth Part of the fifth Part into five Parts to be divided*, which is only a third Part of that which is demanded in the

6. *Expiration of the Term* is no Plea in Ejectione Firmæ ; Per Jermin. Lat. 206. Trin. 3 Car. Dale v. Penhalerick.

7. In Ejectment by A. againſt B. the Court was moved for C. that he will ſave B. harmleſs, and prays that giving B. Security to do ſo, B. may be *ordered by Rule of Court to plead as C. ſhould direct B.* and that B. be not ſuffered to confeſs a Judgment ; Per Roll Ch. J. it is out of the way for you to give ſuch Security, for there yet appeared no *Colluſion*, but you ſhall be *made a Party to defend the Title*, and then move again. Sty. 382. Paſch. 1653. Ricot v. St. John.

8. If Judgment in Ejectment be ſigned in a Country Cauſe for *want of Plea*, but no Poſſeſſion delivered, a Judge in his Chamber at any Time before the Aſſiſes, may compel the Plaintiff to accept a Plea, but if Poſſeſſion is delivered he is without Remedy ; Per Holt Ch. J. 2 Salk. 516. pl. 9. Mich. 9 W. 3. B. R. Anon.

9. In Ejectment *Plea of Ancient Demeſne* was allowed to be well, *without an Affidavit* to verify the Fact, and ſuch Plea had been before allowed to be good in **Earl Coningsby's Caſe.** 2 Ld. Raym. Rep. 1418. Trin. 12 Geo. B. R. Goodright v. Shuffil.

(S) Bar.

1. A Recovery in one Ejectment *is a Bar* in another ; Per Anderſon Ch. J. eſpecially (as Periam J. ſaid) if the Party relies on the Eſtoppel. 3 Le. 194. pl. 242. Mich. 29 Eliz. C. B. Anon.

2. Declaration of a *Park* containing 60 Acres, and the Jury find but of 30, adjudged againſt the Plaintiff for the whole. N. B. The Park was *a Thing intire.* D. 115. b. pl. 67. Marg. cites 29 Eliz. Baskervill's Caſe.

4 Le. 77. pl. 163. Paſch. 28 Eliz. C. B. Spring v. Lawſon, S. P.

3. A Bar *in one* Ejectione Firmæ *is* a Bar *in another* for the ſame Ejectment, but not for another or new Ejectment. Mar. 59. pl. 92. Mich. 15 Car. Anon.

Such Releaſe not allowed. Raym. 93. Hill. 15 & 16 Car. 2. B. R. Keyes v. Bradon.

4. If the *Plaintiff dies*, the Court will ſuppoſe any other Perſon of the ſame Name to be the Plaintiff, and they take Notice judicially that the Leſſor of the Plaintiff is the Perſon intereſted, and therefore they puniſh the Plaintiff if he *releaſe the Action* or the Damages. Mod. 25. Trin. 29 Car. 2. C. B. Addiſon v. Otway.

(T) Abatement.

1. IF Ejectment of Ward be brought *againſt* two, and the *one* dies yet the Writ is good againſt the other, per Thirn, and Hull of the ſame Opinion ; For *this is in Nature of Treſpaſs* ; Quod Nota ; by which Skrene who pleaded this Matter imparled. Br. Ejectione &c. pl. 2. cites 12 H. 4. 10.

2. Ejectio

2. Ejectione Cuſtod' *of Land in E.* the *Defendant ſaid that the Land is in C. and not in E.* Judgment of the Writ, and Plaintiff prayed Leave to inquire a better Writ. Br. Ejectione &c. pl. 4. cites 14 H. 4. 16.

3. In Ejectione Firmæ, the *Omiſſion* of this Clauſe, *Et Bona & Catalla querentis ad valen'* &c. is not material, and the Writ is good without this Clauſe. Thel. Dig. 94. lib. 10. cap. 6. S. 17. cites Plowden Fol. 199, 228.

4. *Leſſee for Years brings an Ejectione Firmæ; The Leſſor being but Tenant for Life dies, pending the Writ*; The Writ does not abate. The Plaintiff may have Judgment and a Writ of Execution. Jenk. 293. pl. 38.

5. If an Ejectment be brought *againſt two*, and *Iſſue be joined*, and then *one of them dies*, and a *Venire is awarded as to the two Defendants, and a Verdict againſt two*, yet upon Suggeſtion of the Death of one of them upon the Roll, the Plaintiff ſhall have Judgment for the Whole againſt the other; cites Cro. J. 330. 274. 2 Keb. 845. becauſe *this Action is grounded upon Torts, which are ſeveral in their Nature, and and one may be found Guilty, and the other acquitted*; Per Cur. Lord Raym. Rep. 717. Hill. 13 W. 3. in Caſe of Gree v. Rolle and Newell.

(U) Verdict. How the Jury may find.

1. EJectione Firmæ; The Plaintiff *declared of Ejectment of* 100 *Acres* of Land, and *in Evidence ſhewed a Leaſe of* 40 *Acres only*; It was ruled to be good for ſo much as was comprized in the Leaſe, and for the Reſidue the Jury may find the Defendant not guilty. Cro. E. 13. pl. 4. Hill. 25 Eliz. C. B. Guy v. Rand.

2. In Ejectment, *ſuppoſing the Ejectment of ten Acres*, and the *Jury find the Circumſtance but of four Acres*, the Plaintiff recovered thoſe four Acres. D. 115. b. Marg. pl. 67. cites it as adjudged Trin. 43 Eliz. B. R. Meredith v. Brown.

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3. In Ejectment the Plaintiff declared on a *Leaſe of a Meſſuage, ten Acres of Land*, 20 *Acres of Meadow*, 20 *Acres of Paſture, by the Name of one Meſſuage and* 10 *Acres of Meadow, be it more or leſs*, and upon Not Guilty pleaded had a Verdict, but Nil capiat per Billam entered, cauſe upon the Matter diſcloſed by the Plaintiff himſelf in the Declaration he cannot have his Execution of the Quantity found by the Verdict; For in the Leaſe there are only 10 Acres demiſed, and thoſe Words (more or leſs) cannot in Judgment of Law extend to 30 or 40 Acres, it being impoſſible by common Intendment, and the rather becauſe the Land demanded by the Declaration is of another Nature than what is mentioned in the Per Nomen, which goes only to the Meadow, and the Declaration to the Arable Land or Paſture. Yelv. 166. Mich. 7 Jac. B. R. Anon.

4. The *Declaration was of a fourth Part of a fifth Part in five Parts to be divided*; and *the Title of the Plaintiff upon the Evidence was only of the third Part of the fourth Part of the fifth Part into five Parts to be divided*, which is only a third Part of that which is demanded in the

the Declaration, and it was ſaid that the Plaintiff could not have Verdict, becauſe the Verdict in ſuch Caſe ought to agree with the Declaration. But per Cur. *the Verdict may be taken according to the Title*; and ſo it was. Sid. 229. pl. 26. Mich. 16 Car. 2. B. R. Ablet v. Skinner.

(W) Judgment.

1. JUdgment was forthwith given becauſe the *Leaſe determined the ſame Day*, and Execution awarded immediately. Cro. J. 227. pl. 1. Mich. 7 Jac. B. R. Underhill v. Kelſey.

2 Bulſt. 186. S. C. but reports that Judgment was given only *for a Moiety.*

2. If one *Coparcener* brings Ejectment *for the Whole*, the Judgment ſhall be for the Whole. Roll Rep. 386. pl. 6. Trin. 14 Jac. B. R. Cooper v. Franklyn.

3. Judgment in Ejectment in C. B. was *quod Querens recuperet*, and the Words *quod Defendens capiatur* are omitted, and on this Exception Judgment was reverſed; for they ſaid in this Judgment ſo entered, there is no Return of Damages nor a Capiatur, and ſo the King is cozened of the Fine, and the Defendant barred of bringing his Writ of Error. Sty. 346. Mich. 1652. Acton v. Ayres.

4. In Caſe of Judgment againſt the caſual Ejector there ought to be a *Latitat* ſued out againſt, and common Bail filed for the *caſual Ejector*, and *Judgment* was ſet aſide for want of it. 2 Show. 249. pl. 253. Mich. 34 Car. 2. B. R. Bouchier v. Friend.

5. *Affidavit* of the Delivery of a Copy of a Declaration in Ejectment to A. and B. *Tenants* in Poſſeſſion of the Premiſſes, or *of Part* thereof; Ruled that there ſhould be *Judgment for ſo much* as was in their Poſſeſſion. Comb. 102. Paſch. 1 W. & M. B. R. Anon.

6. To have *Judgment* ſigned *againſt the caſual Ejector* all Things muſt be very fair of the Plaintiff's Side; for the Defendant loſes his Poſſeſſion by a fictitious Proceeding; Per Cur. 7 Mod. 150. Hill. 1 Ann. B. R. Anon.

7. Ejectment to recover the Poſſeſſion of the *Quakers Meeting-Houſe*. None of them would receive the Declaration, and the Houſe was open only on *Sundays*, and Delivery is not good on that Day, ſo the Plaintiff took a *Judgment by Confeſſion of the nominal Leſſee*; but it was ſet aſide becauſe it cannot be entered on his Confeſſion, which, in Fact, is the Confeſſion of the Plaintiff himſelf. 8 Mod. 109. Mich. 9 Geo. Cooper v. Beale.

8. If *Tenant in Poſſeſſion appears and pleads*, and afterwards *withdraws* his Plea, and *confeſſes Judgment*, the Plaintiff may enter Judgment againſt the Tenant in Poſſeſſion; Per tot. Cur. But whether he may in this Caſe enter it againſt the caſual Ejector the Court was divided; Adjornatur. 8 Mod. 118. Hill. 9 Geo. Smith v. Jones.

9. *Error* in Cam. Scacc. will not lie upon a *Judgment* in Ejectment *againſt the caſual Ejector*. 8 Mod. 118. Hill. 9 Geo. Smith v. Jones.

10. Judgment was in Ejectment *of two ſeveral Demiſes of two ſeveral Tenements*, and the Entry was *Quod recuperet Terminum ſuum in Tenement' prædict'*. It was urged that it ſhould be taken Reddendo Singula Singulis; But if the Plaintiff had two ſeveral Terms in one and the ſame

ſame Land, then poſſibly the Judgment might not be right; and the Judgment was affirmed. Gibb. 83. pl. 11. Trin. 2 & 3 Geo. 2. B. R. Anon.

(X) What ſhall be recovered, and the Effect thereof.

1. IN Writ of *Ejectione Cuſtodiæ*, the Plaintiff ſhall not have Judgment to recover *the Ward and Damages where the Heir is within Age, but* to recover *all in Damages, and ſhall have Seiſin of the Land*; but at this Day he ſhall recover Poſſeſſion of the Land. Br. Ejectione, pl. 13. cites 30 E. 3. 11.

2. In Ejectment *of a Term for Years*, the *Term expired before Judgment given.* Though the Plaintiff cannot have Judgment to recover the Land, yet he ſhall have *Judgment of Damages*; but otherwiſe it is in Actions where Franktenement is to be recovered; And Plaintiff had Judgment. Sav. 28. pl. 66. Trin. 24 Eliz. Booth v. Ld. Cromwell. Co. Litt. 285. a. S. P.

3. By a Recovery in an Ejectment the *Poſſeſſion is bound.* 3 Le. 194. pl. 242. Mich. 29 Eliz. C. B. Anon. It binds the Right, and makes a Title in the Plaintiff. 1 Salk. 258. Mich. 1 Ann. B. R. Withers v. Harris.

4. Ejectment for 10 *Acres*, and the Jury find but of *four*, Plaintiff ſhall recover the four Acres. D. 115. b. pl. 67. Marg. cites 43 Eliz. Meredith v. Brown.

5. A. ſeiſed of Land purchaſes a Houſe and other Land, and pulls down the Houſe, and builds it ſix Feet bigger, which ſix Feet is *upon his own Land*, though the Demandant has Title but to part of the Houſe, Part only being on the Land demanded, yet Judgment was that he ſhall recover the Houſe. Lat. 62, 63. Paſch. 1 Car. Hems v. Stroud. Cro. E. 234. S. C. Meſuagium prædict', viz. ſo much in Length, and ſo much in Breadth, according to the Verdict. —— Poph. 14. S. C.

6. If *Tenant in Common* ſeals a Leaſe in Ejectment, he ſhall recover but a Moiety; Per Hale Ch. J. Mod. 102. pl. 9. Mich. 25 Car. 2. B. R. Anon. He ſhall only recover his *Purparty pro Indiviſo*, and ſhall be put in Poſſeſſion of no more, and in ſuch Caſe the Sheriff ſhall give the ſame Execution as he would do of Rent upon Aſſiſe. 12 Mod. 657. Hill. 13 W. 3. in Caſe of Johnſon v. Allen.

7. Ejectment for an Acre of Land *in D. and S.* and it *lies only in D.* yet Plaintiff ſhall recover; if it be for an *Acre in D.* and *Part of it lies in S.* he ſhall recover what lies in D. if *for a whole Acre, and he has Title only to the 4th Part*, he ſhall recover the 4th Part; Arg. and not denied by the Court. 3 Lev. 334. Trin. 4 W. & M. in C. B. Goodwin v. Blackman.

8. Holt Ch. J. ſaid, that it was held in this Court in the Caſe of **Badger v. Loyd**, that the *Plaintiff might enter pending the Writ of Error upon the Judgment in Ejectment, if he could find the Poſſeſſion empty*; For the Writ of Error binds the Court, but not the Right of the Party; But he muſt take Care that he do not enter with Force. 2 Ld. Raym. Rep. 808. Mich. 1 Ann.

(Y) Judgment ſtayed.

1. JUdgments in Ejectment againſt caſual Ejectors for want of an Appearance ſhall be ſet aſide, and Reſtitution granted if no Latitat hath been ſued out againſt, *nor Common Bail filed* for ſuch caſual Ejector, or nominal Defendant, *within* 14 *Days after ſuch Appearance* ; Per Cur. L. P. R. 85. cites Trin. 4 W. & M.

This Caſe was denied, per Cur. Mich. 12 Geo. 2. B. R. in Caſe of Sir William Clayton v. Boone.

2. If Notice in Ejectment be *given to an Under-Tenant*, and he does *not acquaint his Landlord* therewith, but ſuffers Judgment to go againſt him, the Court upon Motion will not ſuffer Execution to be taken out till the Right be tried. 12 Mod. 211. Mich. 10 W. 3, Anon.

3. If Judgment be againſt the caſual Ejector, and it be made appear that *no Declaration* was *rightly ſerved*, the Court will ſet it aſide ; And if at Common Law an Ejectment had been againſt one that had nothing in the Land, and upon Judgment againſt him another is turned out of Poſſeſſion, there was no Remedy for the right Owner but Treſpaſs or a Writ of Deceit, and this ſtill is all the Certainty a Man has of his Poſſeſſion, and now all we can do is to ſet ſuch Recovery aſide, and to puniſh the Offender ; Per Holt Ch. J. 12 Mod. 655. Hill. 13 W. 3. in Caſe of Gree v. Rolle.

4. *But* upon *Affidavit that Defendant was a Soldier*, and ſo intitled to *Protection* by Law, it was ordered that he ſhould *give Security for Payment* of the Rent for the future. 10 Mod. 383. Hill. 3 Geo. 1. B. R. Smith v. Parkes.

5. The Court uſually *ſtays Proceedings* in Ejectment on reaſonable Terms at any Time before Execution executed, and where the Ejectment was for *Nonpayment of Rent* the Plaintiff had Judgment, but the Proceedings were ſtay'd on *bringing in the Rent and Coſts* within three Days. 8 Mod. 345. Hill. 11 Geo. Philips v. Doelittle.

(Z) Writ of Error.

Cro. E. 290. pl. 10. Hill. 34 & 35 Eliz. B. R. S. P. in Caſe of Warnford v. Haddock.

1. IN Ejectment the Plaintiff declared of a *Leaſe of the 4th Part of an House in N. in four Parts to be divided, by Force of which he entered into a Tenement Parcel' prædict', and was inde Poſſeſſionatus till the Defendant did eject him de Tenementis prædict'*, whereas he ought to ſuppoſe the Entry in the fourth Part, and the Ejectment of the 4th Part; The Court ſaid, De Tenementis prædict' ſhall not be intended the whole Tennement, but of the 4th Part, and the Judgment affirmed. Cro. E. 286. pl. 3. 34 Eliz. B. R. Rawſon v. Maynard.

2. A *Writ of Error* may be brought before the *Writ of Inquiry* be returned in an Ejectment, for in that Action the Judgment is compleat at the Common Law before it be returned, for the Judgment is but to gain Poſſeſſion, and ſo it is in Dower ; But otherwiſe in Treſpaſs, where Damages only are to be recovered, for in ſuch Caſe the Judgment

ment is not perfect till the Writ of Inquiry is returned, nor can be made up before, as in the principal Case it may; Per Roll Ch. J. Sty. 109. Trin. 24 Car. Glede v. Dadeney.

3. In an Ejectione Firmæ, if the Writ of *Habere facias Possessionem contains more Acres of Land than* are expres'd *in the Declaration* it is Error; Per Roll Ch. J. Sty. 238. Mich. 1650. Lumley v. Nevil.

4. 16 & 17. *Car. 2. cap. 8. S. 3, 4. Execution shall not be stay'd by Writ of Error upon any Judgment after Verdict in Ejectione Firmæ, unless the Plaintiff in such Writ become* bound to the Defendant in such a Sum as the Court, *to whom the Writ is directed, shall think, fit, that if the Judgment be affirmed, or the Writ discontinued in his* Default, *or he be* Nonsuit, *he will pay such* Damages *and Sums of Money, to ascertain which a* Writ of Inquiry *shall issue to inquire of the mesne Profits and Damages by Waste done after the first Judgment as shall be awarded, and* Costs *of Suit.*

5. A had Judgment in Ejectment in C. B. and *Execution of his Damages and Costs.* B. brings Error, and the *Judgment is affirmed.* Whereupon A. prays his *Costs for his Delay and Charges*, but could not have them; For no Costs were in such Case at Common Law, and the Statute 3 *H.* 7. 10. *gives Costs only where Error is brought in Delay of Execution.* So 19 *H.* 7. 20. and here, tho' he had *not Execution of the Term, yet he had it of his Costs.* Vent 88. Trin. 22 Car. 2. B. R. Foot v. Berkley.

The Court said, that there was no Reason for such Distinction. Hill. 2 Geo. 2 B. R. Ferguson v. Rawlinson.

6. After a Recovery in Ejectment the bringing a Writ of Error is *no Bar to* an Action of *Trespass for the mesne Profits*, but that it may be brought pending such Writ of Error. 12 Mod. 138. Mich. 9 W. 3. Donford v. Ellis.

(A. a) Of Confessing Lease Entry and Ouster.

1. IF the *Lease is defective*, we can give no Judgment, and the Rule of Court does not bind the Defendant to confess the Lease otherwise than you have made it; Per Roll Ch. J. Sty. 343. Mich. 1652. Theobald v. Conquest.

2. In Ejectment the Lessor of the Plaintiff had Title to enter for a *Condition broken for Non-Payment of Rent.* Lease, Entry and Ouster was confess'd, and the Court was mov'd, that in regard the Lessor had such a special Title, and no Estate until Entry, whether such an *Entry* should be *supply'd by the General Confession*, or that there should be an actual Entry; and held that it should be supply'd by the General confession. Vent. 248. Mich. 25 Car. 2. B. R. Anon.

Vent. 332. Trin. 30 Car. 2. the Court inclin'd to the contrary, tho' Ld. Hale was said to be of another Opinion.—

1 Salk. 259. pl. 13. March 26. 1702. held by Holt Ch. J. at the Assises, that in such Case Entry and Ouster is not necessary, tho' it had been held otherwise before the Time of Hale Ch. J. —2 Ld. Raym. Rep. 750 S. C. ruled by Holt Ch. J. accordingly, tho' he said he formerly doubted of it, and reserved it as a Point for his Opinion, and caused it to be mov'd in B. R. where the other Judges held that the General Confession of Entry by the Defendant was good enough.

3. If A. lets to B. and B. lets to C. to try the Title, the Confession of the Lease Entry and Ouster *extends only* to the Lease made to

This Rule does not extend to con-

feſs *actual Entry upon a Leaſe which is the Title*, but per Cur. it ſhall be *intended* that they entered till the Contrary be prov'd to C. and not to that to B. Per Hale. Vent. 248. Mich. 25 C. 2. B. R. Anon.

the other Part. Sid. 223. pl. 12 Mich. 16 Car. 2. B. R. Langhorne v. Merry.

4. Where the *Defendant in Ejectment appears, and confeſſes Leaſe Entry and Ouſter*, that ſhall be ſufficient to prove an actual Entry in any Caſe where an actual Entry is required; and ſo Scroggs ſaid it was always held by Ch. J. Hale, becauſe it ſhall be taken an Entry to all Intents. Freem. Rep. 468. pl. 643. Trin. 167 Winch v. Huddleſton.

2 Vent 195. Trin. 2 W. & M. in C. B. Fagg v. Roberts S.P. and Coſts taxed for the Defendants.

5. In an Ejectment, where there are *divers Defendants* which are to confeſs Leaſe Entry and Ouſter, if every one do not appear at the Trial, the Plaintiff, cannot proceed againſt the reſt but muſt have *Nonſuit*. Vent. 355. Trin. 33 Car. 2. B. R.

6. For not appearing at the Trial to confeſs Leaſe, Entry and Ouſter, there was *Judgment* againſt the Caſual Ejector, but *ſet aſide becauſe no Bail was filed*. 2 Show. 201. Paſch. 34 Car. 2. B. R. Honor v. Gale.

7. Where an Entry is required, and even neceſſary, the *Confeſſion* of Leaſe Entry and Ouſter does *ſupply* it, (tho' no *Actual Entry*) Per Scroggs Ch. J. who ſaid it was the Opinion of all the Judges 2 Show. 201. pl. 204. Paſch. 35 Car. 2. B. R. Honor v. Gale.

8. Eyres J. much doubted whether the Rules of confeſſing Leaſe Entry and Ouſter, be good in an *Inferiour Court*, but they ſhould proceed the antient Way. Cumb. 208. Trin. 5 W. & M. in B. R. Anon.

9. Ejectment for two Meſuages, two Gardens, 70 Acres of Land 15 of Meadow, and 30 of Paſture, in D. The Plaintiff delivered Declarations to two Tenants only, and as to the Lands in their Poſſeſſion the Defendant entred into the Common Rule, but becauſe he had made ſeveral ſmall Purchaſes in that Pariſh, and the Plaintiff claim'd only 20 Acres lately granted to him by Leaſe from the Biſhop of Glouceſter, therefore he mov'd by his Counſel, that *the Plaintiff might give a Note in Writing* before the firſt Day of the next Term, *what Lands in particular he claimed*, and where ſuch lay, and in whoſe Poſſeſſion &c. or otherwiſe that he might not proceed to Tryal at next Aſſiſes; for Defendant not knowing what Lands Plaintiff would claim, could not tell what Purchaſe Deeds to produce at the Trial; Sed non allocatur. 4 Mod. 214. Paſch. 5 W. & M. in B. R. Gwynn v. Pie.

10. In *Ejectment* the *Demiſe* by the Leſſor of the Plaintiff to the Plaintiff *was laid to be the 27th of April* 1697. *which Time was not come at the Time of the Trial*; but the *Tenant had entred into the common Rule to confeſs Leaſe Entry and Ouſter*; And the Court compell'd the Defendant to confeſs Leaſe Entry and Ouſter, otherwiſe the Plaintiff would have been nonſuit, and then he would have had Judgment againſt the caſual Ejector, although it was objected, that the Plaintiff could not have Judgment though the Verdict were found for him. Ruled by the Court of B. R. upon a Trial at Bar. Ld. Raym. Rep. 728, 729. Anon. cites Mich. 8 Will. B. R.

Per Cur. S. P. *But if one enters* only upon another

11. In Caſe of *Tenants in Common* there muſt be an actual Ouſter of one by the other, or elſe he ſhall not be compell'd to confeſs Leaſe Entry and Ouſter. Per Holt. 7 Mod. 39. Trin. 1 Ann. B. R. Anon.

claiming only as Tenant in Common, and the other brings an Ejectment, it will be hard to enforce the Defendant

Defendant who has done nothing, but as Tenant in Common, to confeſs Leaſe, Entry and Ouſter Per Cur. 12 Mod. 657. Hill. 13 W. 3. in Caſe of Johnſon v. Allen.

12. In Ejectment if Defendant has *not Regular Notice of Trial* the way is not to confeſs Leaſe Entry and Ouſter but to oppoſe Judgment againſt the Caſual Ejector 7 Mod. 118. Mich. 1 Ann. B. R. Anon.

13. If *Defendant will not appear*, and confeſs Leaſe Entry and Ouſter, the *Courſe is* to call him and his Attorney, if he be within the Rule, and then to call the Plaintiff himſelf and nonſuit him, and then upon Return of the Poſtea Judgment will be givnn againſt the caſual Ejector; and the Maſter will tax Coſts upon the Rule for confeſſing Leaſe Entry and Ouſter, and if theſe are demanded of the Defendant and not paid, the Court on Affidavit will grant an *Attachment*. 1 Salk. 259. pl. 14. Trin. 2 Ann. B. R. Turner v. Barnaby.

14. In Ejectment againſt ſeveral if *ſome confeſs Leaſe Entry and Ouſter, and others do not*, the Plaintiff may go on as to the former, and be nonſuit as to the latter, but the Cauſe of the Nonſuit muſt be expreſſed in the Record, viz. becauſe thoſe Defendants would not confeſs Leaſe &c. and on the Return of the Poſtea the Court would be informed what Lands were in the Poſſeſſion of thoſe Defendants, that the Judgment might be entered againſt the caſual Ejector as to them. 2 Salk. 456. pl. 6. Paſch. 4 Ann. B. R. Greeves v. Roll

If Plaintiff ſhews Title he ſhall recover the Whole againſt the other; Per Holt Ch. J. 12 Mod. 655. — If one confeſs Leaſe Entry and Ouſter *for as much of the Premiſes as are in his Poſſeſſion*, the Jury ſhall inquire againſt him alone for ſo much, and *if the other will not* appear, or not confeſs &c. there ſhall be Judgment for ſo much of the Premiſes as are in his Poſſeſſion; Judgment againſt the caſual Ejector; Per Holt Ch. J. 12 Mod. 656. Hill. 13 W. 3. in Caſe of Gree v. Roll. ——— C. brought an Ejectment againſt *S. F. and G. F. appeared, and confeſſed* Leaſe Entry and Ouſter; S. and G. did not appear nor confeſs Leaſe Entry and Ouſter; upon which, by the Direction of Holt Ch. J. at the Summer Aſſizes at Horſham in Suſſex, 12 W. 3. a *Verdict was given* by the Jury *for the Plaintiff againſt F generally*; and Verdict was given againſt the Plaintiff for S. and G. and Indorſement was made upon the Poſtea, that this Verdict was for S. and G. becauſe they did not appear and confeſs Leaſe Entry and Ouſter; and for this Reaſon that they ſhould not have Coſts againſt the Plaintiff, and that the Plaintiff ſhould have Judgment againſt the caſual Ejector for ſuch Lands as were in the Poſſeſſion of S. and G. Lord Raym. Rep. 729. Claxmore v. Searle & al'.

For more of Ejectment in General, See other Proper Titles.

Election.

(A) *In what Caſes* an Election is given by Law.

Fol. 725.

1. IF A. ſeiſed in Fee of 100 Acres, enfeoffs B. of 18 of the 100 Acres, (without aſſigning which of the 100 Acres he enfeoffed him of) to hold to B. and his Heirs at Election of B. and his Heirs when he pleaſe; this is a void Feoffment ſo that this cannot be made Mo. 81. pl. 215. Bullock v. Burdett, S. P. adjudg-

ed —— And. 11. pl. 24. S. C. adjudged. — Bendl. 148. pl. 206. S. C. adjudged. —— S. C. cited per Curiam 2 Rep. 36. b. —— Hob. 171. cites S. C.

made good by any Election, because a Livery cannot operate in Futuro, but ought to pass the Freehold presently or never, and therefore the Feoffment void. Dy. 11 Eliz. 281. 19. adjudged.

But if such Grant be made by the King it is utterly void for the Uncertainty. Ibid. —— If the King grants 120 Acres of his Waste in D. and the Ad Quod Damnum returns, that it is not to his Damage, and that the Waste contains 300 Acres, there nothing passes, for it is uncertain which 120 Acres were intended, and the Party shall not have any Election against the King; All which was agreed upon Evidence to the Jury. Noy 29. Brand v. Todd. —— 12 Rep. 86. Trin. 9 Jac. in the Court of Wards in Stockdale's Case, S P.

2. If a common Person grants to the Mayor and Burgesses of C. *the Moiety of a Yard Land in a Great Waste without Certainty* in what Part of the Waste they should have the same, or the special Name of the Land, or how it was bounded, or without any certain Description of it, so as the same ought to be reduced to Certainty by Election, the Corporation must not make their Election *by Attorney*, but after they are resolved upon the Land they *must make a special Warrant of Attorney, reciting the Grant to them, and in what Part of the said Waste their Grant should take Effect, East, West &c. or by Buttals &c.* according to which Direction the Attorney is to enter &c. Le. 30. pl. 36. Trin. 27 Eliz. B. R. in Sir Walter Hungerford's Case.

2 And. 202. pl. 19. S. C. adjudged; and though by the Death of Sir R. H. their Power to take the Land in Lease by Attornment be determined, yet now they shall take as they may. — Poph. 95. pl. 2. S C. & S. P. held accordingly by Popham and Anderson, and tSerefore if the Bargainees after Sir R.'s Death would elect to take it by Way of Bargain and Sale, they shall have all the Reversions, Remainders, Rents, and Services, as well as the Land in Possession executed to them by the Statute of Uses; And of the same Opinion were all the Justices in Trin. Term following upon their Meeting at Serjeant's Inn for another great Cause. —— Hob. 159. S. C. cited by Hobart Ch. J. as resolved. —— Lutw. 803. Trin. 10 W. 3. S. C. cited by Powell J. that *when an Election is compleated with an Interest, such Election is descendible.*

3. Sir R. H. *bargains and sells* to three Persons *several Manors*, (which are *Part in Demesnes, Part Copyhold, and Part in Lease for Years with Rents reserved) and the Reversions and Remainder* of them with all Rent reserved *Habend. to them and their Assigns after the Death of Sir R. H. for* 17 *Years &c. Afterwards Sir R. H covenants to stand seised of the Premisses to the Use of himself for Life, and to the Heirs of his Body*, and dies; *no Attornment is made to the Bargainees.* Resolv'd, the Bargainees have an Election to take this as a Demise at the Common Law or by Bargain and Sale by 27 H. 8. without Attornment; and though the Lessees or Bargainees have entered generally, yet their Election remains to them still notwithstanding the Death of the Lessor and the Alteration of the Estate by the second Indenture; for they had an Interest in them presently. 2 Rep. 35. b. 36. a. Pasch. 37 Eliz. in the Court of Wards. Sir Rowl. Hayward's Case.

4. If the Tenant in *Socage holds by Fealty and* 10 *s. or a Pair of Gilt Spurs*, if the Heir be not, *so soon as conveniently* he may, all Circumstances considered, after the Death of his Ancestor *ready upon the Land to pay his Relief*, the Lord may distrain for which of them he will; for upon Default of the Tenant the *Election* is given to the Lord. 2 Roll Tenure (L. a) pl. 7. cites Co. Litt. 91.

(A. 2) Rules and Notes, as to Election.

1. IF your *Act may work two Ways*, both *arising out of your Intereſt*, Election is given to the Patient to uſe it either Way but not both Ways to one entire Thing and one entire Act. Hob. 159. cites 2 Rep. 35. 37 Eliz. Sir Rowland Heyward's Caſe.

2. If the Act will work two Ways, *the one by an Intereſt, and the other by Authority* or Power, and the Act be indifferent, the Law will attribute it to the Intereſt and not to the Authority. Hob. 159. in pl. 193. Mich. 10 Jac.

3. But where *Intereſt and Authority meet*, if the Party declares clearly that his Will is that this Act ſhall take effect by his Authority or Power, there it ſhall prevail againſt the Intereſt, for Modus & Conventio vincunt legem. Hob. 160.

4. And though the Party doth not make an *expreſs Declaration*, yet if his Act do import a Neceſſity to work by his Power, or elſe to be wholly void, the Benignity of the Law will give Way to effect the Meaning of the Party. Hob. 160. in Caſe of Colt v. Glover.

5. When Election creates the Intereſt nothing *paſſes till* Election, ſo where no Election can be, no Intereſt can *ariſe*. Hob. 174. Hill. 12 Jac. in Caſe of Stukely v. Butler.

(B) *Who* ſhall have it.

1. IF a Man leaſes Land for Years, reſerving weekly nine Quarters of Wheat, or the Value thereof as it ſhall then be ſold in the Market of W. if the Leſſee pays neither of theſe at the Time appointed, the Leſſor may have his Action at his Election for the Wheat only, or for the Value only, for though the Leſſee might have paid any of them at his Election at the Day, yet after the Day the Law gives the Election to the Leſſor. Tr. 3 Ja. B. R. between Lord *Denny and Parnell*, adjudged.

2. If a Man bargains and ſells 300 Cords of Wood out of his Woods to another and his Aſſigns, to be perceived by the Appointment of the Bargainor, if the Bargainor does not aſſign it within a convenient Time after Requeſt made by the Bargainee or his Grantee, they may take it without Appointment. Co. 5. Palmer 24. b. reſolved. P. 43 El. B. R.

Mo. 691. pl. 955. Maynard v. Baſſet, S. C. but S. P. does not fully appear. —— Cro. E. 819. pl. 14. Baſſet v. Maynard, S. C. adjudged for the Aſſignee of the Bargainee; For the Bargainee had an Intereſt before the Appointment by the Bargainor, which Intereſt he may aſſign. —— Noy. 32. Baſſet v. Baynard S. C. but not clearly reported —— S. C. cited Jo. 276. that there is *no Diverſity where the Wood is to be taken per Viſum, or per Viſum & Allocationem*; For in both Caſes upon Requeſt made and Refuſal the Party may take them without View or Delivery.

3. When a Thing is granted, or concludes conditionally, as 20 s. per Ann. or a Robe Price 20 s. to be paid at ſuch a Day, there *at the Day* the Debtor may pay the one or the other at his Election; but if he does not pay at the Day, the Creditor, or the Grantee, after the Day, has Election to demand the one or the other; Per Catesby, quod

quod Moyle and Littleton J. conceſſerunt. Br. Dette, pl. 112. cites 9 E 4 36.

Dal. 73. pl 55. S. C. in totidem Verbis.

4. A Man *has three Daughters, and covenants with J. S. that he ſhall have the Diſpoſition in Marriage of one of them*; the Election is in the Father of which of the Daughters the other ſhall have the Marriage, and he is not to deliver the Daughter till Requeſt; but upon Requeſt he is to deliver the Daughter to J. S. otherwiſe he cannot have the Effect of the Covenant; Held by all the Juſtices. Mo. 72. pl. 197. Trin. 6 Eliz.

S. C. cited Vent. 271. Trin. 27 Car. 2. B. R. in Caſe of Motteram v. Jolly,

5. If *A. grants* 1000 *Cords of Wood to J. S. to be taken at the Election of J. S.* and the Grantor or a Stranger cuts any Trees, J. S. the Grantee cannot take them, but muſt ſupply his Grant out of the Reſidue. 5 Rep 25. a. Paſch. 43 Eliz. B. R. the ſecond Reſolution in Sir Tho. Palmer's Caſe.

where the Caſe was that A. covenanted with J. S. that J. S. ſhould elect 20 of the beſt Trees out of his Wood to be taken within 11 Years; And the Breach was aſſigned, that the Defendant had cut Trees within the Time; upon which it was demurred and relied upon the ſecond Reſolution in 5 Rep. Sir Thomas Palmer's Caſe. But here the Court were of Opinion for the Plaintiff, for by the Covenant he has 11 Years Time to elect, And by cutting any Trees in the mean Time, the Latitude of his Election is abridged And Hale ſaid that the Caſe in 5 Rep. there if the Grantee can have the Number of his Cords of Wood, he has the Effect of his Grant; But Trees differ in Value exceedingly from each other.

2 Rep. 36. b. 37. a. Paſch. 37 Eliz. in the Court of Wards in Sir Rowland Heyward's Caſe. S P. in a Nota by the Reporter.

6. Note, as to Elections theſe *Diverſities* following; 1ſt. *When nothing paſſes to the Feoffee or Grantee before Election* to have the one Thing or the other, the Election ought to be made in the Life of the Parties, and the *Heir or Executor cannot make Election. But when an Eſtate or Intereſt paſſes immediately* to the Feoffee, Donee, or Grantee, there Election may be made by them, or by their Heirs or Executors. Co. Litt. 145. a.

2 Rep. 37. a. S. P.

7. 2dly, *When one and the ſame Thing paſſes to the Donee or Grantee, and the Donee* or Grantee *has Election in what Manner or Degree he will take* this, there the Intereſt paſſes immediately, and the Party, his Heirs or Executors may make Election when they will. Co. Litt. 145. a.

2 Rep. 37. a. S. P.

8. 3dly. When *Election* is *given to ſeveral* Perſons, there the firſt Election made by any of the Perſons ſhall ſtand. Co. Litt. 145. a.

* 2 Rep. 37. a. S. P. cites 9 E. 4. 36. b. L. 5 E. 4 6. b. 11 E. 3. Annuity. 27. and 11 Aſſ. pl. 8. 29 Aſſ. 55. 3 E. 3 tit. Aſſiſe 175. 43 E. 3. tit. Barr. 194.

9. 4thly, In Caſe an *Election* be *given of two ſeveral Things* always *he which* is the firſt Agent, and which *ought to do the firſt Act, ſhall have the Election. As* if a Man grants a *Rent of* 20 *s. or a Robe* to one and to his Heirs, the Grantor ſhall have the Election; for he is the firſt Agent by payment of the one, or delivery of the other. So if a Man makes a *Leaſe rendring a Rent or a Robe*, the Leſſee ſhall have Election, cauſa qua ſupra, and with this agree the Books in the * Margin. *But if I give* unto you *one of my Horſes in my Stable*, there you ſhall have the Election, for you ſhall be firſt Agent by taking or Seiſure of one of them. And if one grant to another 20 *Loads of Hazil*, or 20 Loads of Maple *to be taken in his Wood of D.* there the Grantee ſhall have Election, for he ought to do the firſt Act, viz. to fell and take the ſame. Co. Litt. 145. b.

2 Rep. 37. a. S. P.

10. 5thly. When the Thing granted is *of Things annual, and are to have continuance*, there the Election remains to the Grantor, (in Caſe where the Law gives to him Election) as well after the Day as before, otherwiſe it is when the *Things* are *to be performed unica vice*; And therefore if *I grant to another for Life an Annuity or a Robe at the Feaſt of Eaſter, and both are behind*, the *Grantee ought to bring his Writ of Annuity*

nuity in the *Disjunctive*; for if he brings his Writ of Annuity for one only, and recovers, this Judgment ſhall determine his Election for ever; for he ſhall never have a Writ of Annuity afterwards, but a Scire Facias upon the ſaid Judgment. Which Reaſon Fitzherbert in his Natura Brevium not obſerving, held an Opinion to the contrary. But *if I contract with you to pay unto you 20 s. or a Robe at* the Feaſt of *Eaſter, after the Feaſt you may bring an Action of Debt for the one or for the other.* Co. Litt. 145. a. In Marg. cites. F. N. B. 122. (E)

11. 6thly, The *Feoffee by his Act and Wrong may loſe his Election*, and give the ſame to the Feoffor; *as if one infeoffs another of two Acres, to have and to hold the one for Life, and the other in Tail, and he before Election makes a Feoffment of both*, in this Caſe the Feoffor ſhall enter into which of them he will for the Act and Wrong of the Feoffee. Co. Litt. 145. a. 2 Rep. 37. b. S. P.

12. If a Man gives to another *the beſt Horſe in his Stable*, the Donor here ſhall have the Election. In Caſe of a *Heriot*, the ſame is to the beſt Beaſt, here he who is to have the Benefit of the ſame, is to have the Election, and that ſhall be ſaid to be the beſt, which he thinks to be the beſt. Per Fleming Ch. J. 2 Bulſt. 9. Mich. 10 Jac. in Caſe of Billingſly v. Hornby.

13. If a *Sale be of 500 Stacks of Wood out of 700.* the Buyer in this Caſe may chooſe; But if it be of 500 to be ſet out by the Seller, the ſetting out would be a Condition precedent; per Cur. 7 Mod. 88. Mich. 1 Ann. B. R. in Caſe of Grips v. Ingledew.

14. A Man *owes Money by Bond, and alſo by Award*, ſuppoſe 20 *l. by each*, and he pays one 20 l. it ſhall be upon which of both he pleaſes; for he, and not the Receivers, is the firſt Agent. Quære. 7 Mod. 123. Hill. 1 Ann. B. R. Stracy v. Saunders.

(C) Who may elect, [and *when*].

1. If a Man levies a Fine come ceo que il ad de ſon done of an Houſe and 100 Acres of Land in D. where he hath there an Houſe and 118 Acres, the Conuſee may elect which 100 Acres he will have, for the Election is given to him by the Fine. M. 37 El. B. R. between *Morris and Leveſay*, agreed. Mo. 102. 16 & 17 Eliz. S. P. per Curiam. — D. 280. b. Marg. pl. 17. cites Mo. 84. S. P.

S. P. ruled in the Court of Wards 21 Eliz. in the Caſe of Evans v. Mitton. ——— accordingly by Weſton, but Dyer denied this Caſe, and vouch'd 12 H. 7. and the Caſe of the Manor of Sour for his Purpoſe, which was prov'd according to the Intention of the Party by Circumſtances; But Weſton put this Diverſity, that if Leſſee for Life be of 100 Acres, and the Leſſor grants the Reverſion of 20 of thoſe Acres by Fine, the Grantee ſhall compel the Leſſee to attorn for which 20 Acres he pleaſes by Quid Juris clamat; But if the Grant be by Deed, then it is in the Leſſee's Election to attorn for which 20 Acres the Leſſee pleaſes. ——— Mo. 602. pl. 832. Hill. 41 Eliz. C. B. Marſhall v. Marſhall adjudg'd, that where a Fine was levied of five Yard Land, with a Proviſo, that if the Feme ſurviv'd her Baron ſhe ſhould have a Yard and half thereof for her Life without ſhewing what certainly, after the Baron's Death ſhe, being Cesty que Uſe, ſhall have Election.

2. But in the ſaid Caſe, if the Conuſee renders it back to the Conuſor for certain Years, the Conuſor hath the Election given him which 100 Acres he will have, and he may elect. M. 37 El. B. R. between *Morris and Leveſay*, per Curiam.

3. If a Man gives two Acres to one, to hold one for Life the other in Fee, the Donee hath Election. Com. *Renegar and* Fig. 6. b.

4. If a Man levies a Fine Come ceo &c. of an Houſe and 100 Acres of Land in D. (where he hath there 118 Acres,) and the Conuſee renders to the Conuſor for 100 Years, and after the Conuſor dies, his Executor may elect which of the 100 Acres he will have, becauſe this was a Thing in Intereſt in the Teſtator. M. 37 El. B. between *Morris and Leveſay*, agreed per Curiam.

5. If a Man gives one of his Horſes to A. and B. and after A. dies, yet B. may elect, becauſe this was a Thing in Intereſt in them, and no expreſs Election limited. Mich. 37 El. B. between *Morris and Leveſay*, per Curiam.

Fol. 726.

6. But if a Man gives one of his Horſes to be elected by A. and B. if A. dies before Election B. cannot elect. M. 37 El. B. between *Morris and Leveſay*, per Curiam.

7. In Caſe of two Grantees the *firſt named* ſhall have Election Mo. 85. in pl. 215. Paſch. 7 Eliz. C. B.

Bendl. 148. pl. 206. S. C. adjudged. —— Mo. 81. pl. 215.

8. Feoffment of a Houſe and 17 *Acres of Land*, *Parcel of a Waſte*, the Feoffee, and not his Heirs, muſt make his Election, or elſe the Grant is void. Hob. 174. cites D. 281. 10 Eliz. Bullock's Caſe.

Bullock v. Burdet, S. C. adjudged. —— And. 11. pl. 24 S. C. agreed that the Election by the Heir was not good. —— S. C. cited 2 Rep. 36 b. per Curiam.

9. Upon *Eſtates executed to Uſes of a Thing uncertain*, the Court thought that the Election ought to be made by the Feoffee or Conuſee to the Uſe, and this as well ſince the 27 H. 8. as before; becauſe Elections being given to the Grantees for their Benefit, the Feoffee before the 27 H. 8. was the ſole Party who was intended to be benefited by the Grant in Judgment of the Common Law, and Ceſtuy que Uſe had no Intereſt but ſuch as the Chancery allowed in Conſcience, and now ſince 27 H. 8. Ceſtuy que Uſe has the Poſſeſſion in ſuch Quality and Form as he had the Uſe, and if he had not the Uſe till Election, he ſhall not have the Poſſeſſion till Election, and if the Election was not incident to his Uſe before 27 H. 8. it is not given to his Poſſeſſion ſince 27 H. 8. But Quære, for in the principal Caſe the Election is limited to the Uſe, and ſo that the Poſſeſſion of all paſſes to the Feoffees, and the Uſe is diſtributory by Election, and therefore it *ſeems reaſonable that he, who is to take the Uſe, is to make the Election.* Mo. 102. pl. 247. Mich. 16 & 17 Eliz. in Calthrop's Caſe.

10. Sir T. S. was ſeiſed of a Manor, and *aliened the Manor except one Cloſe, Parcel of the ſaid Manor, called N.* and there *were two Cloſes, Parcel of the ſaid Manor, called N.* the one containing nine Acres, the other three Acres. The Court held, that the Alienee ſhould not chuſe which of the ſaid Cloſes he would have, but the Alienor or Feoffor ſhould have the Election which of the ſaid Cloſes ſhould paſs. Le. 268. pl. 360. 20 Eliz. C. B. Sir Thomas Lee's Caſe.

11. If a Man deviſes *two Acres of Land out of four* Acres lying together, the Deviſee ſhall have Election. D. 280. b. Marg. pl. 17. cites 40 Eliz. Marſhal's Caſe.

12. If a Man *ſells Trees* growing upon his Land, *excepting ſix Oaks*, the Exceptor is to have the Election, and if there be a *Time limited*, he muſt do it during ſuch Time, but if he ſlip the Time, then the other ſhall elect; But where *no Time is limited*, and Vendor does not elect which he will have left ſtanding, it is doubtful if the other may elect; But it is clear, that if the Grantee *requeſts* Vendor to make his Election, and *Vendor refuſes to elect*, the Vendee ſhall elect, leaving the Number of Trees excepted for the Vendor; But where no Requeſt is, nor Time limited, it is doubtful if Vendee may do ſo; agreed by the Juſtices. 2 Bulſt. 7. Mich. 10 Jac. in Caſe of Billingſley v. Herſey.

13. A. *leaſes to B.* 40 *Acres, Parcel of* 60, and *before B. makes his Election B. dies*; And the Queſtion was, Whether this Leaſe was not void by the Death of B. or whether his Executor might make his Election? The Court held, that an Election might be made by the Executor, *and diſtinguiſhed between* the Caſe of *a Leaſe for Years and a Feoffment*; for in Caſe of a Feoffment it is void, becauſe a *Livery cannot operate in futuro.* Freem. Rep. 530. pl. 713. Mich. 1680. Jones v. Cherney.

14. Election is *deſcendible or Not*, according to the Nature of the Thing, if it be merely Perſonal it cannot deſcend; Per Powel J. Lutw. 803. Trin. 11 W. 3. in Caſe of Eaſtcourt v. Weekes.

15. Where an *Eligible Eſtate* paſſes the *Heir* cannot make Election, As Feoffment of two Acres, habend' the one for Life, and the other in Fee, the Heir ſhall not make Election, but the Leſſor ſhall have all; Per Doderidge J. 2 Roll Rep. 485. Mich. 22 Jac. B. R. in Caſe of Hurd v. Foy.

(D) *What* ſhall be ſaid *an Election.*

1. If a Man gives two Acres to another, to hold the one for Life, and the other in Fee, and the Donee after makes a Feoffment of one Acre, this is an Election to have the Fee in that. Com. 6. b.

2. If a Man leaſes two Acres for Life, the Remainder of one Acre in Fee, and after licences the Leſſee to cut Trees in one Acre, this is an Election that he ſhall have the Fee in the other Acre. Com. 6. b.

3. Deviſe was that *he ſee A. well provided for, or elſe give her* 20 *l.* A. lived with the Deviſee two Years, and then went away; his keeping A. two Years is an Election. Palm. 76. Hill. 17 Jac. B. R. Shaw's Caſe.

4 A Reſervation was of Money or Turkeys on a Leaſe for Years, *Leſſor's bringing an Action* for the Money is an Election. Lutw. 655. Mich. 9 W. 3. Letten v. Winne.

(E) Where the Election ſhall be *perpetual*;

[Or is determined or not.]

1. If a Man delivers Obligation to A. to the Uſe of B. and B. when he hears of it refuſes it, he cannot after by Agreement make this a good Deed; for the Refuſal is peremptory. H. 5 Ja. B. per Curiam. 3 Rep. 26. b. S. P. accordingly, per Curiam, but ſays, that perhaps in ſuch Caſe the Obligor, in Action brought upon this Obligation, cannot plead Non eſt Factum, becauſe it was once his Deed, and cites Bendl. 75. in Tawe's Caſe, and D. 1 Eliz. fol. 167.

2. Treſpaſs

Br Relation, pl 4. cites S. C. accordingly. —— S. C. cited by Hobart Ch. J. Hob 174. and says, so note that the

2. Treſpaſs quare Vi & Armis Arbores ſuccidit, the Defendant ſaid, that the *Plaintiff ſold* to him *all his Wood in ſuch a Vill except* 40 *of the beſt Oaks, to be abated in two Years*, and ſaid that he *came to abate them, and warned the Vendor to chuſe* his Oaks, *and he would not*, by which the Defendant, when he could no longer ſtay, abated the Trees except the 40 Oaks, and admitted for a good Juſtification. Br. Reſervation, pl. 3. cites 44 E. 3. 43.

Vendee in this Caſe had no Property till Election or Default made by the Vendor, which was ſupplied and made certain by the Vendee, and yet the Vendee could not have made the Choice in Default of the Vendor till the Time incurred ſo near that he muſt needs, and that muſt be put upon Judgment of Jury or the Court upon ſpecial Declaration of the Time, and Number of the Trees, and the like. —— S. C. cited 5 Rep. 25. a. and ſays that the Iſſue was taken upon the Requeſt, which Caſe Ld Coke ſays is not well abridg'd by Brook, Tit. Reſervation 3. for there he has * omitted the Requeſt; But ſays, that Fitzh. Tit. Barre, 204. has abridged it truly.

* Brooke ſays (ut ſupra) that Vendee warned the Vendor to chuſe his Trees, and he would not.

3. If a Man grants *to pay to me* 10 *l. at Chriſtmaſs, or to attend upon me at Chriſtmaſs*, there if he does not do the one nor the other, the Money ſhall be paid afterwards &c. for now the Election is determined; For he cannot attend at Chriſtmaſs when the Feaſt is paſt, therefore then the Sum is due, and it ſhall be paid &c. Br. Dette, pl. 112. cites 9 E. 4. 36.

Bendl. 149. pl. 206. S. C.

4. A Grant is made by a *Biſhop*, Election cannot be made by Grantee in time of *Succeſſor*. Mo. 86. in pl. 215. Paſch. 7 Eliz. C. *B.* Bullock v. Burdet.

Adjudged Le. 69 Baſſet v. Baſſet. S. C.

5. Condition of a *Bond* was *to pay* 20 *Kine or* 30 *l. in Money within a Month at Election.* The Obligee makes *no Election in the Month.* Per tot. Cur. Election muſt be made within the Month, and Convenient Time allowed for Proviſion of one of the Things. Mo. 241. pl. 377. Mich. 29 Eliz. Kernet's Caſe.

2 Rep. 37. S. C.

6. When an Election is *coupled with an Intereſt*, ſuch Election is *deſcendible.* Per Powel J. Lutw. 803. Trin. 11 W. 3 cites Sir Rowland Heywood's Caſe.

7. Grantor cannot by his own Act or Default either Subvert or *derogate from his Grant.* 5 Rep. 24. b. Sir Thomas Palmer's Caſe.

In what Caſes Grantee has Election to make it a Rent or Annuity. See tit. Annuity (F. 2) What ſhall determine ſuch Power of Election. See Ibid. (F. 3)

For more of Election in General, See other proper Titles.

Emblements.

the same subject in Com. Dig. tit. Biens G.

(A) *Who* ſhall have them.

Cro. E. 460. (bis.) pl 10. Paſch. 38 Eliz. B. R. S. C. & S. P.

1. IF Leſſee at Will ſows the Land, and after determines his Will, the Leſſor ſhall have the Corn. Co. 5. *Oland* 116. agreed. Co. Litt. 54. b. becauſe he loſes his Rent.

per Popham, to which Fenner agreed. —— Gouldsb. 190. pl. 136. S. C. & S. P. per Popham —— If *Tenant at Will* ſowes the Land and then determines his own Will, he cannot break the Hedges to carry the Corn away. Vent. 222. Trin. 24 Car. 2. B. R. in the Caſe of Perrot v. Bridges.

2. [So]

2. [So] If a Copyholder durante Viduitate ſows the Land, and after before ſeverance takes Husband, the Lord ſhall have the Corn, becauſe her Eſtate determines by her own Act. P. 38 El. B. R. between *Oland v. Burdwick*, adjudged. Co. 5. 116. ſame Caſe. Co. Litt. 55. b.

Cro. E. 460. (bis.) S. C, & S. P. adjudg'd by Popham and Clench, Contradicente Fenner, and Abſente Gawdy. ——Gouldsb. pl. 189. pl. 136. S. C. & S. P. adjudged.——Mo. 394. pl. 512. S. C. & S P. adjudg'd.———2 Bulſt. 213. S. C. & S. P. cited per Cur. Paſch. 12 Jac. B. R.———2 Inſt. 81. cites S. C.

3. If there be Leſſee for Years, upon Condition that if he does Waſte, or ſuch-like &c. that his Eſtate ſhall ceaſe; if he ſows the Land, and after does Waſte, the Leſſor ſhall have the Corn, P. 38 El. B. R. held by Clinch. Co. 5. 116. b. Co. Litt. 55. b.

Cro. E. 461 (bis) S. P. in S. C. by Clench, to which Popham and Fenner agreed.——If he commits a Forfeiture the Leſſor ſhall have the Corn; Per Popham. Gouldsb. 189. pl. 126. in S. C ——Where the Leſſor enters for a *Tort*, or by *Title Paramount*, or by *Limitation* of the Eſtate, the Leſſor ſhall have the Corn. Cro. E. 461. (bis) in the Caſe of Oland v. Burdwick.——He that *enters* for *Condition broken* is by relation in of his firſt Eſtate, and as if the Poſſeſſion had never been out of him, and ſo he that enters ſhall have the Emblements; Arg. and to this Opinion the Court ſeem'd to incline. 2 Roll R. 468. Mich. 27 Jac. B. R. Nicholas v. Simmonds.

4. [So] If there be Leſſee for Life, upon Condition that if he doth ſuch an Act, he ſhall have it but for two Years, and he ſows the Land, and after forfeits the Condition, by which his Eſtate for two Years is ended before the Severance of the Corn, he ſhall not have the Corn, but the Leſſor. P. 38 El. B. R. by two againſt one.

If a Leaſe be made for ſeven Years upon a *Condition* on the Part of the Leſſee, *to be performed at the End of the Term*, to have it for Life, and Leſſee ſows the Land the laſt Year, but performs not the Condition, Per 2 J. contra one, Leſſee ſhall not have the Corn. Cro. E. 461. (bis) in Caſe of Oland v. Burdwick.——Gouldsb. 189. pl. 126. S. C. & S. P. by Fenner.

5. So if Leſſee for Years or Life ſows the Land, and after ſurrenders before Severance, the Feoffor ſhall have the Corn. P. 38 El. B. R. by Popham.

Cro. E. 461. (bis) in Caſe of Oland v. Burdwick S. P. agreed by all.

6. So. if Leſſee for Life or Years ſows the Land, and after aliens in Fee before Severance, the Leſſor entring for a Forfeiture, ſhall have the Corn. P. 38 El. B. R. per Popham.

Cro E. 461. (bis) S. P. in Caſe of Oland v. Burdwick; Agreed by all.——In Treſpaſs it is not denied but where *my Tenant for Life aliens in Fee*, and I enter, that *I ſhall have the Emblements* upon the Land which were *ſown meſne between the Alienation and the Entry*. Br. Emblements, pl. 3. cites 40 E. 3. 5.

7. [But] If a Leaſe be made to Baron and Feme during the Coverture, and the Baron ſows, and after they are divorced Cauſa Præcontractus, the Baron ſhall have the Corn, becauſe the Judgment is the Act of Law. Co. 5. *Oland* 116. b.

S. P. by Fenner to which Popham and Clench agreed. Cro. E. 461. (bis) in S. C.——Mo. 395. pl. 512. S. C. & S. P.——Gouldsb. 190. pl. 136. S. C. & S. P. by Fenner, to which Popham agreed.

8. And in this Caſe if the Divorce be at the Suit of the Baron, yet he ſhall have the Corn, becauſe the Judgment is the Act of Law. Co. 5. 116. b. But ſee the Caſe in the Report, and there Popham doubted thereof.

S. P. by Fenner, to which Popham and Clench agreed. Cro. E. 461. (bis) in Caſe of Oland v. Burdwick.

Hob. 132. pl. 174. Trin. 13. Jac. S. P.

9. If Tenant for Life, or for the Life of another, ſows, and after his Eſtate determines by the Death of Ceſtuy que vie before Severance, the Leſſee or his Executors ſhall have the Corn. Co. Lit. 55. b. For the Corn is Fructus induſtrialis, and this is given to encourage Induſtry, and Charge for the Publick Good. Hobert's Reports 178.

Fol 727.

Cro. E. 460. 461. (bis) S. C. & S P Per Clench, to which Popham agreed.

10. If a Copyholder durante Viduitate leaſes for one Year, and the Leſſee ſows the Land, and after the Copyholder takes Husband, yet the Leſſee ſhall have the Corn; for her Act ſhall not prejudice a third Perſon. P. 38 El. B. R. between *Oland and Burdwick*, agreed.

11. If Tenant at Will ſows the Land, and after ſurrenders the Land to the Leſſor before Severance, and the Leſſor accepts it, the Leſſor ſhall have the Corn, and not the Tenant at Will, though this is not properly a Surrender for the Weakeſs of his Eſtate, yet this is a Relinquiſhment of his Eſtate, and ſo it is determined by his own Act. M. 31. 32 El. B. R. between *Weeper and Handall*, admitted.

12. If Tenant for Years, ſi tam Diu vixerit, ſows, and dies before Severance, yet the Executor of the Leſſee ſhall have the Corn for the Uncertainty of the Determination of his Eſtate, and it would be inconvenient that the Land ſhould not be manured.

I do not obſerve this Point in 5 Rep. 116. or in Cro. E. S. C. —— Gouldsb. 144. in pl. 60. Arg. S P. the Leſſee for Years ſhall have the Corn by reaſon of his Right to the Land at the Time of his ſowing, and never lawfully deveſted by any Act done by himſelf; and Gawdy held accordingly.

13. If Leſſee for Life leaſes for Years, and the Leſſee for Years ſows, and after the Leſſee for Life dies before Severance, yet the * Executor of the Leſſee for Years ſhall have the Corn for the Uncertainty of the Determination of his Eſtate, Co. 5. *Oland* 116.

* It ſeems that the Words (Executor of the) are Surpluſage.

14. If A. ſeiſed in Fee has Iſſue a Daughter, his Wife privement enſeint with a Son, and dies, and the Daughter enters, and ſows the Land, and before Severance a Son is born, yet the Daughter ſhall have the Corn becauſe her Eſtate was lawful, and defeated by the Act of God, and it is for the Good of the Commonwealth that the Land be ſowed. Co. Litt. 55. b.

Went. Off. Ex. 59. S. P.

15. If the Baron be ſeiſed in Fee or for Life in the Right of his Feme, and ſows the Land and dies, or his Wife dies before Severance, yet he or his Executor ſhall have the Corn. Co. Lit. 55. b.

Noy 149. Arnold v. Skeale, S. C. but the Court was divided. —— D. 316. a. Marg. pl. 2. cites 5 Jac. B. R. Arnold v. ..... that the Ch. J. and two Juſtices were of Opinion that the Feme ſhould have the Emblements, but two Juſtices e contra. —— Cro. E. 61. pl. 3. Mich. 29 & 30 Eliz. B. R. the S P. cited by Wray to have been adjudged in B. R. that the Feme ſhall have it. — The Wife ſhall have the Emblements, per Coke Ch. J. obiter. Godb. 189 pl. 270. Trin. 10 Jac. C. B. —— Went. Off. of Ex. 59. S. P. accordingly. —— D. 316. pl. 2. in the principal Caſe, the Court propoſed for the Executor to take a Quarter Part in Recompence of the Seed.

16. If there be Baron and Feme Jointenants for Life, and the Baron ſows the Land, and dies before Severance, his Executor ſhall have the Emblements and not the Feme, for it ſeems there is no Diverſity between this and where the Baron is ſeiſed in the Right of the Feme. Dubitatur, M. 5 Ja. B. between *Skell and Arnold*. Dy. 15 El. 316. 2. Contra Co. Lit. 55. b.

17. If

17. If a Feme ſeiſed in Fee or for Life of, Land, and ſows it, and after takes Husband, who dies before Severance, it ſeems the Wife ſhall have them, and not the Executor or Adminiſtrator of the Baron, becauſe the Baron did not ſow them.

18. If the Baron ſeiſed of a Copyhold in Fee ſows it, and after ſurrenders to the Uſe of the Feme, who is admitted accordingly, and after the Baron dies before Severance, it ſeems that the Wife ſhall have the Emblements, and not the Executor or Adminiſtrator of the Baron, becauſe the Baron paſſed the Emblements with the Land to the Feme, as annexed to the Land, and therefore the Privilege which the Law gave to him which ſowed is taken away by the Surrender, and ſo all one as if the Feme had ſowed it, or purchaſed the Land ſowed of a Stranger.

19. If the Baron ſows the Land, and dies before Severance, and his Wife is endowed of this Land, ſo ſowed, for her third Part, ſhe ſhall have the Emblements, and not the Heir nor Executor, for ſhe is to have the Land, fuerit culta ſive inculta cum Fructibus & Redditibus. Bracton, Lib. 2. Fol. 96. S. 2. 2 Inſt. 81. cites ſame Book. —— Brownl. 44. Trin. 15 Jac. Anon. S. P. where the Feme recovered Seiſin in Dower. —— So if aſſigned to her for Dower by the Heir. D. 316. a pl. 2. by 5 Juſtices, but 4 e contra.

20. If Tenant by Statute Merchant ſows the Land, and before Severance a caſual Profit happens, by which he is ſatisfied, yet he ſhall have the Corn. Co. Lit. 55. b. A. is bound in a Statute to B and ſows the Land; B. extends the Lands which are delivered unto him in Execution; It was adjudged in this Caſe, that the Conuſee ſhould have the Corn ſowed. 2 Le 54. pl. 75. Trin. 29 Eliz. C. B. Burden v. Withington. —— The ſame in Caſe of a Recognizance. Ibid.

21. If A. ſeiſed in Fee of Land ſows it with Grain, and after grants it to B for Life, the Remainder to C. and after B. dies before Severance, C. ſhall have the Corn, and not the Executors of B. for the Reaſon of Induſtry and Charge in B. is wanting. Hobert's Reports 178. per Curiam. Hob. 132. pl. 174. Trin. 13 Jac. —— Cro. E. 464. Arg. and agreed by Popham and Gawdy Juſtices, in Caſe of Knevett v. Poole. —— S. P. Arg. Gouldsb. 144. and agreed by Gawdy J.

So if A. had deviſed it to B. for Life, the Remainder to C. for Life, and B. dies before the Corn is ſevered, Wray and Shute held that C. ſhould have the Emblements, for by the Deviſe of the Land they paſs with it; But if B. had granted them to another it had been otherwiſe; For by the Grant they are Quaſi Chattels ſevered from the Land; but Clench doubted; For he conceived that the Executor of the firſt Tenant for Life ſhall have them as Chattels veſted in him; And he ſaid, if Land be ſown, and then the Land is deviſed to J. S. for Life only, and before Severance the Deviſee dies, his Executor ſhall have the Corn, and not the Reverſioner, which Caſe Wray and Shute denied, but ſaid if it were ſo, it is like the Caſe of a Remainder, and Popham Attorney being demanded his Opinion, agreed with Wray. Cro. E. 61. pl. 3. Mich. 29 & 30 Eliz. Anon.

22. If Leſſee at Will ſows the Land with Grain, Roots, Flax, Hemp, or other annual Profit, and the Leſſor enters before Severance, yet he ſhall have it. Co. Lit. 55. b. Fol. 728.

23. But if the Leſſee plants young Fruit Trees, or young Oaks, Aſhes, or Elms &c. or ſows the Land with Acorns, and after before Severance the Leſſee at Will is put out of the Land by the Leſſor, yet the Leſſee ſhall not have theſe, becauſe they render not any annual or preſent Profit. Co. Lit. 55. b.

24. If Leſſee at Will by good Husbandry or Induſtry, either by overflowing or making of Trenches, or compaſſing of Meadows, or by digging out of Buſhes or ſuch like, makes the Graſs to grow in greater Abundance, yet if the Leſſor enters and ejects him, the Leſſee ſhall not have the Graſs, becauſe the Graſs is the natural Profit of the Land. Co. Lit. 56.

25 So

25. So **if Leſſee at Will ſows the Land** with Hay-Seed, and by **this increaſes the Graſs, and the Leſſor enters and ejects him, yet the Leſſee ſhall not have it. Co. Lit. 56.**

26. *Termor and Tenant in Dower may deviſe* their Emblements. Br. Emblements, pl. 22. cites 8 H. 3. and Fitzh. Deviſe 25.

27. If a *Villein leaſes his Land*, and the *Leſſee ſows* the Land *and dies*, the *Lord of the Villein enters*, he ſhall have the Emblements. The Reaſon ſeems to be inaſmuch as the Lord enters by Title; For *he who recovers Land or enters by Title ſhall have the Emblements.* Br. Emblements, pl. 25. cites 30 E. 1. and Fitzh. Villenage, pl. 45.

28. *Baron ſeiſed in Jure Uxoris leaſed the Land for ſeven Years and died within the Term.* The Wife entred and infeoffed G. but did not ouſt the Termor, and yet this is a good Feoffment; for by his Death the Term is void; but if the *Termor ſow'd the Land in the Life-time of the Baron*, and the Baron died before Severance, the *Termor ſhall have the Emblements.* Br. Leaſes, pl. 24. cites 7 Aſſ. 19.

29. *Baron and Feme Tenants in Tail ſow* the Land, the *Baron died* before Severance, the *Feme ſhall have* the Emblements, *and not the Executor of the Baron.* Br. Emblements, pl. 15. cites 8 Aſſ. 21.

30. *Contra if they had been ſever'd in the Life of the Baron*, or if the Baron had ſold or deviſed them in his Life; Quære. For Brook ſays, it ſeems to him that the Executor ſhall have them. Br. Emblements, pl. 15. cites 8 Aſſ. 21.

Br. Forfeiture de Terres, pl. 109. cites S. C.

31. In Treſpaſs it was adjudged, that where the *Lord ſeiſes the Copyhold of his Tenant for not doing of the Services*, that the Tenant ſhall have the Corn which were ſever'd before the Seiſure, and the Lord ſhall have the Corn growing at the Time of the Seiſing. Br. Emblements, pl. 4. cites 42 E. 3. 25.

32. *Copyholder ſowed the Lands*, and afterwards *committed a Forfeiture*; the *Lord* enter'd and adjudged that he *ſhould have the Corn.* 4 Rep. 21. b. in Brown's Caſe, cites 42 E. 3. 25. a. b.

33. In Treſpaſs it was agreed, that if a Man *leaſes to two for Life*, the *one dies*, the *Leſſor enters and leaſes to W. who ſows the Land*, the other *firſt Leſſee enter'd upon him and took the Goods*, and well. Br. Emblements, pl. 5. cites 46 E. 3. 32.

34. If *Baron ſeiſed in Jure Uxoris, or a Man ſeiſed for Term de auter vie ſows* the Land, and the *Feme dies, or Ceſtuy que vie dies*, he in *Reverſion or the Heir enters*, and *he who ſows re-ouſts him*, and the *other brought Aſſiſe and recover'd* his Damages, yet *he who ſow'd ſhall have the Crop*; For the other has recover'd Damages which ſuffices for the Tort. Br. Emblements, pl. 16. cites 46 Aſſ. 2.

35. If *Tenant in Dower ſows* the Land *and takes Baron, who makes his Executor and dies before Severance* of the Corn, the Feme ſhall have the Emblements, and not the Executor of the Baron. Br. Emblements, 26 cites lib. Fundamenti Legum. fol. 72.

36. *Contra if the Baron ſows* the Land *and dies before Severance*, there the Executor of the Baron ſhall have the Emblements, the Reaſon ſeems to be inaſmuch as *he who did the Labour and Coſts of the Emblements ſhall have them.* Br. Emblements, pl. 26.

S. P. Br. Emblements, pl. 14. cites 7 Aſſ. 19.

37. A Man *ſeiſed in Jure Uxoris leaſed* the Land *for Term of Years*, the *Baron died*, the *Feme entered*, the Tenant ſhall have the Emblements. Br. Emblements, pl. 6. cites 7 H. 4. 17.

38. *So in all Caſes where a Leaſe is determinable for the Life of a Man.* Br. Emblements, pl. 6. cites 7 H. 4. 17.

39. If *Tenant at Will be ouſted* he ſhall have the Corn, *but if he plows the Land or compeſtures it, and be ouſted before the ſowing*, he ſhall loſe the Plowing and the Compeſture; quod non negatur. Br. Tenant per Copie, pl. 3. cites 11 H. 4. 90.

40. If

40. If *Tenant at Will ſows* the Land *and after is ouſted*, he ſhall have the Emblements. *But if he plows or compeſtures* the Land, *and is ouſted before the ſowing*, he *ſhall loſe the Coſt of the Plowing and Compeſture.* Br. Emblements, pl. 7. cites 11 H. 4. 90.

41. If a *Man makes a Leaſe at Will* and the *Leſſor is outlaw'd*, whereby the Will is determin'd *the King ſhall have the Profits*, *but the Leſſee at Will ſhall have the Emblements*; But *if the Leſſee at Will be outlaw'd* the King ſhall have the Emblements. 5 Rep. 116. b. Hill. 44 Eliz. B. R. per Curiam in Oland's Caſe, and cites 9 H. 6. 20. & 21.

42. In Aſſiſe it was ſaid, that he who *recovers Land ſown by* * *Aſſiſe or other Action* ſhall have the Emblements, and the Creſſure upon the Land; quod nota bene. Br. Emblements, pl. 8. cites 19 H. 6. 45.

* S. P. and therefore the Aſſiſe *recouped the Damages* to 40*s.* and no more, in conſideration that the Land was ſown. Br. Emblements, pl. 11. cites 22 E. 3. 50.

43. Where a *Man ſows* the Land and *dies before Severance*, the *Executor* ſhall have the Emblements and *not the Heir*; quod nota. Br. Emblements, pl. 9. cites 21 H. 6. 30.

44. It was held for clear Law, that if a Man *diſſeiſes me*, and *ſows the Land*, *and after he ſevers* the Corn, and I re-enter, *I ſhall have the Emblements.* Br. Emblements, pl. 1. cites 27 H. 6. 1. Paſton's Caſe.

45. *So* of *Trees ſevered*; for theſe were once annexed &c. Br. Emblements, pl. 1. cites 27 H. 6. 1.

46. Note for Law in a Quare Impedit, if a *Parſon dies before the Conception de Noſtre Dame*, *his Glebe ſown*, his Succeſſor ſhall have the Emblements and the Tenths growing, by the Law of Holy Church; Per Littleton. Br. Dean and Chapter, pl. 1. cites 34 H. 6. 38.

47. In *Treſpaſs* the *Defendant ſaid*, *that he was ſeiſed till by the Plaintiff diſſeiſed*, *who ſowed the Land and cut it*, *and* the *Defendant re-entered upon him and carried it away*; and a good Plea by the Opinion of the Court; *For* per Danby J. *when the Diſſeiſee re-enters he ſhall puniſh all Meſne Treſpaſſes*; For the Poſſeſſion ſhall be adjudged continued in him Ab Initio. Br. Emblements, pl. 12. cites 37 H. 6. 67.

48. *But per Billing* Serjeant, *if the Diſſeiſee re-enters before the cutting* or Severance of the Emblements he ſhall have the Emblements; for *they are annexed to the Franktenement*; *But if he enters after Severance* or cutting, the *Diſſeiſor ſhall have them*, *for they are Chattels veſted in him by the Regreſs*, *but* the *Diſſeiſee may take them Damage-Feaſant.* And Brook ſays, it ſeems to him that what Billing ſaid was good Law; For a Man cannot know one Sheaf of Corn from another. Br. Emblements, pl. 12. cites 37 H. 6. 67.

49. In *Treſpaſs*; a Man *leaſed Land at Will*, the *Leſſee ſowed* the Land, the *Leſſor enfeoffed B.* the *Leſſee ſevered* the Emblements, and the *Feoffee took them*; or if the Feoffee ſever them and take them, yet the Tenant at Will ſhall have them; for the *Feoffee cannot take them unleſs for Damage-Feaſant.* Br. Emblements, pl. 13. cites 37 H. 6. 25.

50. And per Forteſcue and Danby, *Tenant at Will*, and *for Life*, *pur autre Vie*, *and* Tenant *in Tail*, ſhall have the Emblement by the *Statute of Merton cap.* 2. and *Tenant in Fee Simple* ſhall have it *by Common Law.* Br. Emblements, pl. 13. cites 37 H. 6. 25.

51. If *Leſſee at Will be ouſted*, and after the *Leſſor*, *Tenant for Life*, *dies*, the Leſſee ſhall have the Corn; Per Gawdy J. Godb. 145. cites 38 H. 6.

52. If my *Father be diſſeiſed*, the *Diſſeiſor cuts Trees*, the *Father dies*, and the *Heir enters and finds the Trees upon the Land*, I ſhall

have it; Per Townſend; which Catesby and Brian denied. Br. Emblements, pl. 17. cites 2 H. 7. 2.

53. If two *Joihtenants* ſow their Land, and *one lets his Moiety for Years*, and the other, that did not let, dies, the other ſhall have the Corn as Survivor. Arg. Ow. 102.

Br. Emblements, pl. 18. cites S. C. accordingly, and that it was the Folly of the Diſſeiſee he had not entered before the Severance of them. ——— Br. Property, pl. 47. cites S. C. ——— S. P. Br. Emblements, pl. 19. cites 12 E. 4. 5. per Fairfax.

54. If *Diſſeiſor ſows the Land*, and after *ſevers the Emblements*, and the *Diſſeiſee re-enters*, he ſhall not have the Emblements; for they came of the Manurance of the Party. Br. Chattels, pl. 10. cites 5 H. 7. 16. 17.

S. P. Br Emblements, pl. 10. cites 15 E. 4. 31. per Littleton; but Choke contra; For by the Re-entry the *Franktenement ſhall be adjudged in him ab initio*, and he ſhall have Treſpaſs againſt every mean Occupier, as if he had continued Poſſeſſion, to which Brian Ch. J. agreed.

S. P. Br. Emblements, pl. 13. cites 37 H. 6. 25. ——— Ibid. pl. 17. cites 2 H. 7. 1. contra per Townſend, that at this Day the Diſſeiſee ſhall have the Emblements, as Corn, though they are ſevered, if they are lying upon the ſame Land, and Brian concordat. ——— So per Fineux Ch. J. Ibid. cites 12 H 7. 25. ——— S. P. by all the Juſtices of C. B. that the Diſſeiſee ſhall have them. Br. Emblements, pl. 20. cites 14 E. 4 6. ——— Contra if they had been *carried out of the Land*. Ibid.

Br. Property, pl. 18. cites S. C. —

55. *Contra* if he had *entered before Severance*. Br. Chattels, pl. 10. cites 5 H. 7. 16. 17.

The Diſſeiſee may take the Emblements be they ſevered or not; Per Paſton. Br. Emblements, pl. 12. cites 15 H. 6.

Br Property, pl. 18. cites S. C. — S P. Br. Emblements pl. 13. cites 37 H 6. 25. ——— S. P. by Townſend, Ibid. pl. 17 cites 2 H. 7. 1. ——— S. P. per Fairfax, Ibid. pl. 19. cites 12 E. 4. 4. 5. ——— S. P. Contra if he carries them out of the Land. Br. Emblements, pl. 10. cites 15 E. 4. 31. ——— If the Diſſeiſor *cuts Trees and carries them away*, yet the Diſſeiſee may take them; Per Littleton; which Choke denied. Br. Emblements, pl. 20. cites 14 E. 4 6. ——— S. P. Br. Treſpaſs, pl. 202. cites 37 H. 6. 35.

56. *But he ſhall have that which is ſevered* before his Entry *which comes of the Nature of the Land*, as Hay made of the Graſs, and *Trees cut* and made into Bavins. Br. Chattels, pl. 10. cites 5 H. 7. 16. 17.

Br. Property, pl. 18. cites S. C. — S. P. Br. Emblements, pl. 18. cites 37 H. 6. 35. ——— Br. Treſpaſs, pl. 202. cites S. C.

57. So of *Apples and Nuts* gathered; Per Fairfax and Tremaile, and the other Serjeants. Br. Chattles, pl. 10. cites 5 H. 7. 16. 17.

Br. Property, pl. 18. cites S. C.

58. *But* by the Reporter, he cannot take them if they are *carried off the Land*; for one Apple or Nut cannot be known from another any more than Money. Ibid.

Br. Property, pl. 18. cites S. C. — * Br. Emblements, pl. 18. cites S. C.

59. And by him, * *where the Diſſeiſee enters before Severance, and the Diſſeiſor re-enters and ouſts him, and ſevers them*, and the *Diſſeiſee re-enters*, he ſhall have them by Reaſon of his Entry before Severance. Ibid.

Br. Emblements pl. 18. cites S. C. accordingly ——Br. Property, 18. cites S. C.

57. *And* if *Feoffee of the Diſſeiſor ſows* the Land he ſhall be in the ſame Plight of it, and no better, as the Diſſeiſor himſelf. Ibid.

Br. Emblements pl. 18. cites S. C. accordingly. ——Br. Property, pl. 18. cites S. C.

58. *And* if *Feoffee upon Condition ſevers the Corn meane between the Condition broken, and the Re-entry* for the Condition broken, he ſhall have the Corn, and not he who enter'd. Ibid.

59. If

59. If *Leſſor at Will* be *outlaw'd* in a Perſonal Action, the King ſhall have the Profits after, but the Leſſee ſhall have the Emblements; But if *Leſſee is outlaw'd* in a Perſonal Action the King ſhall have the Emblements. 5 Rep. 116. b. Hill. 44 Eliz. R. R. Oland's Caſe.

60. A Man deviſed Land, which was ſowed, *for Life*, the *Remainder in Fee*, and the Deviſor died, and the *Deviſee for Life alſo died before the Severance*, and it was adjudged that the Executor of the Tenant for Life ſhall not have that, but he in Remainder. Win. 51. cited to be ſo adjudged 18 Eliz. Allens Caſe.

61. A. gives *Bond that B. ſhall enjoy a Leaſe of Black-Acre immediately after his Death*; The Corn on the Death of A. belongs to A's Executors. 4 Le. 1. pl. 1. Hill. 20 Eliz. Launton's Caſe.

62. A. lets Land at Will to B. and afterwards B. *agreed to ſurrender* the Land and his Intereſt to A. A. enter'd and let it to Defendant, who took the Corn. The Queſtion was, if this was a Surrender, (I agree to Surrender my Land) if it imports an Act to be done in Futuro or in the preſent Time? Judgment pro Quer.' Cro. E. 156. pl. 39. Mich. 31 & 32 Eliz. B. R. Sweeper v. Randall.

He to whom the ſurrender is made ſhall have the Corn; Per Popham Goldsb. 189. pl. 126.

63. A. and B. are *Jointenants*; A. by Conſent of B. *occupies the Land alone*, and takes the Profits to his own Uſe. A. by this is Tenant at Will to B. and if A. dies the Emblements ſhall go to the Adminiſtrator of A. but if B. had only ſaid to A. I will not occupy it, this would be no Aſſent that A. ſhould have all, nor would it give any Thing to A. Cro. E. 314. pl. 7. Hill. 36 Eliz. B. R. Geanes v. Portman.

Owen. 102. James v. Portman S. C. but ſomewhat differently reported, as that if B had ſaid that A. ſhould occupy it ſolely, then the Emblements would not ſurvive.

64. If a *Leaſe be* made *for ſeven Years upon a Condition on the Part of the Leſſee, at the End of the ſeven Years to be performed, to have it for Life*, the *Leſſee the laſt Year ſows the Land, and performs not the Condition*, it was ſaid, that he ſhall have the Emblements, but Popham and Fenner denied it. And Judgment was given for the Defendant. Cro. E. 461. (bis) pl. 10. Paſch. 38 Eliz. B. R. in Caſe of Oland v. Burdwick.

65. *Tenant for Life*, the *Remainder in Fee*; *Tenant for Life made a Leaſe for Years to H. who is ouſted by a Stranger*; *the Diſſeiſor made a Leaſe for Years*, his Leſſee ſowed the Land; Tenant for Life died; It was adjudged, that the Corn belong'd to H. the Leſſee for Years of the Tenant for Life. Cro. E. 463. pl. 12. Hill. 38 Eliz. B. R. Knevett v. Poole.

5 Rep. 85. Kniver's Caſe reſolv'd that the mere Right to the Corn was in H. the Leſſee of Tenant for Life, and he might have Action of Treſpaſs, and recover all the meſne Profits againſt the Leſſee of the Diſſeiſor; And the Reporter adds a Nota, that the Leſſee of Tenant for Life had Right to the Land, and conſequently to the Emblements, as things annexed to the Land and the Death of Leſſee for Life determined his Intereſt to the Land, but his Right to the Emblements remained, and this was the principal Reaſon of the Judgment.— Goldsb. 143. pl. 60. S. C. adjudg'd.

66. When the Eſtate of him that ſows the Land is determin'd *by his own Act by a Caſualty*, and when by the *Act of the Law*, or *by another Man*, makes a Difference as to the having the Emblements; Per Clench J. Cro. E. 460. (bis) pl. 10. Paſch. 38 Eliz. B. R. Oland v. Burdwick.

67. If Leſſee for Life ſows the Land and after *prays in aid of a Stranger*, now if the Leſſor enters he ſhall have the Corn. Per Popham. Godb. 190. in pl. 126. Hill. 43 Eliz.

68. A Man *ſeiſed for Life, or in Fee or Tail in his Wife's Right or his own*, and ſows it with Corn, or any Manner of Grain, and dies before

ſore Harveſt, it ſhall go to the Executor of the Husband, and not to the Wife or Heir that ſhall have the Land; But *Graſs ready to cut, Apples, Pears &c. upon the Trees*, ſhall go to the Wife or Heir. Went. Off. Ex. 59.

69. If Land ſow'd with Corn, Safforn, Hemp &c. or planted with Hops, or having Graſs ready to be cut be *ſold or conveyed*, it ſhall all go to the *Purchaſor of the Land unleſs excepted*, tho' never ſo near Reaping or Cutting, or Gathering. Went Off. Ex. 59.

70. *Roots of Carrots, Parſnips, Turnips*, Skirrets &c. ſown by him that had the Inheritance of the Garden or Land, it ſeems ſhall go to the Heir, and not to the Executors; For the Profitable Part is the Root which is hidden *within the Ground, and cannot be come at without breaking the Soil*, which the Executors cannot lawfully do; But as for *Melons* which are above Ground, the Executors may take them, yet as for *Artichokes*, tho' the Fruit be above the Ground, yet it ſeems they have not ſuch yearly Setting or Manurance as ſhould ſever them in Intereſt from the Soil, therefore they ſhall go with it to the Heir. Went. Off. Ex. 63.

71. Albeit the *Leſſor, determines his Will before the Corn &c. be ripe*, yet becauſe the State of the Leſſee is uncertain, and therefore leſt the Ground ſhould be unmanured, which ſhould be hurtful to the Commonwealth, he ſhall reap the Corn, which he ſowed, in Peace. Litt. S. 68. and Co. Litt. 55. a. b.

72. A man *after Judgment given againſt him* ſow'd the Land, and afterwards brought a Writ of Error to reverſe the ſaid Judgment, but it was affirm'd; he ſhall not take the Emblements; Adjudg'd per tot. Cur. 2 Bulſt. 213. Paſch. 12 Jac. Wicks v. Jordan.

73. If *A. ſeiſed of Land ſows it with Corn*, and then *conveys it to B. for Life, Remainder to C. for Life*, and *B. dies before the Corn is reaped*, now C. ſhall have it, and not the Executors of B. though his Eſtate was uncertain; agreed per Cur. Hob. 132. pl. 174. Trin. 13 Jac. in Caſe of Grantham v. Hawley.

74. The *Leſſor covenanted with the Leſſee his Executors &c. that he ſhould carry away to his own Uſe ſuch Corn as ſhould be growing on the Land at the End of the Term*; afterwards he *conveyed the Reverſion* to the Plaintiff, and the *Executors of the Leſſee ſowed the Land, and ſold the Corn growing on it at the end of the Term* to the Defendant; it was objected, that the Leſſor had never any Property in this Corn, and therefore could not grant it away; but adjudged that the very Right was paſſed when it ſhould happen; for though the Leſſor had not any actual Property in the Corn, yet he had a Right in Poſſe, becauſe of the Lands out of which it proceeds, and the Words in the Leaſe are ſufficient to paſs the Property, as ſoon as the Corn is growing on the Land. Nelſ. Abr. 702. pl. 9. cites Hob. 132. [pl. 174. Trin. 13 Jac.] Grantham v. Hawley.

L. P. R. 512. S. P. cited to be ſo held per Saunders Ch. J.

75. A Man was *ſeiſed* of Land *in Fee and ſowed the Land*, and deviſed that to J. S. and before Severance he died, and whether the Deviſee ſhall have the Corn, or the Executor of the Deviſor was the Queſtion; and by Hobert, Winch and Hutton, the Deviſee ſhall have that, and not the Executor of the Deviſor. Win. 51. Mich. 20 Jac. C. B. Spencer's Caſe.

76. If a Man *deviſe Land, and after ſows* it and dies, in this Caſe the Deviſee ſhall have the Corn, and not the Executor of the Deviſor. Winch. J. ſaid it had been ſo adjudged. Win. 52. Mich. 20 Jac. C. B. in Spencer's Caſe.

S. P. and ſo of *Saffron*

77. *Hops* growing out of the old Roots ſhall go to the Executor or Adminiſtrator, becauſe they grow by the Manurance and Induſtry of the

the Owner and ſo are *like Emblements.* Cro. C. 515 pl. 13. Mich. 14 Car. B. R. Latham v. Atwood.

and Hemp, they ſhall go to the Executor. Went. Off. Ex. 59.

78 If *Sheriff on a Fieri Facias* ſells Corn growing, the Vendee cannot juſtify an *Entry on the Land* to reap it till ſuch time as the Corn is ripe. Per Twiſden J. Vent. 222. Trin. 24 Car. 2. B. R. in Caſe of Perrot v. Bridges.

79. *Tenant at Sufferance* ſows the Land, and afterwards *Judgment is recovered againſt him, and the Corn ſeis'd thereupon and ſold* by the Sheriff (ſtanding) then the Treſpaſs lies for the Landlord againſt the Sheriff and his Officers. L. P. R. 512. cites 32 Car. 2. Sir John Banks's Caſe.

80. *Baron and Feme Jointenants for Life,* Baron ſows the Land and dies before Severance; The Court propos'd to each to take a Moiety. Per Ld. Somers. 2 Vern. 322. pl. 311. Mich. 1694. Rowney's Caſe.

81. But where Strangers are *Jointenants* the Emblements will go to the Survivor, it was admitted. Arg. 2 Vern. 323. pl. 311. Mich. 1694 in Rowney's Caſe.

82. A. *Tenant for Life* Remainder *to B. his Wife for Life* for Jointure, *Remainder to A. in Fee.* A. *deviſes his Remainder in Fee to B.* and *died in May, leaving Hops in the Ground,* which were *cultured at great Charge in February, and gathered in Auguſt.* Quære, Whether they belonged to B. the Wife or to Executor of A. The Maſter of the Rolls at firſt inclined to think the Hops belonged to B. in Right of her Rent and Emblements; But in regard of Caſes cited as adjudged that In Caſe of Dower, ſhe ſhall have the Emblements, becauſe Dower is conſidered as an Excreſcence or Continuance of the Eſtate of the Husband, but a Jointure is not, he afterwards declared that the Hops and Corn growing at the Teſtator's Death were Emblements, and *ought to be accounted for as Part of the Teſtator's Eſtate.* MS. Rep. Trin. 1734 Canc. Fiſher v. Forbes.

For more of Emblements in General, See **Deviſe**, and other Proper Titles.

See Dougl. Rep. 270.

Enfants.

(A) *What* Infants in reſpect of their Office &c. or for other collateral Reſpect, *cannot avoid their own Acts.*

1. IF the King conſents to an Act of Parliament during his Minority, yet he cannot after avoid this Act, becauſe the King as King cannot be a Minor; for as King he is Body Politick. Co. Lit. 43. [a. ad finem.]

Fitzh. Enfant, pl. 15. cites 26 Aſſ. pl. 54. S. P. as ſaid by ſeveral Peers and Sages of the Realm. ——— Br. Age, pl. 34. cites S. C. and S. P. accordingly, and ſays that concordat 6 E. 3. tit. Age. Fitzh. 89. ——— Same Caſes cited Plowd. C. 213. a. ——— 7 Rep. 12. a. S. P. in Calvin's Caſe. Trin. 6 Jac. accordingly; For otherwiſe his Revenue ſhould decay, and the King ſhould not be able to reward Service, &c.

2. So the *King ſhall not avoid Leaſes or Grants* in reſpect of the Infancy of his Natural Capacity. 5 Rep. 27. a. Hill. 26 Eliz. Arg.

3. So the *Mayor, Bailiff, or Head of any other Corporation* ſhall not avoid any of their Deeds or Grants by reaſon of Infancy of their Natural Capacites; becauſe they do them in anorher Right or Capacity, &c. 5 Rep. 27. a. b. Arg. Hill. 26 Eliz.

(A. 2) Infant. Favour'd.

1. THE common Principle is, that an Infant *in all Things which ſound in his Benefit* ſhall have Favour and Preferment in Law as well as another Man, but ſhall not be prejudiced by any Thing in his Diſadvantage. D. 136. b. 137. a. pl. 22. Hill. 3 & 4 P. & M.

2. *Tenant for Life* of full Age, *and Remainder-man an Infant levy a Fine*, and afterwards the Infant reverſeth the Fine as to him for the Inheritance, he ſhall not *enter for the Forfeiture* becauſe he join'd in the Fine, and ſo aſſented to it. 2 Le. 108. pl. 139. Trin. 30. Eliz. C. B. Piggot v. Ruſſel.

It is a defeaſible Forfeiture; Arg. admitted.

3. Infant *makes a Feoffment*; It is no *Forfeiture*. Noy 92. Trin. 2 Car. B. R. Aſhfield v. Aſhfield. Godb. 364. Trin. 2 Car. B. R. Aſhfield v. Aſhfield.

4. An Infant was relieved againſt a *Slip by his Counſel in Miſpleading*. 3 Ch. R. 24. 20 Car. 2. Savage v. Whitebread.

(B) What *Acts* of an Infant are *void*, and what *voidable*.

Fitzh. Aſſiſe, pl 322. cites S. C.

1. IF an Infant in Ward to Guardian in Socage infeoffs the Guardian, this is void for the Deceit that the Law intends in him that hath the Command of him, and the Breach of Truſt which the Law repoſes in him. 35 Aſſ. 8. adjudged.

Cro. C. 502. pl. 2. S. C. all the Court held that a Surrender by an Infant cannot be by Deed, but it is abſolutely void, and Judgment accordingly. ——— Jo. 405. pl. 2. S. C. but not exactly S. P. ——— A Surrender made by an Infant is void; Per Cur. obiter. 3 Mod. 310. Trin. 2 W. & M. in Caſe of Thompſon v. Leech.

2. If an Infant ſurrenders a Leaſe for Years to him in Reverſion, this is void, and cannot be made good by any Agreement at full Age. Mich. 13 Car. B. R. between *Fludd and Gregory*, per Curiam, reſolved upon a Trial at Bar.

3. But

3. But if an Infant being a Leſſee for Years, to begin at a Day to come, accepts a new future Intereſt for the ſame Term, and at full Age when the Term begins, enters into the Land and accepts the new Leaſe, and claims in by it, this Agreement to the new Term ſhall be a Surrender in Law of the firſt Eſtate. M. 13 Car. B. R. between *Fludd and Gregory*, per Curiam, upon a Trial at Bar; but a ſpecial Verdict was found of this among other Things, and after Tr. 14 Car. B. R. upon Argument at the Bar, adjudged per Curiam upon this Point, becauſe it could not be for the Benefit of the Infant, and therefore the Law adjudged it void ab Initio. Intratur. Tr. 13 Car. Rotulo 1154.

Cro. C 502. pl. 2. S. C. all the Court held that the Surrender by an Infant by Acceptance of a ſecond Leaſe is void, becauſe it is without Increaſe of his Term or Decreaſe of his Rent, and where there is not an apparent Benefit, or the Semblance of a Benefit, his Acts are merely void, and there being no ſuch in this Caſe, Judgment wat given accordingly. ——— Jo. 405, 406. pl. 2. S. C. and the Judges held that the Agreement to the ſecond Leaſe did not make void the firſt, becauſe the ſecond Leaſe was never good. ——— 2 Roll Rep. 408. cites 9 H. 6. 36. and 9 H. 7. 24. that a Surrender of Infant is void.

4. Dum fuit infra ætatem was brought *of Land and Rent againſt the Alienee of the Father of the Demandant*, and the Writ was *admitted to lie of the Rent*, and yet, by ſome, the Grant of an Infant was void, and not voidable, which is not ſo, as appears here; For then Action does not lie, and alſo the *Delivery of the Deed cannot be void but voidable*. Br. Dum fuit &c. pl. 1. cites 46 E. 3. 34.

5. If an Infant *levies a Fine*, he ſhall have a Writ of Error during his Nonage, and *aſſign it for Error*. 12 Rep. 122. Mich. 12 Jac. cites F. N. B. 121.

6. If an Infant makes a *Leaſe for Years without reſerving any Rent*, it is void, and not voidable only, becauſe there is no Conſideration, but if any Rent is reſerved it is only voidable; Agreed by all except Gawdy. Mo. 105. pl. 248. Paſch. 17 Eliz. B. R. the 7th Reſolution in Caſe of Lane v. Cowper.

7. If an Infant *takes a Leaſe for Years rendering Kent*, it is only voidable at Election; For if it be to his Benefit, be that Benefit apparent or implied, it ſhall be void in no Caſe Prima Facie, as 21 H. 6. b. but he may at his Election make it void; For *before the Rent-Day he may refuſe and waive the Land*, and then an Action of *Debt will not lie againſt him*; Held per Cur. Brownl. 120. Paſch. 11 Jac. Kettlie's Caſe.

Cro. J. 322. pl. 1. Ketſey's Caſe, S. C. & S. P. held accordingly. —— 2 Bulſt 69. Kirton v Elliot, S. C. the Court were all clear of Opinion that the Infant Leſſee was liable to pay the Rent, and ſo Judgment was given for the Plaintiff.

8. If an *Infant makes a Leaſe for Years rendering Rent*, and the *Leſſee enters*, it is at the Election of the Infant to charge him in Aſſiſe, or to bring Debt for the Rent, or to accept the Rent at his full Age, as 7 Ed. 4. 6. and other Books be; Per three Juſtices. Cro. C. 303. pl. 6. Paſch. 9 Car. B. R. in Caſe of Blunden v. Baugh, and Ibid. 306. agreed per Richardſon Ch. J.

9. If an Infant *makes a Leaſe for Years rendering Rent*, the Leaſe is but voidable; But if an Infant makes a Leaſe for Years *rendering a Roſe or a Pepper-Corn*, or any ſuch like Trifle, the Leaſe is void; Arg. cites Fitzh. Tit. Entry Congeable 26. Mod. 263. Trin. 29 Car. 2. in Caſe of *B*arker v. Keate.

10. An Infant's *Deed* is not void, but only voidable, for which Reaſon an Infant cannot plead Non eſt Factum to his Deed, as a Feme Covert may. 3 Wms's Rep. 208. Mich. 1733. Nightingale & al' v. Ferrers.

(B. 2) Bound. In what Caſes.

1. IN Aſſiſe, *Baron and Feme purchaſed the Land in Fee*, and after the *Baron aliened to his youngeſt Son in Fee within Age*, and after the *Baron and Feme entered into the Tenements of the Aſſent of the Feoffee*, who was yet *within Age*, and after the *Feme continued Seiſin and died*, and the *eldeſt Son entered as Heir*, and the youngeſt, who was infeoffed, brought Aſſiſe and recovered by Award; for the Aſſent was void, becauſe he was within Age, and ſo the Entry of the Baron and Feme a Diſſeiſin; Quod Nota. Br. Aſſiſe, pl. 169. cites 11 Aſſ. 14.

2. Infant may be *bound* by Law to the Performance of a *Condition*; Per Hale Ch. B. Chan. Caſes 143. in Caſe of Fry v. Porter, cites 31 Aſſ. 17. Fitzh. Condition 15. Br. 114. and Coverture and Infancy 71.

Pl. C. 378. b. S. P. and cites S. C. — 2 Vern. 56. pl. 508.

Trin 1706. Scot & Ux' v. Haughton and Doctor Fuller, S. P. —— All Conditions in Fact ſhall bind an Infant, but not Condition in Law; Arg. Godb. 365. —— S. P. per Rainsford J. Vent. 206. in Caſe of Fry v. Porter, cites 8 Rep. Whittingham's Caſe —— S. P. per Hale Ch. J. Vent. 205. Paſch. 24 Car. 2. B. R —— Copyhold ſurrendered to the Uſe of an Infant, to the Intent that he ſhould pay an Annuity to another at full Age, which he refuſed to do, it was decreed he ſhould pay it, and the Arrearages. Toth. 171. cites 9 Eliz. Sawyer v. Gillet.

3. He who *aliens within Age may enter*, *but* he ſhall *not have* Writ of *Dum fuit infra ætatem till* he comes of *full Age*; Quod Nota. Br. Dum fuit &c. pl. 3. cites 39 H. 6. 42.

4. If an Infant *commands J. N. to make an Obligation in his Name, and to deliver it as his Deed*, this is not his Deed; For the Command of an Infant is void; Contra if he himſelf delivers it. Br. Coverture, pl. 50. cites 14 E. 4. 3.

5. If an Infant be to make a *Preſentation* it ſhall not be ſtayed for his Nonage, for the Cure of Souls is to be regarded, and therefore if in ſuch Caſe he doth ſurceaſe in ſix Months, the Ordinary ſhall collate; Per Manwood J. 3 Le. 46. pl. 66. Mich. 5 Eliz. C. B. Anon.

6. Infant ſhall be *bound* by the *Statute of* * *Ceſſavit* and † *Waſt* &c. tho' the Statutes are general, for the firſt is an Injury to the Lord, and the other to the Leſſor, and he himſelf acquires the Eſtate, and he that hath Policy to acquire is by Law preſumed to have Reaſon to defend the ſame Thing; Per Walſh. Pl. C. 364. b. Mich. 4 & 5 Eliz. in Lord Zouch's Caſe.

* 3 Mod. 222. Arg. —Per Eyre J. Show. 83. Contra.

† Committing Waſt by Infant is a Forfeiture becauſe *it is againſt a Statute*, and if Leſſor recovers the Place waſted, the Infant ſhall not enter again; Arg. Godb. 365.

7. Infant *Lord* has Title to enter for *Mortmain*, but *enters not within the Year*, or does not enter into the Land of the Villein before the Villein has alien'd the Land, he ſhall be *bound by Laches*, becauſe he had not but Title to the Thing which never was in him; Per Walſh. Pl. C. 364. b. Mich. 4 & 5 Eliz. in Ld. Zouch's Caſe.

8. Infants are bound by *Laches* in Caſe of *Waif*, *Eſtray*, *Wreck*, *Sale in Market Overt* or Acts done by reaſon of their Office, or for Neceſſity; Per Walſh. pl. C. 364. b. Mich. 4 & 5 Eliz. in Ld. Zouch's Caſe.

9. A. of full Age, and B. within Age, *Jointenants*, are *diſſeiſed* by C. C. levies a *Fine*, and after Proclamations 5 Years paſs. A. dies. B. ſhall have other five Years after his full Age for the Whole; Per Bendloes. J. Pl. C. 367. Mich. 4 & 5 Eliz. Stowell v. Zouch.

10. Where

10. Where an Infant *made a Conveyance by Bargain and Sale to Queen Eliz.* it was not aided by the Stat. 18 Eliz [cap 2.] Cited by Coke Ch. J. Cro. J. 364. pl. 2. as adjudg'd in 30 Eliz. in Bawd's Caſe.

11. *Feme Obligor of full Age marries an Infant*, in Debt on the Bond Age was denied. Noy. 69. 39 Eliz. Deeles v. Nokes.

12. Infant keeps an *Hoſtry*; his Gueſts are *robb'd*; No Action lies againſt the Infant, See Actions (D) pl. 3. cites 40 & 41 Eliz. Croſs v. Andrews.

13. Tho' a *Feoffment* by Infant Tenant for Life or Years be not ſuch a Forfeiture but that the Infant may enter again upon the Leſſor, yet if it be *by Matter of Record*, as if he levies a *Fine*, he ſhall never enter again; Arg. Godb. 365. cites 8 Rep. 44. [Hill. 45 Eliz.] Whittinghams Caſe.

14. If an Infant bargains and *ſells Lands by Deed indented and inrolled*, he may avoid it any Time. 2 Inſt. 673.

15. *Chancery* will decree no *Award* to bind an Infant. Chan. Caſes. 280. Trin. 28 Car. 2 Cavendiſh v. . . . . Submiſſion by him not void but voidable. Cumb. 318. Hill. 6 W. 3. B. R. Roberts v. Newbold.

16. *Expreſs Cuſtoms* may bind an Infant Copyholder; Per Eyres J. Show. 83. Hill. 1 W. & M. in Caſe of King v. Diliſton cites Le. 266. Seeme's Caſe, of the Lords appointing one to receive the Profits during Nonage; and ſo it is in the Caſe of *an Office*, a *Condition expreſſe* will bind an Infant. Ibid. cites 8 Rep. 44 Whittinghams Caſe. But Per Dolben J. contra Ibid. 85 — But a *General* Cuſtom does not bind an Infant; Per Eyre J. Show. 84. in S. C.

(B. 3) Acts of Infant avoided when.

1. IT is a Common known Rule, that *all* ſuch Gifts, Grants or *Deeds* made *by an Infant*, which do not *take Effect by Delivery of his Hand* are void; But ſuch Gifts, Grants or Deed made by an Infant by Matter in Deed, or in Writing, which take Effect by Delivery of his own Hand are voidable by himſelf, and his Heirs, and by thoſe which ſhall have his Eſtate. Perk. 6. S. 12.

2. If an Infant brings Error to reverſe a Fine levied by him, if the *Inſpection* be had, and Witneſſes produced to prove the Infancy, the Reverſal may be after full Age, or after his Deceaſe by his Heir. Dio. 844. pl. 1139. Paſch. 13 Jac. Keckwith's Caſe. *S. C. cited in 2. Sid. 131. a.* *Fine* by Infant was vacated on the Inſpection. 3 Lev 36. Mich. 33 Car. 2. C. B. Hutchinſon's Caſe.

3. A *Diverſity* is to be obſerved *between Matters of Record* done or ſuffered *by an Infant, and Matters en fait*; for Matters en fait he ſhall avoid either within Age, or at full Age, as has been ſaid; but Matters of Record, as Statutes-Merchants, and of the Staple, Recognizances knowledged by him, or a Fine levied by him, Recovery againſt him by Default in real Action (ſaving in Dower) muſt be avoided by him, viz. Statutes &c. by Audita Querela, and the Fine and Recovery by Writ of Error during his Minority, and the like; and the Reaſon thereof is, becauſe they are *judicial Acts*, and taken by a Court or a Judge, therefore the Nonage of the Party to avoid

the ſame, ſhall be tried by Inſpection of Judges, and not by the Country. *And for that his Nonage muſt be tried by Inſpection, this cannot be done after his full Age*; and ſo is the Law clearly holden at this Day, though there be ſome Difference in our Books. But if the Age be inſpected by the Judges, and recorded that he is within Age, albeit he come of full Age before the Reverſal, yet may it be reverſed after his full Age. Co. Litt. 380. b.

But a *Common Recovery* may; for this ſhall not be tried by Inſpection as in Caſe of a Fine. Cro. E. 739. pl. 13. Hill. 42 Eliz.

4. A *Fine* was levied *by an Infant Feme, and ſhe and her Husband were examined as to her Age*, and *both anſwered that ſhe was of Age*, and afterwards ſhe was examined privately as to her Conſent, who anſwered, *that ſhe was under no Conſtraint, and was willing to levy the Fine*; but was not queſtioned then as to her Age. About two Years after the Wife died without Iſſue; The Court agreed that the Fine cannot be ſet aſide *after her Death.* Mod. 246. pl. 6. Paſch. 29 Car. 2. C. B. Barrow v. Parrot.

B. R Holland v. Dauntzey —— The bringing a Writ of Error during his Nonage is not ſufficient, but the Fine by Judgment in the Writ of Error muſt be *reverſed during his Nonage.* Godb. 122. l. 141. 29 Eliz.

(B. 4) Acts of Infants; avoided by whom.

1. IF *two Jointenants* are, and the *one is an Infant*, and *he makes Feoffment* of his Part, the other cannot enter; for none ſhall avoid an Act done by an Infant but he who is *privy in Blood.* Br. Entre Cong. pl. 47. cites 39 H. 6. 42.

2. None ſhall *take Advantage of the Infancy of his Anceſtor*, but he that has Right deſcended to him from the ſame Anceſtor; but the Heir of an Infant may take Benefit of a Condition, though no Right deſcended to him from the ſame Anceſtor. 8 Rep. 44. a. Hill. 45 Eliz. Whittingham's Caſe.

3. *Privies in Blood*, as the *Heir General or Special*, may avoid a Conveyance made by their Anceſtor during his Nonage. 8 Rep. 44. b. Hill. 45 Eliz. in the Star-Chamber, in Whittingham's Caſe.

4. As if an *Infant ſeiſed in Fee makes a Feoffment* and dies, his Heir ſhall enter. 8 Rep. 42. b. in S. C.

5. So if *ſeiſed in Tail Male*, and he *makes a Feoffment and dies*, his Son being Heir General and Special may enter. 8 Rep. 43. a. S. C.

6. *And* if he has *no Sons*, but only Daughters, *his Brother being Special Heir per Formam Doni* made to his Father, may avoid the Feoffment, becauſe he is privy in Blood, and has the Land by Deſcent. 8 Rep. 43. a. in S. C.

7. But *Privies in Eſtate cannot* avoid a Conveyance made by an Infant. 8 Rep. 43. a. in S. C.

8. *As* if *Tenant in Tail*, being *within Age, makes a Feoffment and dies without Iſſue*, the *Donor ſhall not enter*, becauſe he was privy only to Eſtate, and no Right accrued to him by the Death of the Donee. 8 Rep. 43. a. in S. C.

9. *So* if there be *two Jointenants within Age*, and *one* of them *makes a Feoffment in Fee of his Moiety, and dies*, the *Survivor cannot enter.* For by the Feoffment the Jointure was ſevered ſo long as the Feoffment continued in Force, and therefore the Heir of the Feoffor

have a Dum fuit infra Ætatem, or enter into the Moiety. 8 Rep. 43. a. in S. C.

10. *But if Both had joined* in the Feoffment, *and one had died*, the Right had ſurvived to the other, and he ſhould have had the Land from the firſt Feoffor. 8 Rep. 43 a. in S. C.

11. If a Man within Age, *ſeiſed in the Right of his Wife, makes a Feoffment and dies*, his Heir cannot enter, becauſe no Right deſcends to him, but inaſmuch as the Baron, if he had lived, might have entered in the Life of his Wife only, and not in reſpect of any Right which he himſelf had, *the Wife might in ſuch Caſe have entered in her own Right.* 8 Rep. 43. b. in S. C.

12. *But if the Feme, being only Tenant in Tail, and the Baron within Age had made a Gift in Tail* to another, *by which the Baron gained a new Reverſion in Fee, and died*, the *Wife might enter*, or *the Heir of the Baron*, who had a new Reverſion deſcended to him; *but if the Heir had enter'd, and defeated the Tail given by the Infant*, his Eſtate vaniſhed, and by Operation of Law *the Feme was immediately ſeiſed of her old Eſtate.* 8 Rep. 43. b.

13. *Privies in Law*, as the *Lord by Eſcheat*, ſhall not avoid a Conveyance made by an Infant. 8 Rep. 44. a.

14. *As* if an *Infant makes a Feoffment and dies without Heir*, the Lord ſhall not avoid it; Per Curiam agreed; *but* becauſe it appeared the Feoffment was *executed by Letter of Attorney made by the Infant*, it was reſolved to be void, and that the Land ſhould Eſcheat to the Queen. 8 Rep. 42. 45. Whittingham's Caſe.

15. Where an Incroachment of a *Water Courſe* was made in the Infancy of the Anceſtor, who *after full Age acquieſced* under it 21 Years, tho' ſuch Infancy was urged, yet Ld. Cowper took no Notice of it for the above reaſon. G. Equ. R. 4. Hill. 6 Ann. in Canc. Ld. Guernſey v. Rodbridges.

(B. 5) How Relievable after Age, and in what Caſes.

1. IF an Infant within Age *ſeiſed of Rent purchaſes the Land*, and *aliens the Land within Age* he ſhall have Election if he will demand the Land or the Rent; Per Kyrton, quod non negatur. Br. Coverture pl. 12. cites 46. E. 3. 33, 34.

2. If an Infant be *bound in a Recognizance* he *has no Remedy to avoid it* by his Nonage; but the Court ought not to take him to be bound, if they can perceive it, quod nota. Br. Coverture pl. 23. cites 8 H. 6. 30.

3. If an Infant *makes* a Gift or *a Leaſe rendering Rent, and accepts the Rent at full Age*, this is a good bar in Dum ſuit infra ætatem. Br. Dum ſuit, &c. pl. 8. cites 22 H. 6. 24.

4. If a *Guardian pleads an ill Plea where he might have pleaded a good one, by which the Infant loſes*, the Infant ſhall have Writ of Diſceit at his full Age, and *recover all in Damages* againſt the Guardian; and therefore the Court cannot accept a Guardian but ſuch as is ſufficient to render the Infant Damages at his full Age. And in this Caſe the Infant here is at no Miſchief; For he ſhall recover in Value againſt the Vouchee, and the ſame Law where the Guardian vouches illy, he ſhall

ſhall render Damages to the Infant. Br. Droit de Recto. pl. 15. cites 9 E. 4. 36.

5. Where an Infant *aſſigns Dower* to his Mother *more than the third Part*, he cannot enter into the Surpluſage at full Age, but is *put to his Writ of Admeaſurement of Dower*. Per Kingſmill J. but per Rode Ch. J. he may enter as upon *Partition* made within Age which is equal, Quære. Br. Entre Cong. pl. 44. cites 21 H. 7. 29.

6. If an Infant *makes a Feoffment*, he *may enter either within Age or at full Age*; and if he dies, *his Heir may enter or have a Dum fuit infra Ætatem* &c. Litt. S. 406. and Co. Litt. 247. b. 248. a.

7. An Infant who is *bound in a Statute Staple* or the like ſhall reverſe it by *Audita Querela* at full Age, or within Age. Br. Coverture pl. 64. cites F. N. B. 104.

8. Infant is not relievable by Audita Querela after full Age againſt a *Statute* by him entred into. Mo. 75. pl. 206. Mich. 7 & 8 Eliz. Worſley's Caſe.

Godb 149. pl. 52. 9. Infant *acknowledged a Recognizance*, and upon *Audita Querela upon Inſpection he* was adjudged within Age, and had Scire Facias againſt the Conuſee, and upon one Nihil returned Judgment was that Recognizance be diſcharged where two Nihil's ought to be returned or Scire Feci, and for this *Judgment was reverſed for Error*, and now the Infant is of full Age and cannot have a new Audita Querela; But he ſhall *have a ſpecial Writ reciting all the Matter*, and ſo be relieved; tho' Judgment be reverſed, yet the Depoſitions of Witneſſes remain. Jenk. 322. pl. 30. cites 2 Jac. Randals Caſe.

10. Lands of an Infant was charged by his Father's *Will for payment of Portions* to younger Children, who bring a Bill praying that the Truſtees may be Decreed to ſell &c. The Infant, while a Minor deſired that the Truſt Eſtate might not be ſold, and *offered to ſubject other Lands not within the Truſt*, by which means a Sale was delayed; Decreed per Lords Commiſſioners to hold him to his Offer, for if he would have departed from it he ſhould immediately on his coming of Age have *applied to the Court to have retracted his offer* and amended his Anſwer, but now he had Acquieſced under the Anſwer about four Years. 2 Vern. 224. pl. 206. Paſch. 1691. Cecil v. E. of Salisbury.

(C) *What Act* done by an Infant *ſhall bind him.*

Contract.

1. IF an Infant in Reverſion accepts a Leaſe for Life of Tenant in Dower, but never takes the Profits, and at full Age diſagrees to the Leaſe, (*) this ſhall not bar him of his Action of Waſt, for Waſt done in the mean time. 30 E. 3. 16.

* Fol. 729.

2. If a Man lends an Infant 10 l. to Pay at a certain Day, this Contract ſhall not bind him. 39 E. 3. 20. b. admitted by the Iſſue.

3. If a Infant makes a Contract pro Victu & Veſtitu, this ſhall bind him.

Fitzh. Arbitrement, pl. 4. cites S. C. & S. P. admitted. 4. [So] If an Infant makes a Contract for his Table he may be charged in an Action upon this Contract. 18 E. 4. 2. 10 H. 6. 14.

5. So

5. So **if he buys a Coat or** Cloth for Apparel, **this shall bind him, for he cannot live without Meat, Drink and Cloths.** 18 E. 4. 2. 10 H. 6. 14.

Fitzh. Arbitrement, pl. 4 cites S. C. & S. P. admitted. —

But where an Infant buys Silks and Velvets, which appear to be above his Degree, the same is void, they being Things of Superfluity and not of Necessity Lat 22. in a Nota says it was adjudged. — So for Gold Lace to trim his Suit. 2 Roll Rep. 45. cites it as the Lord of Essex's Page's Case — Ibid. 144. S. C cited by the Name of Price's Case. ——— S. C. cited by Vaughan Ch. J. Cart. 216 Trin. 22 Car. 2. C. B.

6. **If an Infant** is a Mercer and hath a Shop **in a Town,** and there buys and sells, **and he** contracts to pay **a certain Sum to J. S.** for certain Wares sold to him by J. S. to re-sell, **yet he is not chargeable upon this Contract, for this trading is not immediately necessary ad Victum & Vestitum. Trin. 10 Ja. B. R. between** *Hill and Whittingham*, **in a Writ of Error per Curiam, and the Judgment given before e contra reversed, for if he shall be bound thereby, Infants might be infinitely prejudiced, and buy and sell and live by the Loss.**

Cro J. 494. pl. 15. Trin. 16 Jac. S. C. adjudged and the first Judgment reversed. — 2 Roll Rep. 45. S C adjudged and the former Judgment reversed accordingly. ——— D. 104. b. Marg. pl. 13. cites S. C. adjudged and Judgment reversed accordingly. ——— Noy 21, 22. S.P. obiter, accordingly that the Infant is not bound. ——— S.C. cited by Crooke 2 Roll Rep. 271.

7. **If an Infant makes a Contract** pro Victu or Vestitu, **and** enters into a single Bill for Payment thereof, **this shall bind him, though he be ousted of his Law thereby.**

Lev. 86. Mich. 14 Car. 2. B R. Russell v. Lee, S.P. where it was for Victuals and Clothes necessary, delivered to him and suitable to his Quality, and they shall be intended to be for his own Use though not so alleged.

8. But if **the Infant enters** into an Obligation with a Penalry for Payment **thereof, this Obligation shall not bind him. Pasch. 32 Eliz. B. R. by three Justices. Mich. 11 Ja.** *Cupworth's* **Case, per Curiam.**

Co. Litt. 172. a. S. P. — Lev. 86. Mich. 14 Car. 2. in Case of Russell v. Lee, S. P. Arg. cites Co. Litt. ut supra; and Cro. E. 920. S. P. held accordingly; and the Court in the principal Case was of the same Opinion. Godb 219 pl. 316. Mich. 11 Jac. C. B. Kersby v. Cuffer, S. P. agreed per Cur. But it is said there that If when he comes to full Age he enters into an Obligation for Necessaries which he had when he was within Age, the Law is now taken to be that the same shall bind him ——— But Ibid. cites Randall's Case 44 Eliz. adjudged, that an Obligation with a Penalty for Money borrowed within Age is absolutely void. ——— But per Wray if an Infant had been bound in an Obligation with a Surety, and afterwards at his full Age he in Consideration thereof promises to keep his Surety harmless, an Action lies on such Promise; For the Infant cannot plead Non est Factum. Le. 114. in pl. 156. cites Mich. 28 & 29 Eliz. Edmonds's Case.

9. But **an Infant may bind himself in an** Assumpsit for Payment thereof, **and an Action upon the Case lies against him upon the Promise; for this is but in Nature of an Action of Debt, and therefore where Debt lies, an Action upon the Case lies against him,** (but perhaps it would be otherways upon a Collateral Promise) **for Wager of Law is not to be regarded; for a Man of full Age shall by such Action be ousted thereof. Trin. 15 Ja. B. R. between** *Tillet and Buckstone*, **Rot. 1374. adjudged, that an Action upon the Case lay against an Infant upon Promise of Payment for Beer and Billets. Mich. 2 Car. Regis, between** *Delavall and Clare*, **agreed per Curiam. Contra, Mich. 11 Ja. B. per Curiam.**

An *Infant having a Family buys Bread*, and afterwards *makes up an Account with the Baker*, he is not *chargeable in an Assumpsit upon this Account*, because it is founded upon the Account in which an Infant is not chargeable, for the Law allows him not such Discretion, but it may be mis-reckoned. 2 Roll Rep. 271. Mich. 20 Jac. B. R. Tirrill's Case.

Palm. 528. S. C. held accordingly. —— Jo. 182. pl. 4. S. C. adjudged that the Action lay. —— Co. Litt 172. a. S. P. —— An Action *on the Case* lies againſt an Infant upon an Aſſumpſit by him for Neceſſaries, though it was objected that Damages are to be recovered in it, and that Debt only would lie. Lat. 169. Trin. 2 Car. Wood v. Witherick. —— Noy 87. S. C. & S. P. agreed per Curiam.

10. **If an Infant promiſes another,** that if he will find him Meat, Drink and Waſhing, and pay for his Schooling, **that** he will pay 7 l. yearly, **an Action upon the Caſe lies upon this Promiſe, for Learning is as neceſſary as other Things, and though it is not mentioned what Learning this was, yet it ſhall be intended what was fit for him, till it be ſhewn to the contrary on the other Part;** and **though** he to whom the Promiſe was made does not inſtruct him, but pays another for it, **the Promiſe of Re-payment thereof is good; and it appears that the Learning, Meat, Drink and Waſhing could not be afforded for a leſs Sum than 7 l. Mich. 4 Car. B. R. between** *Pickering and Gunning* **adjudged, this being moved in Arreſt of Judgment, which Intratur. Trin. 3 Car. Rot. 918.**

11. If an *Infant binds himſelf* he ſhall not avoid it; Per Markham. Newt. ſaid this is by Cuſtom; But per Markham, this is by the Common Law; For it *is for his Benefit* to be inſtructed to gain his Living. For as the Maſter may have Action of Covenant againſt the Apprentice to ſerve him, ſo ſhall the 'Prentice have againſt him to inſtruct him. But per Newton, Covenant by an Infant is void by the Common Law. But per Aſcue J. an Infant may be an Apprentice *by Indenture*; for it is for his Benefit. But Paſton J. denied theſe Caſes. So Newton and Paſton againſt Aſcue and Markham. And it was agreed, that an Infant may be conſtrained to ſerve but not to be an Apprentice. Br. Coverture, pl. 25 cites 21 H. 6. 31.

12. *Account* does not lie againſt an Infant clearly Per Newton Ch. J. quod non negatur. Br. Coverture, pl. 24. cites 19 H. 6. 5.

13. If an Infant be at *Table* with me *for 12 d. for the Week*, or *buys Cloth* of me for his Robes, Debt lies, and Nonage is no Plea; for thoſe are Neceſſaries; for he cannot live without Meat, Drink and Veſture. Br. Coverture, pl. 51. cites 18 E. 4. 12.

Gro E 920. pl. 16. Hill. 45 Eliz. B. R. Ayliff v. Archdale, S. C. the whole Court held it to be void; *But* if he had taken an *Obligation of the very Sum which he laid out* for his neceſſary Maintenance it had been otherwiſe. —— Mo. 679. pl. 929. S C adjudged in C. B. for the Defendant. —— Godb. 364. pl. 456. Arg. cites S. P. adjudged 5 Jac. B. R. in Caſe of Bendlaſh v. Holiday. —— Reſolved that a Bond taken for Neceſſaries of an Infant is good. Mar. 145. cited by Bramſton Ch. J. as Trin. 4 Car. Pickering v. Jacob.

14. An Infant had taken ſo much for *neceſſary Apparel and Diet* as *amounted to 50 l. A. paid the Money for the Infant and took an Obligation of him with a Penalty.* Adjudged that it did not bind him in Regard of the Forfeiture. Arg. Hutt. 107. cites it as 25 Eliz. Aleph's Caſe.

See 1 Mod. 86. 300. 2 Lev. 21. 3 Mod. 28.

15. Infant has Eſtate on *Condition* to be performed by him; if the Condition be broken during his Minority, the Land is loſt for ever. 8 Rep. 44. b. Hill. 45 Eliz. Whittingham's Caſe.

If *Conditions* in Law annexed to *Offices* founded on Confidence and Skill, be broken by Infant or *Feme Covert*, this ſhall bar Infant and Feme Covert for ever. 8 Rep. 44. b. Hill. 45 Eliz. Whittingham's Caſe.

16. *Debt on Eſcape againſt an Infant Gaoler* that ſuffers a Priſoner to eſcape out of Execution, will lie upon the Statute of W. 2. 11. 2 Inſt. 382.

17. Infant *Ideot* (ſo found by Office) *levies a Fine* to A. and declares the Uſe of it by Indentures, and good. 10 Rep. 24. b. Mich. 10 Jac. B. R.

18. An

18. An Infant ſhall not be charged upon his *Promiſe for the Board of a Stranger*, though otherwiſe it ſhall be for his own Board; Agreed by Coke and Crooke. 3 Bulſt. 118. Trin. 14 Jac. in a Nota. Roll Rep 281. in pl. 2. S. P. by Coke and Crooke agreed.

19. *Aſſumpſit* by Executor, in Conſideration the Teſtator *would buy and pay for the Defendant 24 Yards of Lace, 11 Yards of Velvet, and three Yards of Broad-Cloth, and make him a Cloak*, Defendant promiſed to pay ſo much as he ſhould pay for the Wares, and alſo ſo much as he ſhould deſerve for the making of the Cloak; and further declared that the Defendant was *indebted* to the Teſtator *27 l. for a Doublet and a Pair of Velvet Hoſe made for him*, which he promiſed to pay but had not. The Defendant ſaid, that at the Time of the ſeveral Promiſes he was within Age; adjudged for the Defendant, becauſe it does not appear, that this Cloak, Doublet and Hoſe were for the Defendant himſelf, nor if it had been ſo averred, yet it not being averred that it was *neceſſary and convenient Apparel for him to wear according to his Eſtate and Degree*, therefore the Promiſe did not bind him. Cro. J. 560. pl. 8. Hill. 17 Jac. B. R. Ive v. Cheſter. 2 Roll. Rep. 144. Green v. Cheſter. S. C. & S. P. agreed.—— Palm. 361. Cheve v. Cheſter. S. C. adjudg'd againſt the Plaintiff for not averring that it was for neceſſary Apparel.—— Poph. 151, 152.

Jene v. Cheſter. S. C. adjudged.——Lev. 87. Mich. 14 Car. 2. B. R. cites S. C.

20. *Infant and another of full Age covenanted the one with the other*, though the Infant is not bound, yet the other is. Sid. 446. pl. 5. Paſch. 22 Car. 2. B. R. Farnham v. Atkins.

21. Where it has been held that the *Deeds of* Infants are not void but voidable, the Meaning is, that *Non eſt Factum cannot be pleaded*, becauſe they have the Form though not the Operation of Deeds, and therefore are not void upon that Account, without ſhewing ſome ſpecial Matter to make them of no Efficacy; per Curiam. 3 Mod. 310. Trin. 2 W. & M. in B. R. in Caſe of Thompſon v. Leach. Therefore if an Infant makes a *Letter of Attorney* though it it is void in itſelf, yet it ſhall not be avoided by pleading Non eſt Factum, but by ſhewing his Infancy. 3 Mod. 311. Trin. 2 W. & M. in B. R. in Caſe of Thompſon v. Leach.—— But he may ſay, Non conceſſit &c. per Wray Ch. J. 2 Le. 218. in Humfreſton's Caſe.

22. If one deliver Goods to an Infant on a *Contract* &c. knowing him to be an Infant, the Infant ſhall not be charg'd in *Trover* and Converſion for them; for by ſuch Way all the Infants in England ſhould be ruined. Sid. 129. Paſch. 15 Car. 2. in the Exchequer Chamber, in Caſe of Manby v. Scott.

23. *But* if the *delivery of Goods* be to a Feme, not knowing her to be a Feme Covert, or to an Infant *not knowing him to be an Infant* it will be otherwiſe. Sid. 129. in caſe of Manby v. Scott.

24. Some have endeavoured to *diſtinguiſh between a Deed which gives only Authority to do a Thing, and ſuch which conveys an Intereſt by the delivery of the Deed itſelf*, that the firſt is void and the other voidable. But the Reaſon is the ſame to make both void, only where a Feoffment is made by an Infant it is voidable, becauſe of the Solemnity of the Conveyance; Per Curiam. 3 Mod. 311. Trin. 2 W. & M. in B. R. in Caſe of Thompſon v. Leach.

25. An Infant *being Bail and taken in Execution* it is diſcretionary to diſcharge him on Bail or not. Carth. 278. Trin. 5 W. & M. in B. R. Loyd v. Eagle.

26. A. *lends* an Infant *Money* and Infant lays it out *in Neceſſaries*, yet the Infant is not liable; per Treby Ch. J. 1 Salk. 279. pl. 4. Paſch. 5 W. & M. in C. B. Darby v. Boucher. 1 Salk. 387. Earle v. Poole. S. P.

27. Covenant lies not againſt *Apprentice* being an Infant. 7 Mod. 15. Paſch. 1 Ann. B. R. Lylly's Caſe. Unleſs by Cuſtom. Mod. 271.

28. William

28. William Pengelly an *Infant Apprentice in Exeter goes to the Angel in Taunton* with one R. D. *and there abides for ſeveral Days* together *on Pretence of a Courtſhip* &c. In an *Action brought* by one Periam, *the Landlord, for the Proviſions and Neceſſaries found* for Pengelly the Plaintiff was nonſuited, for it was at his Peril to entertain another Man's Apprentice, and he might have had an Action for it; beſides the ill Conſequence this would bring if ſuch Things ſhould be allowed to Infants, *theſe Things not being for Neceſſaries, though it was objected the Plaintiff was an Inn-keeper*; But it was made out that the Plaintiff was privy to the Courtſhip &c. Devonſhire Aſſizes in the Summer. 1708.

(D) *Acts* done by an Infant.

What Acts are *void*.

For being *without Livery* is void, ſo that the Entry is not neceſſary. Br. Treſpaſs, pl. 338. cites 18 E. 4. 1. 2.

1. IF an Infant leaſes for Years, and the Leſſee enters, the Infant may have Treſpaſs againſt him. 18 E. 4. 1. b. 4. b.

Quære, If *Leaſe for Years without Rent* be not void. 2 Sid. 110. Davis v. Mannington.

* Fol 730. An Action of *Debt for Rent upon a Leaſe made to an Infant*, and Judgment pro Quer' againſt the Infant 2 Bulſt. 69. Kirton v. Elliot. —— Such Leaſe is not void but voidable, and may be affirmed by Acceptance, and that though it was made by an Infant Copyholder of his Copyhold Lands without Licence. Noy 92. Trin. 2 Car. B. R. agreed per Cur. Aſhfield v. Aſhfield. —— Jo. 157. S. C. adjudg'd, that the Leaſe ſhall be good as to Strangers.

2. If he leaſes for Years, rendring Rent, it is at his Election to (*) affirm the Leaſe, or to have Treſpaſs againſt the Leſſee for the Occupation. 18 E. 4. 2.

Contra if it be *by Deed and Livery* of Seiſin made by *himſelf*, but otherwiſe if by Attorney. Br. Treſpaſs, pl. 338. cites 18 E. 4. 1. 2.

3. If an Infant exchanges with another, if the other enters the Infant may have an Aſſiſe. 18 E. 4. 2.

Br. Treſpaſs, pl. 338. S. C.

4. If he ſells Goods, it is at his Election to make it void, for he may have Treſpaſs, or Debt for the Money. 18 E. 4. 2.

Fitzh. Arbitrement, pl. 4 cites S. C. & S P —— Br. Arbitrement, pl. 43. 10 H. 6 14. is of a Treſpaſs done *by an Infant*, *and* that Award in ſuch Caſe ſhall bind him, becauſe it is for his Advantage to excuſe him of a Treſpaſs of which he is impeachable by Law. But Brooke ſays Quære.

5. If a Treſpaſs be done to an Infant, and he ſubmits to an Award, the Award made by them ſhall not bind but at his Election.

Contra. 10 H. 6. 14.

* Br. Faits, pl. 31. cites S. C and Aſcue J. held it good becauſe it is for his Advantage; But Paſton J. e contra. But Brooke ſays that the Law ſeems to be with Aſcue. —— S. C. cited Noy 130.

6. If a Man makes a Deed of Feoffment to an Infant, and the Infant makes a Letter of Attorney to another to take Livery for him, this is good, becauſe it is for his Benefit. Dubitatur, * 21 H. 6. 31. But Brooke in abridging it, Title Faits, 31. ſeems that it is good, Mich. 11 Car. B. R. between *Palfryman and Groby*, per Curiam, upon Evidence at the Bar, reſolved, upon a Trial which concerned Sir Sidny Mountague and Dame Gorges, ſhe being but of the Age of 11 Years at the making of the Letter of Attorney.

7. If

7. If the King *alions Land, Parcel of his Dutchy of Lancaſter, within Age*, there he may void it by Nonage, for he has the Durchy as Duke, and not as King; *Contra of the Land which he has as King*; For the King cannot be diſabled by Nonage as a common Perſon ſhall be. Br. Prerogative, pl. 132. cites 1 E. 6. & concordat Anno 6 and 26 E. 3. tit. Age 8.

8. If a Man *infeoffs an Infant, and after enters* into the Land *by the Aſſent of the Infant*, and *continues Seiſin*, and *dies ſeiſed*, yet the Entry of the Heir of the Feoffor is not lawful, for his Father was a Diſſeiſor, and the Aſſent of the Infant was void. Br. Coverture, pl. 34. cites 11 Aſſ. 14.

9. In Mortdanceſtor it was held clearly, that *Releaſe of an Infant of all the Right in Lands of which he was never ſeiſed* is void, ſo that another who is of half Blood ſhall have the Land as Heir of their common Anceſtor, if he who releaſed dies without Iſſue; But *otherwiſe* it is ſaid *of a Feoffment*; the reaſon of the Diverſity ſeems *by reaſon of the Livery* of the Land this is only voidable, and the other is void. Br. Coverture, pl. 40. cites 34 Aſſ. 10.

10. If an Infant *accounts before Auditors of Receipt*, he ſhall be bound, Per Newton; Quære. But note, that this is Matter of Record. Br. Arbitrement, pl. 43. cites 10 H. 6. 14.

11. In Præcipe quod reddat, Nonage at the Time of the Deviſe is a good Plea where a Man *claims by Deviſe* by Teſtament *of J. N.* if he was *within Age* at the Time of the Deviſe; For an Infant *cannot deviſe*. Br. Coverture, pl. 30. cites 37 H. 6. 5.

12. If an Infant makes a Deed of *Feoffment and a Letter of Attorney* to a Stranger *to make Livery* of Seiſin, and he makes Livery of Seiſin by Force thereof, he ſhall be taken for a Diſſeiſor. Perk. S. 13. cites P. 18 E. 4. 2. S. P. Arg. 2 Roll Rep. 242.

13. If an Infant *commands W. to make a Bond* for him, *and to deliver it as his Deed*, which he does, this is not the Deed of the Infant. Br. Obligation, pl. 53. cites 14 E. 4. 2.

14. *Contra* where he *himſelf delivers it*, Quod fuit Conceſſum; For the Command is void. Ibid.

15. If an Infant *delivers a Horſe, or bails* Goods, Treſpaſs does not lie for him. Br. Treſpaſs, pl. 338. cites 18 E. 4. 1, 2.

16. If an *Infant* makes *Grant of an Advowſon by his Deed, and at his full Age he confirms* the ſame Grant, yet it is not good, for the firſt Grant was void. Br. Coverture, pl. 1. cites 26 H. 8. 2.

17. *But* if he *gives Goods, and delivers them with his Hands*, Treſpaſs does not lie. Ibid. S. P. Br. Coverture, pl. 26. cites 22 H. 6. 3. But contra if the Donee takes them by Virtue of the Gift.

18. *So of Feoffment* and *Livery made by the Infant himſelf*, and *not by Attorney, this is voidable*, and not void; Note the Diverſity. And ſo ſee that Livery of a Deed of an Infant is not like to the Livery of Land or Goods by him. Ibid. Br Feoffment de terres, pl. 48. cites 18 E. 3. pl. 27. S. P. accordingly. —— S. P. Br. Coverture, pl. 26. cites 22 H. 6. 3. But if he makes Letter of Attorney to one to make Livery, who does it, Treſpaſs lies.

19. Infant *makes a Will*, and publiſhes it, and dies at full Age, it is of no Effect. Pl. C. 344. Trin. 10 Eliz. in Caſe of Brett v. Rigden.

Mo. 103. 105. pl. 248. Lane v. Cowper S. C. & S. P. held by all but Gawdy to be void.——Such Leaſe by Infant is good enough, becauſe it *is for his Advantage*. Noy 133. Rames v. Machin.

20. *Leaſe to try a Title in Ejectment* made by an Infant *without Rent* Profit, or other Recompence, but only to try the Title, being made upon the Land, it is not *void*; Per Gawdy, J. but per Wray and Southcot contra. 2 Le. 216, 217. pl. 275. Paſch. 16 Eliz. B. R. Humfreſton's Caſe.

21. *Surrender of Copyhold* was made by Infant to the Uſe of a Stranger, who was admitted; The Infant ſhall enter at full Age; For this is no Bar nor Diſcontinuance. Mo. 597. pl. 814. Hill. 35 Eliz. Goole v. Grane.

Infant Surrenderor, may enter at full Age. Poph. 39. Mich. 35 & 36 Eliz. in Caſe of Bullock v. Dibler.

22. *Surrender of a Copyhold* by Infant of five Years of Age allowed by this Court, tho' Lord of the Manor inſiſted he never heard of any Admittance in that Manor at ſuch an Age. 2 Chan. Rep. 392. 2 Jac. 2. Naylor v. Strode.

23. If an Infant *bargain and ſell his Land for Money for Commons or Teaching*, it is good with Averment; if for Money otherwiſe if it be proved, it is avoidable; if for Money recited, and not paid, it is void; and yet in the Caſe of a Man of full Age the Recital ſufficeth Ld. Bacon on the Statute of Uſes, 355.

24. If a *Leaſe for Life* be made *to an Infant*, and *he by* Charter of *Feoffment aliens in Fee*, the Breach of this Condition in Law is no abſolute Forfeiture of his Eſtate. Co. Litt. 233. b.

25. *So* of a *Condition in Law given by Statute*, which gives an Entry only; As if an Infant *aliens* by Charter of Feoffment *in Mortmain* this is no Bar to the Infant. Co. Litt. 233. b.

26. *Exchange* by Infant of Lands is not void, but voidable only. Co. Litt. 51. b.

27. *Leaſe of Land to an Infant* if for his Benefit is voidable only at his Election; But he may make it void by refuſing or waving the Land before the Rent Day comes; For then no Action of Debt will lie againſt him; But the Infant *coming to Age before the Rent-Day*, and it not being ſhewed that the Rent was of greater Value than the Land, in Debt for Rent againſt Leſſee it was adjudged for the Plaintiff. Cro. J. 320. pl. 1 Paſch. 10 Jac. B. R. Ketſey's Caſe.

28 *Money paid by an Infant* with his own Hands, in Conſideration of an Horſe agreed to be ſold him for that and a further ſum, is but voidable to be recovered again by an Action of Account; Per Hobert Ch. J. Hob. 77. pl. 98. Auſtin v. Gervas.

No Stranger ſhall avoid it. Ibid. 44, 45. cites the Caſe of Lord Brook v. Ld. Latimer.—— Arg. Bridgm. 75. S P.—The Lord by *Eſcheat* ſhall not take Advantage of the Infancy becauſe a Stranger, and if Infant *Tenant in Tail* makes Feoffment and dies *without Iſſue*, no Stranger in Blood ſhall take Advantage of the Infancy; Per Holt Ch. J. Show. 87. Hil. 1 W. & M. in Caſe of King v. Dilliſton.

29. If Infant *makes Feoffment in Fee and dies without Heir*, the Feoffment is unavoidable; Per Bridgman. Bridgm. 44. Mich. 13 Jac. cites 49 E. 3. 13 6 H. 4. 3. 7 H. 5. 9. 39 H. 6. 42.

But they muſt ſue ſeveral Writs of *Dum fuit infra Ætatem*; For the Nonage of the one is not the Nonage of the other. Ibid ——* Becauſe the *Jointenancy is ſevered*. But 3 Aſſ. pl. 15. where the Jointenancy is not ſevered it is otherwiſe; Agreed. Roll. R. 442. in Caſe of Smallman v. Agburrow.

30. *Two Jointenants in Fee, one* of them being an *Infant makes Feoffment in Fee* and *dies*, the Survivor ſhall * not enter; But if *both within Age make Feoffment*, one Joint Right remains in them, and therefore if one dies the Right will ſurvive, and the Survivor may enter into all; Arg. Bridgm. 44. Mich. 13 Jac.

31. If an Infant *grants a Rent-charge* out of his Land, it is not voidable, but ipſo facto void; for if the *Grantee diſtrains* for the Rent, the *Infant may have an Action of Treſpaſs* againſt him; Per Curiam. 3 Mod. 310. Trin. 2 W. & M. Perk. S. 17. cites Paſch. 18 E. 4. 2. S. P.

32. A *Leaſe of Land* by Infant rendering Rent is good till Diſagreement, but if without Render it is void; Arg. Show. 299. Mich. 3 W. & M. It is not in the Election of the Leſſee to avoid it for the Infancy of his Leſſor; Per Twiſden J. Sid. 42. in pl. 8. Paſch. 13 Car. 2. B. R.

33. The *Difference* taken that the Deed of an Infant (as *Letter of Attorney*, whereby he gives an Authority,) is *void*, but where he paſſes any Intereſt, (as *Bond &c.*) is *only voidable*, is not agreeable to Reaſon; For by that means the Infant would be more prejudic'd in paſſing his Eſtate than he would in giving a bare Authority which cannot be maintain'd; Per Holt Ch. J. Cumb. 468. Hill. 10 W. 3. B. R in Caſe of Thompſon v. Leach.

(E) What [*Acts* are] *voidable.*

[*As to Chattles.*]

1. AN Infant delivers Goods to his own Uſe, this is only voidable, for he ſhall not have Treſpaſs againſt the Bailee. 18. H. 6. 2.

2. If an Infant *gives a Horſe, and does not deliver* the Horſe *with his Hands*, and the Donee takes the Horſe by Force of the Gift, the Infant ſhall have an Action of Treſpaſs; But if an Infant be an Executor, the Payment of the Debt of the Teſtator by him is good and effectual &c. Perk. S. 14. cites Trin. 15 E. 345. If an Infant delivers *Money* with his Hands, it is only voidable to be recovered back in an Action of Account; Hobart Ch. J. Hob. 77. in Caſe of Auſten v. Gervis ——If an Infant delivers Goods with his own Hands Treſpaſs does not lie. Lat. 10 cites it as adjudged Paſch. 33 Eliz —S. P. Mod. 137. by Hide J. cites 21 H. 7. 39. 26 H. 8. 2. But if an Infant gives or ſells Goods, and the *Vendee or Donee takes them by Force of the Gift or Sale*, the Infant may have an Action of *Treſpaſs* againſt him.

(F) What ſhall *bind* him.

1. IF an Infant Adminiſtrator, being above 17 Years of Age, by the Aſſent of his Friends, ſells a Leaſe for Years that he hath for Lands as Adminiſtrator, to the Intent with the Money to pay the Debts of the Teſtator, and diſcharge the Debts of the Infant himſelf, which were for his Apparel and Diet, this ſhall bind the Infant. Mich. 14 Ja. in Camera Stellata, reſolved by Hobart and Canfield, and decreed by the Court between two *Snows* Plaintiffs, and *Barraden* and *Watkins* Defendants; But it would have been otherwiſe, as they agreed, if the Infant had been under 17 Years of Age, for before this Age he cannot adminiſter by the Civil Law.

2. If

Cro. C. 490. pl. 15, Kniveton v. Latham, S. C. adjudged. — Jo. 400. pl 8. Kniveton v. Katham, S. C. adjudged Nisi by three Justices, but Crooke e contra.

2. If A. be bound to B. in 100 l. for Payment of 52 l. at the End of one half Year after, and after B. dies, making three Executors, and after the Obligation is forfeited one of the Executors comes to the Age of 18, and then accepts the 52 l. in full Satisfaction of the said Obligation, and makes a Releaſe of the ſaid Obligation, yet this does not diſcharge the Obligation, becauſe the Releaſe is made by an Infant, and by the Forfeiture the 100 l. was a Debt of the Teſtator and the 52 l. cannot be a Satisfaction of the 100 l. and in Equity there may be a good Cauſe to take the Forfeiture, and in an Action of Debt againſt an Executor he may plead a Judgment upon an Obligation forfeited in Bar, ultra quæ he has not Aſſets, which ſhews that the Sum forfeited is the Debt, and an Infant Executor cannot releaſe the Debt of the Teſtator without a Satisfaction. Mich. 13 Car. B. R. between *Knyveton and Statham* adjudged upon a Demurrer, Intratur Trin. 13 Car. Rot. 962. but this was againſt the Opinion of Croke.

Jo. 389. pl. 10. S. C. adjudged and Judgment affirmed. — Win. 103, 104 Cooper v. Edgar, S C. and Ibid. 115. to near the End of 120.

3. If an Infant covenants by Indenture to levy a Fine, and that it ſhall be to certain Uſes, and after he levies the Fine, and dies within Age, the Limitation of the Uſes ſhall bind the Heir of the Infant, as well as the Infant himſelf, ſo long as the Fine continues not reverſed. Trin. 13 Car. B. R. between *Spring and Sir Julius Cæſar*, Maſter of the Rolls and others, in a Writ of Error upon a Judgment in Banco in a Quare Impedit, adjudged per Curiam without Queſtion as to this. Intratur, Mich. 11 Car.

S. C. debated by ſeveral Serjeants in C B.

Fol. 731.

(G) What *judicial Acts* done *by an Infant* ſhall bind him.

See Tit. Recovery Common (D) per totem.

1. If an Infant by his Guardians ſuffers a Common Recovery, he being Tenant to the Præcipe, this ſhall bind him, ſo that he ſhall not avoid it in a Writ of Error, for by Intendment he ſhall have Recompence in Value; and if this be not for the good of the Infant, he may have his Recompence over againſt his Guardians. Paſch. 9 Car. B. R. between the Earl of *Newport and* D. of *Buckingham*, adjudged in a Writ of Error to reverſe ſuch a Common Recovery ſuffered in Banco, and then ſeveral Precedents were cited of ſuch Common Recoveries ſuffered by Infants, and then ſaid, that much Land depending upon ſuch Recoveries, and all the ſaid Precedents are in nature of Judgments.

Sty. 246. Ailet v. Watleſs, S C. adjudg'd accordingly for the Defendant niſi. — A Common Recovery was ſuffered, in which a Feme Covert was vouchee,

2. [But] if an Infant ſuffers a Common Recovery, in which he comes in as Vouchee in proper Perſon, and not by Guardian or Attorney, this is erroneous, and may be reverſed for this Cauſe in a Writ of Error, for this is more ſtrongly Error than if he had been by Attorney, inaſmuch as he cannot have any Remedy againſt any if he be deceived. Hill. 1650 between *Aylet and Walker* per Curiam reſolved, that this ſhall not bind the Infant, and that he may reverſe it for this Cauſe in a Writ of Error; but it was adjudged that he could not avoid it himſelf by Entry without a Writ of Error. Intratur Trin. 1649. Rot. 200. upon a ſpecial Verdict in Eſſex.

and under Age, and appeared by Attorney, and the ſame was reverſed in a Writ of Error Niſi Cau at the End of the Term. 5 Mod. 209, 210. Paſch. 8 W. 3. Stokes v. Oliver.

3.

3. It was ſaid for Law, that if *Poſſeſſion* be *in an Infant Plaintiff in Aſſiſe*, the Aſſiſe ſhall be awarded, becauſe he cannot know nor chuſe his Poſſeſſion and Title &c. Br. Coverture, pl. 29. cites 24 E. 3. 24.

4. *But* if *Recovery* be *pleaded againſt him without Poſſeſſion*, this is alſo as ſtrong as againſt a Man of full Age. Ibid.

5. *So* of a *Fine if he ſhews Part* of the Fine. Ibid.

6. Note per Finch in Præcipe quod reddat, that if an *Infant* be *non-ſuited in Writ of Right*, yet he *may have Writ of Poſſeſſion after*, by reaſon of his Infancy. Br. Droit de Recto, pl 2. cites 41 E. 3. 12.

7. If an Infant *be barred in Aſſiſe upon Verdict at large*, *becauſe they did not find a Divorce* which was not given in Evidence, yet the Infant ſhall be bound by it; For *Matter of Record* ſhall bind an Infant who has appeared to it, the Record being in Force, as ſtrong as it ſhall bind a Man of full Age. Br. Coverture, pl. 15. cites 7 H. 4. 23.

8. In *Scire Facias ad Cognoſcend' Fact'. After a Judgment of Debt upon a Releaſe thereof*, it was agreed that none ſhall be bound by a Recognizance, as Mainpernor thereof, if he be within Age; For if he was bound he has no Remedy. Br. Age, pl. 20. cites 8 H. 6. 30.

9. If an *Infant does Treſpaſs*, *and puts himſelf in Arbitrement* &c. who give their Award that &c. this ſhall bind the Infant, for this is for his Advantage to excuſe him of the Treſpaſs of which the Law charges him; Per Strange. Brook ſays Quære inde; For it may be that the Award is of greater Recompence than the Law will give in the Action. Br. Coverture, pl. 62. cites 10 H. 6. 14.

10. *And* per Newton, if an Infant *be Receiver*, *and enters into Account before Auditors*, he ſhall be charged in Debt upon Account, Per Newton, which Brooke ſays he believes is Law; For it does not appear of Record now if he was within Age or not, and it ſeems that he cannot have for Plea in Debt upon Account, that he was within Age at the Time of the Account; For it is a Judgment paſſed before againſt him; Quære. Br. Coverture, pl. 62. cites 10 H. 6. 14.

11. To avoid *Recognizances* or *Statutes* entered into by an Infant, he muſt bring his *Audita Querela* during his Infancy, for there is no Remedy after; Arg. 2 And. 158. in pl. 87. Paſch. 42 Eliz. But he may avoid a *Bond* after full Age, by pleading Infancy at the Time. Ibid.

12. In Writ of Right, an Infant may *join the Miſe aad try it by Battel*, for he may perform it by Champion, and not in proper Perſon; *But in Appeal* he ſhall not join Battel; For this ſhall be done in proper Perſon. Br. Droit de Recto, pl. 15. cites 9 E. 4. 36.

13. An Infant is not bound by *Failure of Record pleaded in Aſſiſe* to be Diſſeiſor as another Man is, and yet the Statute is general, but it ought to have a reaſonable Conſtruction; Per Hawes, quod non negatur. Br. Coverture, pl. 44. cites 4 H. 7. 11.

14. The Juſtices ſeemed to incline that if *Judgment by default of a Real Action* of Land, be given againſt an Infant, that it ſhall bind him. But no Rule was given in the Caſe. Godb. 80. pl. 94. Mich. 28 & 29 Eliz. Anon.

15. S. Tenant in Tail covenanted in Conſideration of the Marriage of his Eldeſt Son, to ſtand ſeiſed to the Uſe of himſelf for Life, and after to the Uſe of his Eldeſt Son for Life, and after to the Uſe of the firſt Son of his eldeſt Son which ſhould be in Tail; and afterwards his Eldeſt Son had Iſſue G. S. his Eldeſt. The Grandfather would ſell Part of the Land, and aſſure more in Recompence to the Son, and the Purchaſors would not take any Aſſurance unleſs the Infant who was but four Years old would ſuffer a Recovery, and to ſatisfy the Purchaſors it was prayed that a *Guardian* might be *allowed the Infant*, and *that a Recovery might be had againſt him as Vouchee*, which the Court agreed unto, and admitted two Gentlemen there preſent to be Guardians for him, (the Infant being brought into Court,) and *he by his Guardians*

appeared and vouched the common Vouchee; and the Recovery had accordingly. Cro. E. 471. pl. 24. Hill. 38 Eliz. B. R. Stapleton's Caſe.

16. Infant *confeſſed a Judgment*, and an Action of *Debt in B. R.* was brought againſt him, and now he brought Audita Querela during his Nonage. Popham Ch. J. was clear that *Audita Querela* does not lie upon Action of Debt in this Court, as it would lie upon a *Recognizance* or *Statute* acknowledged, but that the Party *ſhall have Error*, but not in B. R. but *in the Exchequer Chamber* by the Statute of 27 Eliz. Mo. 460. pl. 642. Mich. 38 & 39 Eliz. B. R. Randal's Caſe.

17. Judgment *in Dower by Default* againſt Infant Tenant ſhall bind. D. 104. a. pl. 10. 104. b. pl. 13. in Marg. cites Mich. 2 Jac. B. R. Smith's Caſe.

18. An Infant *Tenant in Tail ſuffer'd a Recovery by his Guardian*; The Court held, that the ſame ſhould bind him, becauſe he might have *Remedy over againſt the Guardian by Action upon the Caſe*; But *otherwiſe* if he ſuffer a Recovery *by Attorney*, for that is void, becauſe he has no any Remedy over againſt him, as it was adjudged 4 Jac. in Caſe of Holland v. Lee. Godb. 161. pl. 225. Mich. 7 Jac. C. B. Zouch v. Michil.

19. An *Infant, who wanted only nine Weeks to be of full Age, acknowledged a Fine before Commiſſioners*, who by the Inſpection could not tell whether he was of Age or not; the Fine was reverſed. 2 Bulſt. 32. Hill. 12 Jac. Requiſh v. Requiſh.

20. *In an Aſſiſe* the *Defendant pleaded in Bar a Recovery againſt the Plaintiff in a former Aſſiſe*; The *Demandant ſaid he was an Infant, and that he was not Tertenant at the Time* of the ſaid Recovery, *but that J. S. was Tenant, and the Recovery was a Recovery by Default*; Reſolved 1ſt. That a Recovery is not ſo ſacred a Thing but that it might be falſified; 2dly, That becauſe in this Caſe, the *Infant cannot have Error or attaint, therefore he ſhall falſify*; and the rather in this Caſe becauſe *here is a Title and Judgment pleaded againſt an Infant where his Title is not diſcovered.* Cro. J. 464. pl. 13. Hill. 15 Jac. B. R. Holford v. Platt.

21. An Infant Widow *brought* Writ of *Error to reverſe a Fine levied by her of her Lands whilſt ſhe was Covert Baron*, and it was moved that a Guardian be aſſigned her to proſecute for her, and that ſhe might be inſpected by the Court, and the Inſpection be recorded; and an Affidavit was made by one in Court, that he knew the Infant there preſent and the Time of her Birth and baptizing, and ſwore the Times preciſely; the Church-Book was alſo produced in Court, and proved by Oath wherein the Time of her baptizing was entred, and that ſhe was the ſame Perſon; upon which ſhe had by her own Election Attwood an Attorney of this Court aſſigned for her Guardian, and the Affidavits were ordered by the Court to be recorded, and the Inſpection to be entred, and a Scire Facias awarded againſt the Heir. Sty. 457. Trin. 1655. Sherlock's Caſe.

22. Error to reverſe a *Fine* for Infancy; now it was moved, That the *Party being in Court* ſhe *might be inſpected and the Inſpection recorded*, and there was produced and read a Copy of the Regiſter-Book ſworn to be a true one, and ſeveral Affidavits of her Age. Curia. Let the Inſpection be now recorded; The *Iſſue of her Infancy may be tried at any Time hereafter, though ſhe comes of Age.* Vent. 69. Paſch. 22 Car. 2. B. R. Couſin's Caſe.

2 Vent. 30. Perrot's Caſe. S. C. the *Wife at the Time of levying the*

25. P. married J. B. an Heireſs, and afterwards Sir H. P. (Father of P.) and an ignorant Carpenter took the Conuſance of a *Fine* of the ſaid J. being under Age, and by Indenture the Uſe was limited to J. and his Wife for their two Lives, the Remainder to the Heirs of the Survivor; about two Years after the *Wife died without Iſſue*; and B.

Heir to her prayed the Relief of the Court. Upon Examination it appeared that Sir H. P. did *examine the Woman whether ſhe were willing to levy the Fine? and asked the Husband and her Whether ſhe were of Age or not? both anſwered that ſhe was.* She afterwards being privately examined touching her Conſent, anſwered as before, and that ſhe had no Conſtraint upon her by her Husband, but ſhe was not there queſtioned concerning her Age. All agreed, that there was no Way to ſet the Fine aſide. Mod. 246, 247. pl. 6. Paſch. 29 Car. 2. C. B. Barrow v. Parrot.

Fine was 20 Years old, ſo that the Nonage could not be diſcerned on the View. All the Judges agreed they could not meddle with the Fine; but if the Wife had been alive and ſtill under Age, they might bring her in by Habeas Corpus and inſpect her, and ſet aſide the Fine upon a Motion; for perhaps the Husband would not ſuffer the Bringing or Proceeding in a Writ of Error.

26. An Infant *was Bail and taken in Execution*, whereupon he brought Audita Querela, and Witneſſes ſwore to his Infancy. But per Cur. it is a Matter of Diſcretion either to admit him to Bail, or refuſe it. He being in Execution; But had the Audita Querela been brought before, he muſt have had a Superſedeas of courſe, ſo he was not bail'd then; But afterwards in Michaelmas Term *upon producing a Copy of the Regiſter of his Age* out of Yorkſhire, *and examining the Witneſſes* again *he was diſcharged* by the Court. Carth. 278. Trin. 5 W. & M. in B. R. Loyd v. Eagle.

27. A. *deviſes Lands to Truſtees until Debts paid, and then to an Infant and his Heirs. Defendant enters and levies a Fine, and five Years paſs.* Infant when of Age brought an Ejectment, but was barred becauſe the Truſtees ſhould have entred; Equity will relieve and not ſuffer an Infant to be barred by *Laches of the Truſtees*; nor to be barred of a Truſt Eſtate during his Infancy. The Infant in this Caſe ſhall recover the mean Profits. 2 Vern. 368. pl. 331. Mich. 1699. Allen v. Sayer.

28. The *Father Tenant for Life*, Remainder *to the Son in Tail* with *Remainder over.* The *Son is an Infant*, and *on an advantageous Propoſal for the Son's Marriage, the Father and Infant Son join in Marriage-Articles*, and the *Father only covenants, that within a Year after the Son's coming to Age the Father and Son will join in a Fine and Recovery* of the Family Eſtate *to divers Uſes.* The *Infant Son ſeals the Deed*, and *within a Year after he comes to Age, joins with his Father in a Fine and Recovery*; the Infant Son's ſealing of theſe Articles is not ſufficient to declare the Uſes of the Fine and Recovery. 3 Wms's Rep. 206. pl. 51. Mich. 1733. Nightingale v. Ferrers.

(G. 2) Bound by what Contract.

1. WHERE an Infant was charged for *Apparel* ſome of which was *beyond his Rank, and ſome not*, and the Plaintiff in his Declaration confeſſed that the *Infant had paid Part*, but it did not appear for what Part, whether for the Neceſſary or Unneceſſary; Per Gawdy J. it ſhall be *intended* for the neceſſary Apparel. Goldsb. 168. pl. 99. Hill. 43 Eliz. Mackerel v. Batchelor.

Cro. E. 583. pl. 11. S. C. the Court held that he having acknowledged Satisfaction for 4l. for Part &c. and they did not know for which Part, therefore they could not have Judgment for any Part; But otherwiſe he ſhould have Judgment for thoſe Contracts which were allow'd of. —— A *Taylor ſues* an Infant for the making Apparel *not convenient for the Quality of the Infant.* He need not aver that convenient, becauſe he does not provide the Materials, but only the Making and Neceſſaries thereto, as Lining &c. See Lat. 157. Trin. 2 Car. Delaval v. Clare. —— It will come Time enough in the Replication. Jo. 146. Vere v. Delavall. —— Noy. 85. S. C. adjudg'd for the Plaintiff.

2. An

2. An Action was brought againſt an Infant who attended the Earl of Eſſex in his Chamber, and it was for 40 l. for a *Sattin Doublet and Hoſe, with Silver and Gold Lace*, and a *Velvet Coat and Hoſe* to his own Uſe; he pleaded Infancy, and though he was ſued by the Addition of *Gentleman*, yet the Court held that theſe were not proper Cloaths for a Gentleman, but above his Degree, and ſo the Action would not lie againſt him for thoſe Things, as not agreeable to his Rank, but for a Fuſtian Doublet and Cloth Hoſe it lay, being Neceſſaries. Goldsb. 168. pl. 99. Hill. 43 Eliz. Mackerell v. Batchelour.

3. Infant buys a Horſe and *pays* Part of *the Conſideration Money with his own* hand, this is not void but voidable only, (being delivered by his own Hands) and to be recovered again by an Action of *Account*. Hob. 69. 77. Auſtin v. Jervas.

Lat. 157. cites S. C. & S. P. adjudged maintainable.

4. A Brewer brought an Action againſt an Infant for *Beer* ſold to the Infant, and held maintainable. Noy 85. in Caſe of Delaval v. Clare, cites M. 17. Jac. B. R. Rot. 1574. Blackſtones Caſe.

5. If Infant has Houſes it is Neceſſary to repair them, and yet *Contract for Repairs* will not bind him, for no Contract binds but what concerns his Perſon; Per Haughton J. 2 Roll Rep. 271. Mich. 20 Jac. B. R. Turell's Caſe.

6. Single Bill given by Infant *for Neceſſaries* is good, but Obligation with Penalty is not. 1 Lev. 86. Mich. 14 Car. 2. B. R. Ruſſel v. Lee.

In this Caſe was cited and admitted Per Cur. as a Caſe in Point Cart. 215. Trin. 22 Car. 2. C. B. Rainsford v. Fenwick.

7. Caſe by a Farrier for *Medicines apply'd to Defendant's Horſes*, for which Defendant promiſed to pay. Defendant pleads that at the Time of the ſuppoſed Promiſe he was an Infant under the Age of 21. Plaintiff replied, that the Medecines were neceſſary for the Defendant's Horſes. Defendant demurred, and had Judgment; For tho' the Phyſick might be neceſſary for the Horſes, yet the Horſes were not neceſſary for Defendant, and as an Infant's Contract is *binding for Things neceſſary only for his Perſon*, ſuch Neceſſity ſhould have been put in Iſſue that the Court might have judged of it. M. 12 Geo. 2. B. R. Clowes v. Brooks.

8. In an Action upo a Quantum Meruit for *Diet, Lodging, and Apparel*, the Evidence was, that the Defendant being an Infant was ſent with a Ruſſia Merchant beyond Sea by his Mother, who did agree to pay him ſo much for Diet, Waſhing, and Apparel, and the Merchant in Ruſſia committed the Care of the Infant to the Plaintiff, and promiſed to pay him for his Diet, Lodging, and Apparel; And Roll directed the Jury, that if an Infant *comes to a Stranger and boards with him*, there is a *Contract in Law* implied that he ſhould pay for his Board, as much as it is worth, but if another undertakes to pay for his Boarding, this Expreſs Agreement takes away the implied Contract, and the Verdict was accordingly found for Defendant. All. 94. Mich. 24 Car. B. R. Duncombe v. Turkridge.

If an Infant ſhould promiſe to give an *unreaſonable Price* for Neceſſaries, it would not be good to bind him; Arg. 10 Mod 85. Paſch 11 Ann. B. R. in Caſe of Mitchel v. Reynolds.

9 Aſſumpſit was brought for *Labour and Medicines in curing the Defendant of a Diſtemper &c.* who pleaded Infancy; The Plaintiff reply'd, it was for *Neceſſaries generally*; Adjudged upon Demurrer that the Replication in this general Form without ſhewing how, or in what Manner, was good. Carth. 110. Hill. 2 W. & M. in B. R. Huggins v. Wiſeman.

For here the Infant is a Trader, and the Bill of Exchange was *drawn in Courſe of Trade, and not for any Neceſſaries.* Ibid.

10. Infancy is a good Plea in Bar againſt a *Bill of Exchange*. Carth. 160. Mich. 2 W. & M. in B. R. Williams v. Harriſon.

11. Infant

11. Infant keeps a *common Inn*, yet an Action on the Caſe on the Cuſtom of Inns will not lie againſt him; Cited per Holt Ch. J. Carth. 101. Mich. 2 W. & M. in B. R. in Caſe of Williams v. Harriſon. Roll 2. pl. 3.

12. No Difference between *Money lent* to an Infant, *and he buys Neceſſaries*, or if a Stranger buys them for him; for in both Caſes it will come in Iſſue whether the Goods were convenient for his Degree and Quality; But becauſe the Plaintiff had laid the *Venue* where the Money was lent, and not where the Neceſſaries were bought, Judgment was given againſt him. Cumb. 482. Trin. 10 W. 3. B. R. Ellis v. Ellis. 5 Mod. 368. S. C. but reported there as not good for the Money lent, but only for what Money Plaintiff laid out for Ne-

ceſſaries for the Infant, who (it ſays) was dead, and this laſt is according to 1 Salk. 279 Barbey v. Boucher. 5 W. & M in C. B. that of Ellis v. Ellis was Trin. 10 W. 3 B. R.—Hill 10 Ann. B. R. * a Judgment in C. B. agreeing with that of Ellis v Ellis as reported by Cumb 482. was reverſed, for that the lender muſt lay the Money out for the Infant, or ſee it laid out, and then it is his laying out. 1 Salk. 386. Earle v. Peale.——12 Mod. 197. S. C. and becauſe the Employment of the Money for Neceſſaries was *traverſable*, and no Venue laid, Judgment was given for the Defendant for that Omiſſion.——* 10 Mod. 66. S. C. and Per Cur. the Goodneſs or Badneſs of a Contract is not to depend on a *ſubſequent Contingency*.——But tho' the Law be, that if one actually lends Money to an Infant to pay for Neceſſaries, yet as the Infant in ſuch Caſe *may waſte and miſapply it*, he is therefore not liable, as in 1 Salk. 279. It is yet otherwiſe *in Equity*; For if one lends Money to an Infant *to pay a Debt for Neceſſaries, and thereupon he actually does pay the Debt*, he his liable in Equity, tho' not at Law; For in this Caſe the *Lender ſtands in the Place of the Perſon paid*, (Viz.) the Creditor for Neceſſaries, and ſhall recover in Equity as the other ſhould have done at Law; Per the Maſter of the Rolls. Wms. Rep. 559. Trin. 1719. Marlow v. Pitfield.

13. No *Contract* binds an Infant but what concerns his Perſon. 2 Roll Rep. 271. Mich. 24 Jac. B. R. Tirrils Caſe. As for Diet, Apparel, or neceſſary

Learning, but Covenant to *bind himſelf Apprentice* does not unleſs by ſpecial Cuſtom. Cro J. 494. pl. 15 Trin. 16 Jac. B. R. Whittingham v. Hill.——Such *Apparel* muſt be convenient only. 2 Roll. 144. Green v. Cheſter.——*But* he may be charged for a *Tort*, as in Trover, tho' not on Contract, nor as *Bailiff*, or for Goods to carry on a *Trade*, and therefore when Infants are *Factors* their Friends ſhould give Security for their accounting. Abr. Equ. Caſes 6. pl. 3. Trin. 1700. Smalley v. Smalley.

14. Infant made a *Contract with Conſent of Friends*, that Intereſt Money ſhould become Principal, (it being a matter of Extremity) and it was decreed good. 9 Mod. 103. Mich. 11 Geo. cited per Ld. C. as Lady Betty Cromwells Caſe.

(G. 3) Bound by Forfeiture.

1. IF an *Eſtate upon Condition deſcends* to an Infant, *who does not perform the Condition*, he ſhall loſe the Land, notwithſtanding the Nonage. Br. Coverture pl. 71. cites 31. Aſſ. 17.

(G. 4) Bound by what Agreement of him and his Guardian.

1. BILL to have a ſpecifick Performance of an Agreement &c. upon this Caſe; *Mr. Fuller during his Minority by himſelf and Guardian enters into Articles with the Defendant to let him a Farm at a certain Rent* &c. The *Defendant enters* upon the Farm, and continues

the Poſſeſſion, *and pays the Rent after Mr. Fuller came of full Age.* After that *Mr. Fuller conveys the Inheritance to the Plaintiff*, and then the *Defendant quits the Farm, inſiſting that he was only Tenant at Will*, and refuſes to accept a Leaſe, or execute a Counter-part, *becauſe Mr. Fuller being an Infant at the Time of making the Agreement was not bound by it, and therefore the Defendant ought not to be bound* by it. It was inſiſted, that the Defendant was bound by the Articles tho' Mr. Fuller had his Election at his full Age to perform or not perform the Articles; For tho' in ſuch Caſes the Infant has his Election at his full Age, the other Party has not his Election, but is bound by ſuch Agreement with an Infant. It was inſiſted by the Defendant, that this Bill is brought by a Purchaſor of the Inheritance, and this Covenant does not run with the Land, nor is tranſferr'd by the Statute H. 8. But Harcourt C. decreed that the Plaintiff ſhould execute a Leaſe to the Defendant, and the Defendant execute a Counter-part of ſuch Leaſe to the Plaintiff in Purſuance of the Articles, and the Defendant to pay Coſts. MS. Rep. Trin. 13 Ann. in Canc. Clayton v. Aſhdown.

2. If a *Infant ſeiſed in Fee, upon a Marriage* with the Conſent of her Guardians, ſhould *covenant, in Conſideration of a Settlement, to convey her Inheritance to her Husband*; Ld. C. Parker ſaid, that Equity would execute the Agreement if the Conſideration was a competent Settlement. 2 Wm's Rep. 244. Mich. 1724 in Caſe of Cannel v. Buckle.

See tit. Age. per totum.

(H) What *Judicial Privileges* an Infant ſhall have.

Br. Aſſize, pl. 298. cites S. C. —— Br Reſceit, pl. 126 cites S. C. but Brooke makes a Quære if this Receipt be Ratione Ætatis.

1. IN an Aſſize againſt two, of which one is an Infant, if they make Default, by which the Aſſize is awarded, and after the Aſſize remains for Default of Jurors, yet the Infant ſhall be received to plead afterwards. 29 Aſſ. 36.

Br. Error, pl. 128. cites S. C.

2. In an Aſſize by an Infant, if the Tail pleads an ill Bar, and the Infant replies, by which he makes the Bar good, if the Plaintiff had been of full Age, yet this ſhall not make the Bar good againſt the Infant, but if the Judgment be for the Tenant thereupon, this is Error, for the Court ought to plead for the Tenderneſs of his Age. 37 Aſſ. 5. adjudged.

3. If an Infant be *nonſuited in Writ of Right*, yet after he may have Writ De Poſſeſſ'; and if he prays to be received, and ſhews Cauſe, he may after change the Cauſe. Br. Coverture, pl. 6. cites 41 E. 3. 13. per Finch.

4. If an Infant makes *Default in Præcipe quod reddat*, by which Grand Cape is awarded, he has not loſt the Land by his Default by Reaſon of his Infancy, quod nota. Br. Coverture, pl. 4. cites 3 H. 6. 10.

5. If an Infsnt be *impleaded by any Præcipe* of his Lands, and loſes by defending, he ſhall have a *Writ of Error*, and becauſe he was within Age at the Time of the Judgment it ſhall be reverſed and the Infant ſhall be reſtored to all that he loſt. Hetl. 65. Mich. 3 Car. C. B. Wilkins v. Thomas.

(H. 2) Action.

(H. 2) Actions. Liable to Actions or Suits in what Caſes for Torts &c.

1. *Account* does not lie againſt an Infant *of Receipt during his Non-age.* Br. Coverture, pl 20. cites 21 E. 3. 7. 8. Co. Litt. 72. a. S. P.

2. *Agreement of an Infant* to a Tort does not make him a Tort-feaſor, by the beſt Opinion. Br. Aſſize, pl. 46. cites 3 H 4. 16.

3. Infant ſhall not be ſworn within Age, nor ſhall he be charged by *Bailment*; Contra upon *Trover*, as Executor. Br. Coverture, pl. 63. cites 11 H 6. 40.

4. If *Leaſe for Years* be made *to an Infant*, and he *manures the Land*, Debt lies of the Rent; for he has Quid pro quo. Br. Coverture, pl. 25. cites 21 H. 6. 31.

5. If an *Infant* of ſo tender Age that the Juſtices think he cannot conceive Malice, be indicted and *found guilty of Felony*, the Juſtices may diſmiſs him; Per Moil and Billing, quod nemo negavit. And Wangf. who was of the Councel againſt the Infant of four Years in Treſpaſs of putting out the Eyes of a Man conceſſit, becauſe in Felony a Man cannot juſtify, but plead Not Guilty. Br. Corone, pl. 6. cites 35 H. 6. 12.

6. If a Man *leaſes to an Infant of ſeven or eight Years*, and *a Stranger does Waſt*, the Infant ſhall not be thereof charged; contra *of his own Waſt*, and contra of a Man of full Age in the firſt Caſe. Br. Coverture, pl. 68. cites Doct. & Stud. 67.

7. *And* an Infant ſhall be bound by his *Ceſſer in Ceſſavit*. Ibid. cites Doct. & Stud. lib. 2. fol. 113.

8. *So* if he be *Warden of a Priſon and ſuffers a Priſoner to eſcape*; for thoſe Statutes do not except Infants. Ibid. 2 Inſt. 382. S. P. and that the Statute of Weſtm. 2. 13 E. 1. cap. 11. extends to ſuch Infant. ——— 8 Rep. 44 b. S. P. per Curiam.

9. An Infant *ſhall anſwer to the Intruſion or to the Purchaſe by him*; So where he is vouched in Writ of *Dower*; and he ſhall anſwer to Appeal if he be of the Age of 12 Years. Br. Coverture, pl. 66. cites F. N. B. Dum fuit infra Ætatem.

10. *Waſt* done by an Infant ſhall bind, and ſo of *Ceſſavit*. 8 Rep. 44. b. Paſch. 25 Eliz.

11. An Infant and Baron and Feme ſhall be puniſhed for *Waſte done by a Stranger*, and ſo ſhall the Wife that has Eſtate by Survivor for the Waſte done by the Husband in his Life-time, if ſhe agree to the State, though there has been Variety of Opinions in other Books. Co. Litt. 54. a.

12. Action *for Words* lies againſt an Infant of 17 Years of Age; For *Malitia ſupplet Ætatem*; Per Cur. Noy 129. Hodſmam v. Griſell.

13. A *Bill* was exhibited in the Star-Chamber on 27 *Eliz.* 4. *of fraudulent Conveyances* againſt ſeveral Perſons, of whom one was an Infant, and it was reſolved that this Infancy ſhall not excuſe him of the Penalty of the Year's Value of the Land, he being of 16 *Years and privy to the Conveyance, and having juſtified that* fraudulent Deed *to be made Bona Fide*, and therefore ſhall be puniſhed as if he were of Age. Noy 105. Poulton v. Wiſeman & al'.

14. *Account*

Noy 87. S. C. accordingly, and cites the Case of Stirrel v. Holliday. —2 Roll Rep. 271. Tirrel's Case, S. C. held accordingly. —— Action lies not against an Infant upon an Insimul Computaverunt for Diet, because Infant may misreckon in the Account. Palm. 528. Pasch. 4 Car. B. R. Pickering v. Gunning. —— Jo. 182. pl. 4. S C. but S. P. does not appear.

14. *Account* lies not against an Infant, because the Infant may be mistaken, and in such Action Evidence shall not be upon the Value of the Things, but upon the Account only. Lat. 169. in Case of Wood v. Witherick, says the very same Point was adjudged 19 Jac. B. R. between **Stirrell and Homeday**, and the Reason there was, because the Infant might be mistaken.

15. Action upon the *Case* was brought against an Infant for *affirming a Jewel to be* his own which was not, and the Defendant pleaded Infancy, and the Plaintiff demurred, and adjudged for the Defendant; For be the Jewel his own or not he was not bound; Cited Sid. 258. in Case of Johnson v. Pye, as of Pasch. 16 Car. 2. between Gorve and Nevil.

Lev. 169. S. C. adjornatur. —— Keb. 905. pl 7. S. C. adjornatur. —— Ibid 913. pl. 16. S. C. awarded that the Plaintiff nil capiat per Billam.

16. *Case* lies not against an Infant *for affirming himself to be of Age*, and thereby borrowing Money of the Plaintiff; and a *Diversity* was taken between *Torts* and *Contracts* of Infants, for though Infants shall not be bound by Contracts, yet they shall be bound for Torts cites D. 105. But per Cur. though Infants should be bound by *actual Torts*, as Trespass &c. which are *Vi & contra Pacem*, yet they shall not be bound by *those which sound in Deceit*. Sid. 258. Trin. 17 Car. 2. B. R. Johnson v. Pye.

17. If an Infant *judicially perjures himself in Point of Age*, or otherwise, he shall be punished for the Perjury; Agreed. Sid. 258. pl. 3. Trin. 17 Car. 2. B. R. in the Case of Johnson v. Pye.

18. But not for barely affirming himself to be of Age in order to borrow Money on a Mortgage; For such *Torts* that must punish an Infant *must be Vi & Armis, or notoriously against the Publick*, but not where the Plaintiff's own Credulity has betrayed him; Per Keeling. And by Windham, the Commands of an Infant are void, and for such he shall never be attainted a Disseisor, much less shall be punished for a bare Affirmation, which Twisden agreed, and that there must be a Fact joined to it, as *cheating with false Dice* &c. Also by this Means all the Pleas of Infancy would be taken away, for such Affirmations are in every Contract. Windham said, that had any other Person affirmed the Infant of Age, an Action would lie, (and cited the Case of **Grove v. Nevil**, where the Defendant pleaded Infancy, to which the Plaintiff demurred in an Action upon the Case, *for falsely affirming a Jewel to be his own which was another Man's.)* The Court awarded, on the Plaintiff's Prayer, a Nil capiat per Billam. Keb. 914. pl. 16. Trin. 17 Car. 2. B. R. in Case of Johnson v. Pie.

19. Infant may be charged for *Trover* because it is *a Tort*, but *not on Contract*, nor as *Bailiff*, or for Goods to carry on a *Trade*, and therefore when Infants are *Factors*, their Friends shall give Security for their accounting. Abr. Equ Cases 6. Trin. 1700. Smally v. Smally.

(H 3) What Real Actions he may have.

1. INFANT may have *Writ of Right and join the Miſe* if he be Purchaſor. Br. Coverture, pl. 66. cites F. N. B. Dum fuit infra Ætatem.

2. Infant may have *Formedon* within Age, but *if Deed of Warranty of his Anceſtor, whoſe Heir* &c. be pleaded, the Parol ſhall demur Ibid.

(H. 4) What Action an Infant may have on his own Contract.

1. IF an Infant *makes* me *Bailiff of his Manor*, Treſpaſs does not lie againſt me, for he ſhall have Writ of Account; For it is for his Benefit. Br. Coverture, pl. 25. cites 21 H. 6. 31. per Aſcue J.

2. If an Infant makes a Contract for an Horſe, and *pays Part of the Money himſelf*, it is not a void Conſideration, for being delivered with his own Hands it is but voidable, to be recovered again by an Action of Account; Per Herbert Ch. J. Hob. 77. Auſten v. Gervas.

3. An Infant by his Guardian brought *Aſſumpſit*, and after Verdict for him it was *moved* in Arreſt of Judgment, becauſe *the Conſideration of the Promiſe being made by the Infant to pay a Sum of Money was void.* But per Cur. the Action well lies, for it is only in the *Election of the Infant* to make his Promiſe void, and not of the other Party. Sid. 41. Paſch. 13 Car. 2. Forreſter's Caſe. This was on a Promiſe to the Infant, that on Payment of ſo much Money by the Infant the Defendant would make an Aſſurance, and Judgment for the Plaintiff. Keb. 1. pl. 1. Gable v. Foſter, S. C.

4. An Infant brought an *Aſſumpſit by his Guardian*, and *declared, that where the Defendant entered into his Cloſe, and cut his Graſs, that in Conſideration he would permit him to make it into Hay, and carry it away, he promiſed to give him* 6 *l.* for it. Upon this Declaration the Defendant demurred, ſuppoſing it to be no Conſideration, becauſe it was *not recipreal*; For the Infant, was not bound by his Permiſſion, but might ſue him notwithſtanding; But the Court gave Judgment for the Plaintiff. Vent. 51. Mich. 21 Car. 2. B. R. Smith v. Bowen. Mod. 25. pl. 66. S. C. adjudged Niſi &c. —— 2 Keb. 581. pl 114. S. C. adjudged —— If an Infant makes a Leaſe for Years, rendering Rent, it is not in the Election of the Leſſee to avoid this Leaſe for the Infancy of the Leſſor, but the Infant ſhall have an Action for the Rent; And ſo on a Promiſe to an Infant to pay ſo much, in Conſideration he would permit the Defendant to enjoy ſuch a Houſe, it was adjudged a good Conſideration, and an Action for it maintainable by the Infant; though the Infant might avoid his Promiſe if an Action were grounded upon it againſt him. Mod. 25. in S. C. by Twiſden ſaid it had been ſo adjudged. —— S. P. by Twiſden, Sid. 42. in pl. 8.

(H. 5) Actions. When they muſt ſue. Limitations.

1. AN *Aſſumpſit* is made to an Infant, the *Statute of Limitations* is not pleadable if he brings his Action within ſix Years after his full Age, though he was but a Day old when the Promiſe was made. 2 Mod. 71. Paſch. 28 Car. 2. C. B. Croſier v. Tomlinſon.

2. If an Infant *lets ſix Years paſs after he comes of Age*, and then brings a *Bill for an Account againſt the Receiver of the Profits of his Eſtate* during his Infancy; if the Defendant pleads the *Statute of Limitations* it is as much a Bar to ſuch Suit as it would be to an Action of Account at Common Law, and this is not ſuch a Truſt as being a Creature of a Court of Equity the Statute ſhall be no Bar to. Ch. Prec. 518. pl. 320. Trin. 1719. Lockey v. Lockey.

(H. 6) Actions. How they muſt be ſued. By Attorney or Guardian.

Upon this Statute, whether the Infant be *eſloigned or no* he ſhall ſue by Prochein Amy; For the Eſloignment is put in the Act to ſhew what Miſchief may fall out in this Caſe. If the *Surmiſe* that the Plaintiff is within Age be *untrue*, his *Admittance by Prochein Amy is Error*. 2 Inſt. 390.

1. *Weſt.* 2. 15. 13 *E.* 1. ENACTS that *if an Infant be eſloigned, ſo that he cannot ſue perſonally, his next Friend ſhall be admitted to ſue for him.*

2. R. brought Aſſize by Prochein Amy, it is no Plea that the Infant-Mother is alive, for the *Statute intends him to be the Prochein Amy who will firſt ſue for him.* Br. Garden and Prochein Amy, pl. 27. cites Temp. E. 3. It. Not.

3. *But* the Iſſue was ſuffered 27 E. 3. who was Prochein Amy, and there it was agreed that *where Land deſcends of the Part of the Father, and other Land of the Part of the Mother*, that *ſuch Amy* of one Part or the other *who firſt gets the Infant ſhall have the Suit.* Brook makes a Quære if this be not ſuch Amy to whom no Land may deſcend. Br. ibid.

4. *But* the Suit is always *in Name of the Heir* by Prochein Amy, as it is in other Caſes by ſuch a one his Attorney &c. which appears in the Book of Entries. Br. ibid.

5. *And* ſee 34 E. 3. that an *Infant who ſues or anſwers by Prochein Amy ſhall not be ſuffer'd to diſallow* the Suit or Plea pleaded by him, nor the Prochein Amy, though the Infant comes in Perſon, neither may a Feme diſallow the Plea of her Baron. Br. ibid.

6. *Scire Facias upon a Fine*, the Defendant made Default, and one came and informed the Court that the *Plaintiff eſloigned the Infant for Fear of a Recovery by the Defendant*, for the Defendant was *Infant*; wherefore he was admitted to anſwer by Guardian ex aſſenſu querentis. Quære if he may not be admitted by Guardian, without his Aſſent, as well as by Prochein Amy. Br. Garden and Prochein Amy, pl. 4. cites * 40 E. 19.

* This is miſprinted, and ſhould be 40 E. 3. 16. pl. 6. and ſo are the other Editions.

7. Infant

7. Infant brought Aſſiſe by Guardian and well; and ſo it ſeems that an *Infant may ſue as well by Guardian as by Prochein Amy*, for the Statute of Prochein Amy *W.* 2. *cap* 15. *is in the affirmative*, but *where the Suit of the Infant is againſt his own Guardian*, as for Waſt, Mortdanceſtor, Aſſiſe &c. there for Neceſſity it ſhall be by Prochein Amy, and it ſhall be by Prochein Amy by the ſame Statute where the Infant is eſloigned, but *where the Suit is not againſt the Guardian, and alſo the Infant is not eſloigned, there the Suit may be by Guardian.* Br. Garden and Prochein Amy, pl. 26. cites 12 E. 3. and Fitzh. Aſſ. 116.

8. *Aſſiſe by two Coparcenors*, of which the *one was an Infant*, and appeared by Guardian, and it was demanded where he was made Guardian. Per Stone, he ought not to ſhew it, for he may anſwer as Prochein Amy by Statute, and there has been great Debate *where one anſwers as Guardian, and the other as Prochein Amy*, which *Plea ſhall be taken.* Per Fiſh, *his who beſt pleads in Advantage of the Infant.* Br. Garden, pl. 9. cites 28 Aſſ. 22.

9. *Guardian ſhall ſhew Warrant*, but *Prochein Amy not*, quod nota; and yet it ſeems that the Guardian ſhall be admitted by the Court, and Prochein Amy not; *but* by 19 *Aſſ.* 10. the *Guardian ſhall not have Warrant as Attorney ſhall have*, becauſe he is admitted by the Court, and this is the beſt Law. Br. Garrant de Attorney, pl. 47. cites 34 Aſſ. 5.

10. In *Eſtrepement againſt* an Infant, he *appeared by Guardian*, and well, per Cur. notwithſtanding that it be a *perſonal Action* and the Infant in a Manner Treſpaſſor. Br. Garden, pl. 20. cites 3 H. 6. 16.

11. Brook makes a Quære if an Infant may ſue a *perſonal Action by Prochein Amy.* Br. Garden, pl. 20. 3 H. 6. 16.

12. Writ of *Waſt* has been ſued by the Infant of the Prochein Amy *againſt the Father of the Infant Tenant by the Curteſy.* Br. Garden, pl. 3. cites 34 H. 6. 4.

13. *S. brought Action of falſe Impriſonment* againſt P. and becauſe the *Plaintiff was eſloign'd*, G. came as Prochein Amy, and prayed to be admitted for him and counted by Vaviſor, and the Plaintiff was *of the Age of ten Years*, and becauſe G. took upon him to ſay upon his Honeſty, that the Plaintiff was eſloigned, therefore he was *admitted without Oath.* Br. Garden, pl. 14. cites 20 E. 4. 2.

14. *Office may be travers'd* by Prochein Amy of the Infant, where the Tenure is *found in Chivalry* of the King *where it is held of W. N. in Socage.* Br Garden, pl. 13. cites 6 H. 7. 15.

15. Infant may have *Appeal of Murder* of his Anceſtor whoſe Heir he is, and it ſhall be by Guardian and not by Attorney, and the Parol ſhall not demur at this Day. Br. Garden, pl. 1. cites 27 H. 8. 11.

16. An Infant ſhall *ſue by Prochein Amy, but if* he be *Defendant* in any Action he *ſhall make his Defence by Guardian* and not by Prochein Amy. F. N. B. 27. (H) and in the new Notes there (d) cites 40 E. 3. Stat. Weſtm. 2. cap. 15. 27 H. 8. 11. 3 H. 6. 16. 1 H. 5. 6. 29 Aſſ. 67. 27 Aſſ. 53.

In our Books the Names of *Guardian and Prochein Amy are ſometimes taken the one for the other*, becauſe they are oftentimes all one; As the *Guardian in Socage is alſo Prochein Amy*, and now as well the one as the other are allow'd by the Judges to be ſome of the Officers of the Court. 2 Inſt. 261.

Guardian and Prochein Amy are diſtinct, and either may be admitted for the Plaintiff, and the *Prochein Amy* never was till the Statute W. 1. 47. and W. 2. 15. And he *is appointed in Caſe of Neceſſity where an Infant is to ſue* his Guardian or be eſloined, or that the Guardian will not ſue for him. And for theſe Cauſes he might be admitted to ſue by either where he is to demand or to gain; But when he is *to defend a Suit* in an Action Real or Perſonal *it ought always to be by Guardian*, and the Guardian ought to be admitted by the Court, who ought to anſwer his Miſ-pleading if there be Cauſe; and Defendant ought always to appear by Guardian, and not by Prochein Amy. Per three Judges againſt one; and ſo a Judgment in Durham was revers'd. Cro. J. 641. pl. 5. Trin. 20 Jac. B. R. Simpſon v. Jackſon. ——— 2 Roll Rep. 257. S. C. and Judgment was reverſed. ——— Palm. 295. S. C. and Judgment reverſed.—S. C. cited accordingly, and ſays the Precedent are ſo. Hutt.

Hutt 92. in Caſe of Young v. Young. — S. P. by Richardſon. Litt. Rep. 60. — Cro. J. 441, 442. S. P. — Cro. C. 161 pl. 2. Goodwin v. Moore. S. P. Mich. 5 Car. B. R. — Admittance ad proſequend' is good, even where the Infant is Defendant; For it is to proſecute his Plea by which he defends himſelf againſt the Plaintiff. 8 Mod. 25. Hill. 7 Geo. 1. Spiller v. Adams.

17. In *Waſt by Infant againſt his Guardian* one came as Prochein Amy by the Statute Weſtm. 2. and pray'd to be received, for that the Infant was eſloign'd; it was replied, that this appeared not judicially to the Court, and that [though] ſuch Suggeſtion had us'd to be made in Aſſiſe and Mortdanceſtor, becauſe the eſloining might be enquired of, there being a Jury the firſt Day, but that otherwiſe it was in this Caſe of Waſte; But reſolv'd that the Prochein Amy ought to be admitted upon the ſaid Suggeſtion in this Caſe, becauſe the Writ is brought againſt the Guardian, who perhaps had eſloin'd the Infant, and he ſhall not take Advantage of his own Wrong; And the Court awarded the Prochein Amy to be admitted. 2 Inſt. 261.

18. An Infant appeared by *Guardian, and coming to Age continued ſtill by his Guardian*, whereas he ſhould then have been by his Attorney, and Judgment was given for him, and the Judgment was affirmed in Error. Bulſt. 171. Trin. 9 Jac. Anon.

He may appear and proſecute as Plaintiff or Demandant either by Prochein Amy or by Guardian at his Election

19. If Infant be Plaintiff he muſt ſue by *Prochein Amy*, and if Defendant by *Guardian* and not in Perſon, and the Court ought to aſſign the Guardian. Arg. Roll Rep. 304 Hill. 13 Jac. B. R. in Caſe of Holland v. Lee.

Jo. 177. Young v. Young. — Infant may ſue by Guardian, and the Father not being thought proper, he being a Defendant, the eldeſt Six Clerk was appointed. N Ch. R 44 Offley v. Jenny and Baker. — He ſhall ſue by Prochein Amy, though his Prochein Amy cannot anſwer for him as a Guardian ſhall in Caſe of Infants being Defendants. Sty. 369. Paſch. 1653. B. R.

20. One cannot anſwer for an Infant as Guardian either in Chancery or any other Court, except he be *aſſigned Guardian by the Court*; for if he might, that were to make himſelf his Guardian, and that might prove to the Damage of the Infant, therefore if one will ſue an Infant he muſt *move the Court to aſſign a Guardian* that may anſwer for him, but an Infant may ſue by Prochein Amy, though his Prochein Amy cannot anſwer for him. Per Roll Ch. J. Sty. 369. Paſch. 1653. Anon.

2 Lev 38. Baddington v. Freeman. S. C. — Vent. 185. S. C. & S. P. Freeman v. Baddington.

21. *Feme Covert* an Infant is *ſued with her Husband* he cannot make an *Attorney for her* but ſhe muſt appear by Guardian. 2 Keb. 878. pl. 52. Hill. 23 & 24 Car. 2. B. R. Freeman v. Bodington.

22. The Court will admit one to *ſue by Guardian* upon a Motion, though not preſent nor any Affidavit made. Cumb. 256. Paſch. 6 W. & M. in B. R.

23. The Writ and *Suit of an Infant is ſubject only to the Direction of the Prochein Amy*, and not of the Infant. 1 Salk. 176. Paſch. 12 W. 3. B. R. Toler's Caſe.

24. Infant ſuing by Prochein Amy, and *no Entrance of the Admiſſion*, is not Error. Comb. 330. Trin. 7 W. 3. B. R. Read v. Waldron.

It was ſo ſaid Arg. 2 Wms's Rep. 297. in Caſe of Turner v. Turner. Trin. 1725.

25. Where a Suit was by a Prochein Amy *not ſufficient to anſwer Coſts*, the Court ordered another ſhould be named. P. R. C. 296.

26. It

26. It ſhould ſeem that an Infant *may ſue* here either *by himſelf*, *by Prochein Amy*, *or by Guardian*, as the Court pleaſes. P. R. C. 296.

27. And *ſo* it ſhould ſeem he *may defend*. And if he is of Diſcretion, ſhall anſwer upon Oath. P. R. C. 296.

28. Any one may bring a *Bill* as Prochein Amy to an Infant without his Conſent, becauſe it is at his Peril that he brings it. But none can bring a Bill in the Name of a *Feme Covert* as her Prochein Amy without her Conſent, but it will be diſmiſſed on Affidavit. Ch. Prec. 376. Mich. 1713. Andrews v. Cradock. Mich. 10 Ann. G. Equ. R. 36. S. C.

29. *Outlawry*, or *Excommengement* in a Guardian, or Prochein Amy *cannot be pleaded* or alledged *in Diſability*, where an Infant ſues or defends by him; becauſe he Acts in Auter Droit. P. R. C. 296.

30. If a Prochein Amy be *Inſolvent* the Defendant may apply to the Court in order to have a ſolvent one named. It was ſo ſaid by Mr. Talbot Trin. 1725. Arg. in Caſe of Turner v. Turner.

31. An Infant by Prochein Amy brought *Bill to eſtabliſh a Will* of Land pretended to be deviſed to him. The Court directed an Iſſue, which was found againſt the Plaintiff. The *Prochein Amy died before the Coſts taxed*, and the Infant came of Age and never proceeded one Step. The Regiſter and Clerk in Court informed the Court that the Courſe was to *diſmiſs the Bill with Coſts Generally* without ſaying who ſhould pay them. And Ld. C. King ſaid he would diſmiſs the Bill with Coſts, and (as he apprehended) upon a General Diſmiſſion the Defendant had Election to ſue the Infant or Prochein Amy for ſuch Coſts. 2 Wms.'s Rep. 297. Trin. 1725. Turner v. Turner.

(H. 7) Dum fuit Infra Ætatem. Lies in what Caſes.

1. WHERE *an Infant ſeiſed of Land in Fee, and another, who has nothing* in the Land, *jointly make Feoffment* of the ſame Land to another, the *Infant* at his full Age *ſhall have Dum fuit infra Ætatem alone*, without joining with the other or with his Heirs. Thel. Dig. 25. lib. 2. cap. 2. S. 2. cites Mich. 18 E. 2. Brief 831.

2. One Jo. brought Writ of Dum fuit infra Ætatem *of Tenements which he himſelf leaſed Dum* &c. The *Tenant ſaid that the Demandant and Si. his Father leaſed* to him &c. Judgment of the Writ, and held no Plea. Thel. Dig. 170. lib. 11. cap. 34. S. 52. cites Mich. 18 E. 2. Brief 831. and ſays ſee 6 E. 3. 245.

3. If *Baron and Feme within Age alien in Fee*, and the *Baron dies*, the Feme may have Dum fuit infra Ætatem; For it is at her *Election to affirm it to be an Alienation*, and to take upon it or to enter. Br. Coverture, pl. 60. cites 14 E. 3. and Fitzh. Brief 282. S. P. of a Feoffment in Fee reſerving a Rent. Co. Litt. 337. a.

—— *But if ſhe was of full Age*, ſhe ſhall not have a Dum fuit infra Ætatem for the *Nonage of her Husband*, though they be but one Perſon in Law. Co. Litt. 337. a.

4. Dum fuit infra Ætatem in the Per againſt N. *ſuppoſing her Entry by the Demandant within Age*, the Tenant *ſaid that he entered by the Demandant and J. G. and not by the Demandant alone*; *Judgment of the Writ*, and no Plea, but he was compelled to anſwer over by Award; For if he brings Writ of the Moiety, ſuppoſing the Entry as above, ſuch Plea may the Tenant have again, and ſo has not Quantum by which he was compelled to anſwer, whereupon he *pleaded the Alienation of both in Bar, and as to the Moiety of J. G. Judgment of the Writ*,

and *to the other Moiety the Demandant was of full Age at the Time* &c. Priſt. Br. Enter en le Per. pl. 17. cites 21 E. 3. 50.

If two Jointenants, being within Age make a Feoffment, though they may join in a Writ of Right, yet they cannot in a Dum fuit infra Ætatem, for the Nonage of one is not the Nonage of the other. Co. Litt. 337. a.

5. *Two Infants ſeiſed in Fee and purchaſed jointly*, both *aliened within Age*, and *the one died*, the *other brought Dum fuit infra Ætatem without the other by him alone*; the *Tenant ſaid that he entered by the Demandant and by J. G. the other Infant*; *Judgment of the Writ which ſuppoſes the Entry by the one alone*, & non allocatur, but the Writ awarded good. Br. Dum fuit &c. pl. 2. cites 21 E. 3. 50.

6. By which the *Tenant pleaded this Matter in Bar, that the Demandant and J. G. purchaſed jointly and aliened to him in Fee, ſo that for the Moiety of J. G. Judgment ſi Actio, and for the other Moiety, that the Demandant was of full Age at the Time* &c. Priſt &c. For he cannot have other Form of Writ; But yet it appears that this Infant who ſurvived ſhall not recover the Whole; for the Action does not ſurvive to the one of the Whole; For it ſeems if both had been alive they ſhould not have joint *Dum fuit infra Ætatem*, but ſeveral Writs; but of Diſſeiſin if the one dies e contra. Br. Dum fuit &c. pl. 2. cites 21 E. 3. 50.

In Dum fuit infra Ætatem, it was *pleaded that the Demandant and another leaſed to him the Land* &c. Judgment of the Writ, and it was *replied that the Demandant and the other were Jointenants, and that the other is dead* &c. by which Herle held the Writ good. Thel. Dig. 171. lib. 11. cap. 52. S. 11. cites Hill. 6 E. 3. 245 & 296. and ſays ſee 15 & 21 E. 3. Dum fuit infra Ætatem, 1 & 2 agreeing.

7. Where *two Jointenants within Age alien*, and *one dies*, the *Survivor ſhall have* Dum fuit infra Ætatem *of the Whole*. But ſays *Quære*, for it was ſaid there that the Feoffment was *a Severance*, and ſo it is of a Judgment. Thel. Dig. 25. lib. 2. cap. 2. S. 2. cites Mich. 18 E. 2. Briet 831. and ſays ſee Mich. 15 E. 3. and Mich. 21 E. 3. Dum fuit infra Ætatem 1. & 2.

8. Dum fuit infra Ætatem *againſt Baron and Feme in that they had not Entry unleſs by R* &c. the *Feme was receiv'd* by Default of the Baron, *and demanded Judgment of the Writ becauſe ſhe was ſeiſed before the Coverture*, et non allocatur; For it is no Plea unleſs it be for Miſchief of Warranty or ſuch like; by which he *pleaded that R. was of full Age at the Time of the Demiſe* &c. Br. Enter en le Per, pl. 7. cites 45 E. 3. 17.

9. Dum fuit infra Ætatem was brought *of Land and Rent againſt the Alienee of the Father of the Demandant*; and the Writ was *admitted to lie of the Rent*. Br. Dum fuit &c. pl. 1. cites 46 E. 3. 34.

Where two Jointenants one within Age, and the other of full Age, makes a Feoffment, the Infant ſurviving may enter, or ſhall have a Dum fuit infra Ætatem, but for a Moiety. Co. Litt. 337. b.

10. Where *two Jointenants* are, the *one of full Age*, *the other within Age*, and the *Infant aliens the Whole and dies*, his Heir ſhall have Dum fuit infra Ætatem for the Moiety, and the other Jointenant ſhall have Aſſiſe for his Moiety only. Thel. Dig. 25. lib. 2. cap. 2. S. 3. cites Paſch. 9 H. 6. 6. and that ſo it was held Hill. 39 H. 6. 42. per Choke; and ſays ſee Littleton in cap. of Diſcontinuance.

11. If an Infant makes a *Feoffment* he may enter either within Age or at full Age; and if he dies his *Heir* may enter, or have a Dum fuit infra Ætatem &c. Litt. S. 406. and Co. Litt. 247. b. & 248. a.

(H. 8) En Ventre ſa Mere. How conſidered &c.

1. IF Tenant in Tail has Iſſue two Sons, and enfeoffs the youngeſt Son of the Land entailed, and the youngeſt dies ſeiſed of the ſaid Land, his Wife being Enſient and Eldeſt enters into the Land, and then the Iſſue is born. The Iſſue *cannot re-enter becauſe the Eldeſt is remitted*, and in of his Antient Right before the Iſſue any Thing had, for then there was no Perſon capable by Deſcent nor otherwiſe. And. 31. pl. 76. Hill. 1 & 2 P. & M. Anon.

2. *Feoffment on Condition* that if Feoffor or his Heirs pay 10 l. that he may re-enter. He dies, leaving a *Daughter*, who paid the Money and enters, and then a *Son* is born, yet the Daughter ſhall retain the Lands; Per Curiam. Hob. 3. pl. 5. Paſch. 11 Jac. cites 9 H. 7. 25. agreed in Shelley's Caſe.

1 Rep. 95. a. 99. a. —— Mo 140 in pl 281. cites S. C. — S. C. cited Cro C. 87 in pl. 8.

3. A *ſurrender to the Uſe of* an Infant en Ventre ſa Mere is merely Void; But if a Copyholder ſays I ſurrender my Copyhold Eſtate, and if my Child which ſhall be born dies before his Age of 21 Years, that then my Brother ſhall have this, this clearly may be good enough; Per Coke Ch. J. 2 Bulſt. 274. Mich. 12 Jac. in Caſe of Simpſon v. Southern.

He may take by way of Remainder, but not by immediate Surrender; Per Coke Ch. J. Ibid.

275. —— Reſolved that an Infant en Ventre ſa Mere cannot *take an Eſtate in Poſſeſſion by way of Purchaſe*, but he may by way of Remainder. Mo. 637. pl. 877. Hill. 37 Eliz. Church v. Wyatt.

4. The Defendant's Wife being privement enſient at her Husband's Death, the Child could not be *provided for* by Law, but the Court ordered the Child ſhould have *ſufficient Allowance*. Toth. 157. cites 3 Car. Pope v. Moore.

5. A. *mortgaged Lands* upon a *Conditon, that if he or his Heirs repay* 100 *l. at ſuch a Day that he ſhould Re-enter.* He *dyed having Iſſue a Daughter only, his Wife being privement enſeint with a Son, the Daughter* and Heir *at the Day, pays the* 100 *l.* afterwards the Son is born; It was reſolved in this Caſe, that the Siſter ſhould retain the Land for ever againſt the Son born, for in as much as ſhe paid the Money; (and if ſhe had not paid it the Land had been loſt,) if ſhe ſhould not retain the Land againſt the Son, ſhe hath no remedy for the Money, and by the Payment thereof, ſhe hath gained the Land, and is in as a Purchaſer, although ſhe was entituled to it by a Condition, and as Heir. Cro. C. 87. pl. 8. Mich. 3 Car. in the Court of Wards, Kirton's Caſe.

S C cited Cart. 190. that the Siſter ſhall retain the Land.

6. A. conveys a Term on Truſt to raiſe 1500 *l. for ſuch Child as ſhould be living at his Death.* A. dies leaving no Child, his Wife *enſient* with a Daughter, which was afterwards born. Per Somers K. this poſthumous Daughter is a *Child living at A's. Death* within the Meaning of the Truſt. Ch. Prec. 50. pl. 51. Mich. 1692. Hale v. Hale.

7. A Bond being given to pay 900 l. to a Daughter if there be no Son living at Obligor's Death, the Wife was enſeint of a Son at the Obligor's Death. Decreed the Daughter not to have the 900 l. 2 Freem. Rep. 223. pl. 294. Mich. 1698. Gibſon v. Gibſon.

8. Lands on Marriage are limited to himſelf and Wife for Life, and to the firſt &c. Son in Tail Male, Remainder to the Husband in Fee, *provided if Husband and Wife or either of them die without Iſſue Male living at the Time of his or her Death, leaving* only one Daughter unmarried, the Truſtees to ſtand ſeiſed till they have raiſed 1500 l. for

for her, and if more Daughters unmarried at the Death of A. and his Wife, or either of them, and no Iſſue Male living begotten between them, then 3000l. for ſuch Daughters. A. the Father dies, leaving Daughters, and his Wife enſeint of a Son afterwards born; It ſeems the Daughters are intitled to the 3000 l. and if ſo Ld. Cowper thought that Equity would not take it away, but would be further inform'd as to the Value of the Eſtate. 2 Vern. 578. pl. 522. Hill. 1706. Palmer v. Cracroft. & al'.

9. A Child in Ventre ſa Mere may be *vouched*, is capable to *take*; A *Bill* may be brought on its Behalf, and the Court will grant an * *Injunction* to ſtay waſt. The Mother may juſtify *detaining of Writings* on the Behalf of a Child en Ventre ſa Mere. A Limitation Hæredibus de Corpore Procreatis ſhall include Iſſue after born, and ſo, e converſo, Procreandis includes Iſſue already born; Arg. 2 Vern. 711. Hill. 1715. and cites the Caſe of Palmer v. Creagheroft.

* Chan. Prec. 50. pl. 51. one Lutterel's Caſe was cited in Ld. Bridgman's Time, where a Bill was exhibited on Behalf of an Infant en Ventre ſa Mere to ſtay Waſte, and an Injunction was granted upon it.

(I) *Of what* Things an Infant is *capable.*

Cro. E. 636, 637. pl. 34. S. C. adjornatur — Cro C. 556. ſays that notwithſtanding

1. AN Infant is not capable of the Stewardſhip of the Courts of a Biſhop, becauſe by Intendment of Law he hath not ſufficient Knowledge, Experience, and Judgment, to uſe the Office, and alſo becauſe he cannot make a Deputy, Mich. 40 & 41 Eliz. B. R. between *Scambler and Waters*, adjudged per Curiam.

the Opinion cited in Co. Litt. fol. 3. and there ſaid to be reſolved 43 & 41 Eliz. betwixt Scambler v Walter, that the Grant of the Office of under Stewardſhip in Poſſeſſion, or Reverſion to an Infant, is void, becauſe he is incapable thereof not having Knowledge to execute pro commodo Regis & Populi, but this Caſe was denied, unleſs it be with this Difference, where it is granted with ſuch a Clauſe to exerciſe it per ſe vel Deputatum, and where he is of ſuch a tender Age, that he cannot by Intendment execute it by himſelf, as being a Infant of 3 or 4 Years of Age, who has not Diſcretion to execute it; But when there is a Clauſe to execute it per ſe vel Deputatum ſuum ſufficientem it is good enough; for he may appoint a ſufficient Deputy, and if he does not elect ſuch, it is a Forfeiture of his Office.

2. An Infant *ſhall not be any of the* 12 *who join with the Defendant in Writ of Debt for waging his Law*, by which one was challenged for his Age and awarded to be of full Age by the Juſtices by Inſpection. Br. Coverture, pl. 22. cites 8 H. 6. 15.

3. If a Man makes *a Feoffment to an Infant*, and he *makes Letter of Attorney to take Livery*, this is good. Br. Coverture, pl. 25. cites 21 H. 6. 31. Per Aſcue J.

4. Infant may be a *Mayor*, *Abbot* or *Biſhop* without Diſability, and if he be Executor he may make Releaſe of the Debt of the Teſtator. Br. Coverture, pl. 54 cites 21 E. 4. 12, 13.

5. An Infant Monk, or Feme Covert may *caſt a Protection*, and Brook ſays it ſeems to him that an Infant and thoſe may be *Attorney to make Livery of Seiſin*; But it was ſaid that an Infant *cannot* be Attorney in the Law *in Actions or Suits*. Br. Coverture, pl. 55. cites 21 E. 4 18.

S P. Br. Coverture pl. 57 cites 24 E. 3. 12, 13. —S. P. Ibid. pl. 57. cites 18 H. 6. 4. and Fitzh. Releaſe, 8.

6. If an Infant be made *Executor*, he *may make Releaſe or Acquittance of the Debt of the Teſtator*, and may *ſell the Goods*, and give and diſtribute them; But a Feme Covert Executor cannot do ſo without her Baron. Br. Coverture, pl. 56. cites 21 E. 4. 24. Per Littleton.

7. Infant

7. Infant Grantee of an *Office* in Reverſion (exerciſable by Deputy) to exerciſe the ſame per ſe vel Deputatum ſuum Sufficientem, may *appoint a Deputy*, and if he does not, or the Deputy be not *ſufficient*, it is a *Forfeiture* of his Office, and the Approbation of his Sufficiency is to be by the Lord of the Manor, or Judge of the Court &c. and *Miſdemeanor of Deputy* at the Infant's Peril. Cro. C. 556. pl. 11. Trin. 15 Car. B. R. Young v. Fowler.

Mar 38. pl. 68. S. C. & S. P held by the Court clearly — Jo. 310. pl. 24. Young v. Stowell S. C. accordingly.

8. An Infant may *preſent to a Church* becauſe the Ordinary gives the Allowance whether the Clerk be ſufficient. Cro. C. 556. pl. 11. Trin. 15 Car. B. R. in Caſe of Young v. Fowler.

Noy 41. S. P. Obiter in Caſe of Reeve v. Martin.

9. Infant may be a *Truſtee*; Per Ld. Chancellor. Vern. 343. pl. 335. Mich. 1683. in Caſe of Jevon v. Buſh.

2 Vern. 561. pl. 508. Trin. 1706. S. P. in Caſe of Scot v. Haughton and Doctor Fuller.

10. A Petition to the King to direct his Judges to take a *Fine or Recovery* from an Infant referred to the Ld. Chancellor; Per Maynard Serjeant, a Fine cannot be taken from an Infant, nor was it ever done, but a Common Recovery may be had as deſired by the *King's ſpecial Direction*. Vern. 461. pl. 438. Trin. 1687. Sir Humphry Mackworth's Caſe.

11. An Infant cannot be an *Attorney* for another; Arg. Show. 167. Trin. 2 W. & M. in Caſe of Coan v. Bowles.

Cro. E. 637. pl. 34. S. P. for h

not be conceived to be of Diſcretion to execute it. —— He cannot be Attorney becauſe he cannot be ſworn. Mar. 92 pl. 154. Hill. 16 Car. C. B. Anon.

(I. 2) Several Ages for ſeveral Purpoſes.

1. A Male at the Age of Seven is married to a Female of 14, and before the Male is 13 ſhe has Iſſue, this Iſſue is a Baſtard. Jenk. 95. pl. 84. cites 1 H. 6. 3.

If the Feme of an Infant under 14 has Iſſue, it is a Baſtard. Noy 142. Paſch. 2 Jac. C. B. in Caſe of Strange v. Foot.

2. A Feme has ſeveral Ages, viz. *at ſeven Years to have* * *Aid to be married*, and 9 Years *to deſerve Dower*, and † 12 Years *to conſent to Marriage*, and ‡ 14 Years *to be out of Ward*, and || 16 Years *for the Lord to tender Marriage*, and 21 Years *to make Feoffment, or to deliver a Deed. But* the *Age of Conſent of a Man is* 14 Years. Br. Gard, pl. 7. cites 35 H. 6. 40.

Br. Age, pl. 6. cites S. C. and that there are only two Ages for the Male, viz. 14 and but thoſe of the Spiritual Law ſay, that it is not ſo unleſs that ſhe be then Apta Viro. Br. Age, pl. 41. cites 8 E. 4. 7.

* Mo. 741. Arg. cites S. C. & S. P. by Wankford. † S. P.

‡ If ſhe attained thereunto in the Life of her Anceſtor. Co. Litt. 78. b. cites S. C.

|| If ſhe were under the Age of 14 at the Death of her Anceſtor. Co. Litt. 78. b. cites S. C.

3. And per Wang. *when the Lord after* 14, *and before* 16, *has married the Daughter, ſhe may enter into her Land*; For the two Years over and above 14 Years is only Time for him to tender the Marriage, and this ſeems to be Reaſon; For it is ſaid there, that the Courſe of the Chancery is to make Livery before 14 Years cum Exitibus, and after 14 but Livery only, and not cum Exitibus; And the Reaſon ſeems to be, inaſmuch as after the Livery made at ſuch Age which ſhe ought

to have Livery, ſhe ſhall have the Iſſues ab illo Die by the Law. Br. Garde, pl. 7. cites 35 H 6. 40.

4. Infant of the Age of 12 Years, Male and Female, ſhall be compelled *to ſerve in Husbandry*. Br. Coverture, pl. 64. cites F. N. B. 190.

5. *A Man*, by the Law, for ſeveral Purpoſes, has divers Ages aſſigned unto him, viz. 12 *Years to take the Oath of Allegiance* in the Torn or Leet, 14 *Years to conſent to Marriage*, 14 Years for the Heir in Socage *to chuſe his Guardian*, and 14 Years alſo accounted his *Age of Diſcretion*, 15 *Years for the Lord to have Aid pur faire Fitz Chivaler*, *under* 21 *to be in Ward to the Lord by Knight's Service*, *under* 14 *to be in Ward to Guardian in Socage*, 14 *to be out of Ward of Guardian in Socage*, and 21 *to be out of Ward of Guardian in Chivalry*, *and to alien his Lands*, *Goods and Chattels*. Co. Litt. 78. b.

Toth 174. cites 11 Car. S C. — Full Age for Socage is 14 Years. 13 Rep. 51. and cites D. 213.

6. *A lawful Age*, in general Words, (unleſs it be in a particular Caſe, as Guardian in Socage) muſt be taken and conſtrued 21 Years. Chan. Rep. 100. 11 Car. fol. 341. Hartwell v. Ford.

7. Infant makes *his Will*, *and charges his Perſonal Eſtate with Payment of Debts*, his Executor ſhall pay Bond Debts which he had contracted, there being Aſſets ſufficient. N. Ch. R. 55. 1651. Hampſon v. Sydenham.

Agreed that a Female may make a Will at 12, the Male at 17, or if proved to be a Perſon of Diſcretion, at 15. 2 Vern. 469. Mich. 1704. in Caſe of Biſhop v. Sharp. —— No Diſpute was made but that a Male at 14, and a Female at 12, may make a Will of Perſonal Eſtate, and it was ſaid to be ſo agreed by Ld. Wright in Caſe of Sharp v. Sharp. Chan. Prec. 316. Mich. 10 Ann. Hyde v. Hyde.

8. Eccleſiaſtical Court is the proper Judge of Age *for making Wills*, and whatever our Law ſays concerning it, is only as directed by their Law. 2 Show. 204. pl. 213. Mich. 34 Car. 2. B. R. Smallwood v. Berthouſe.

And if B. at that Age makes a Will and an Executor, the Executor of B. ſhall have the Eſtate deviſed to B. by A. 2 Ch. R. 386. S. C. —— Vern. 326. Whitmore v. Weld, S. C. before North K. but no Decree. —— Vern. 347. decreed per Ld. Jefferies, S. C. —— 2 Vent. 367. S. C. decreed per Ld. Jefferies.

9. A. names B. an Infant *Executor*, *and then names C. Executor during B's Minority*. C's Executorſhip ceaſes when B. is 17, and the Property of the Goods veſts then in B. Per Finch C. 2 Chan. Caſes 169. Mich. 36 Car. 2. Whitmore v. the Earl of Craven.

10. *Till eight Years* Children are accounted *Nurſe-Children*. 2 Salk. 470. pl. 1. per Cur Paſch. 7 W. 3. B. R.

11. Infant under 14 not bound by a *Marriage* but may diſſent; Arg. Cumb. 457. Mich. 9 W. 3. B. R. in Caſe of the King v. Thorp.

1 Salk. 39. Freke v. Corniſh, S. P. and ſays the Spiritual Court will not grant Adminiſtration to any under 21 by the Conſtruction of the Statute of Diſtributions, becauſe they are to give Bond &c.

12. *Adminiſtration granted during Minori Ætate of Executor* ceaſes at 17, but during Minori Ætate *of Adminiſtrator* not till 21, becauſe an Executor, by the Civil Law, may take that Office upon him at 17; But an Adminiſtrator being created by Statute, the Time of his full Age muſt be granted by the Common Law. Cumb. 475. Paſch. 10 W. 3. B. R. Atkinſon v. Corniſh.

13. A. was *born Feb.* 1. *at Eleven at Night*, and *January* 31, *at One in the Morning*; A. makes a Will of Lands and dies; it is a good Will, for

for he was then of Age; Said per Holt Ch. J. to have been ſo adjudged. 1 Salk. 44. Mich. 3 Ann. B. R. Anon.

41. An *Orphan* of the City *of London* at 17 made a Will of his Share of the legatory Part of her Father's Perſonal Eſtate, who was dead Inteſtate, and held good by the Statute of Diſtributions, but dying unmarried, and before 21, her Orphanage Part ſurvived, and ſhe could not deviſe it. 2 Vern. 558. pl. 506. Trin. 1706. Wilcox v. Wilcox.

Infant of 14 may make a Will. Comb. 50. Paſch. 3 Jac. 2. B. R. Anon.

(L 3) Caſes wherein a Feme Covert and an Infant differ.

1. THE *Deed of a Feme Covert* with her Baron ſhall not be inrolled becauſe it is not the Deed of the Feme, and ſo ſee that Deed of a Feme Covert is void. Br. Coverture, pl. 47. cites 7 E. 4, 5.

2. If an Infant is made *Executor*, he *may make Releaſe or Acquittance of the Debt of the Teſtator*, and *may ſell the Goods*, and give and diſtribute them; But Feme Covert Executor cannot do ſo without her Baron. Br. Coverture, pl. 56. cites 21 E. 4. 24. per Littleton.

3. *Statute Staple nor Deed inrolled* ſhall not be accepted of a Feme Covert by the Common Law; Contra by the *Cuſtom in London*, nor *Fine*, *Statute*, nor *Deed inrolled*, ſhall not be ſuffered by an Infant. Br. Coverture, pl. 59. cites 32 H. 8.

4. If an Infant *by Indenture bargains and ſells* Lands for Money, and after *levies a Fine* come ceo que il ad de ſon Done &c. this Indenture is not void but voidable, and the Uſe paſſes by the Bargain; then the Fine being levied upon it the Bargain is irrevocable unleſs for Error; As if Baron and Feme bargain and ſell their Lands by Indenture, though the Indenture be void againſt the Feme, yet a Fine and Recovery upon it ſhall bind her for ever, the Indenture declaring the Will of the Feme how the Uſe ſhall paſs. Mo. 22. pl. 73. Paſch. 2 Eliz.

5. An Infant and J. S. were bound in a *Bond for the Debt of the Infant*; The Infant *at full Age promiſed to ſave harmleſs* J. S. and died; An Aſſumpſit lies againſt the Executor of the Infant; But if a Feme Covert being ſo bound had, *after her Husband's Death*, *promiſed* to ſave her Surety harmleſs againſt ſuch Bond, ſuch Aſſumpſit ſhould not have bound the Wife. Godb. 138. pl. 164. Mich. 27 Eliz. B. R. Barton v. Edmunds.

3 Le. 164. pl. 215. Edmond's Caſe, S. C. and per Curiam clearly, tho' here was no preſent Conſideration upon which was given for S. C. cited as adjudged.

the Aſſumpſit could ariſe, yet upon the whole Matter the Action lies, and Judgment the Plaintiff. —— 4 Le. 5. pl. 22. S.C. adjudged. —— Cro. E. 126, 127. in pl. 7. S.C. cited as adjudged.

6. If Feme Covert *delivers Goods Treſpaſs lies*, but it is otherwiſe of an Infant if he delivers them *with his own Hands*; Arg. Lat. 10. cites it adjudged to this Purpoſe, Paſch. 32 Eliz. Rot. 1017.

7. An Infant may do *any Act to his Advantage*, which a Feme Covert cannot, As a *Leaſe* made by Infant is voidable only, but by Feme Covert is void; So of a *Bond* by Feme Covert, ſhe may plead Non eſt Factum, but ſo cannot an Infant, but he muſt plead the Special Matter that he was within Age.

8. *Leaſe*

8. *Leaſe by* Infant *reſerving no Rent* is void; But otherwiſe of Baron and Feme; For Baron has Power, and the Feme joining in the Leaſe it is not void, for ſhe may affirm the Leaſe by bringing a Writ of Waſte or by Acceptance of Fealty; Adjudged. Hutt. 102. Hill. 4 Car. Anon. cites 2 Rep. 61. in Wiſcott's Caſe.

9. A Feme Covert is not capable to *make a Contract*, becauſe ſhe is ſub poteſtate Viri, and though it be for Neceſſaries of Diet and Apparel, that ſhall not charge the Husband, but an Infant's Contract for ſuch Things is good; Arg. Hutt. 107. Mich. 5 Car. in Caſe of Bill v. Lake.

5 Rep. 27. Ruſſel's Caſe S P.— But not before 17; Arg Roll Rep. 248. cites 5 Rep. Prince's Caſe, 29. b.

10. Feme Covert *Executor* cannot *aſſent to a Legacy*, but an Infant of 18 may. Sid 188. pl. 14. Paſch. 16 Car. 2. B. R. Cookes v. Bellamy.

Contra as to Infants, per the Maſter of the Rolls,

11. Infants and Feme Coverts may *execute Powers*; Admitted, Arg. 9 Mod. 17. Mich. 9 Geo. becauſe they are only Inſtruments. 21 Mar. 1738. in Caſe of Colton v. Hoskins,

(K) *What* Things ſhall *bind* an Infant by Agreement *at* his *full Age*.

Cro. J. 320. pl. 1 Ketſey's Caſe, S. C. adjudged that he was chargeable,

1. IF a Leaſe for Years be made to an Infant rendering Rent, the Rent is arrear, and after the Infant comes of full Age, and afterwards continues the Occupation of the Land, this will make him chargeable with the Arrears incurred during his Infancy. Paſch. 11 Ja. B. R. between *Kettle and Elliot* adjudged.

becauſe he was of full Age before the Rent Day came. —— Brownl. 120. S. C. adjudged accordingly —— 2 Bulſt. 69 Kirton v Elliot, S. C. adjudged againſt the Infant, but no Notice is taken there of his having attained his full Age.

2. *Exchange* of an Infant is good by Agreement at full Age. Br. Coverture, pl. 17. cites Hill. 12 H. 4.

3. If an Infant *makes an Indenture*, and *at the full Age binds himſelf to perform it*, he ſhall not avoid the Indenture. Br. Coverture, pl. 28. cites 14 H. 8. 29. per Brudnell.

4. *And* if an Infant *ſells a Horſe for* 10 *l* and *brings Debt* of the 10 l. *at full Age*, he ſhall not avoid the Contract. Br. Coverture, pl. 28. cites 14 H. 8. 29. per Brudnell.

When he came to full Age he ſaid, "God give "you Joy "of it." It was held by Mead J. that thereby the Leaſe was affirmed and made good. 4 Le. 4. pl. 15. Mich. 24 Eliz. C. B. Anon.

5. *So* if he makes a *Leaſe* reſerving Rent within Age, and *accepts Rent* at full Age. Br. Coverture, pl. 28. cites 14 H. 8. 29. per Brudnell.

6. If an *Infant poſſeſſed of a Term for Years ſells it for Money, and after he comes of full Age receives Part of the Money* for it, he ſhall avoid the Grant notwithſtanding; for the Contract being void in the Commencement it cannot be made good by any ſubſequent Act; per totam Curiam. Dal. 64. pl. 25. 6 Eliz. Anon.

7. Father

7. Father of Infant leaſed the Son's Lands for 20 Years; at full Age the Son, upon the Back of the Indenture, *releas'd to the Defendant all his Right*; Per Wray, this Leaſe by Father, as Guardian, was voidable only by the Son, and then ſuch Indorſement is a good Aſſignment. 2 Le. 220, 221. pl. 278. Paſch. 18 Eliz. B. R. Anon.

8. If Infant makes a Deed of *Feoffment*, or Leaſe for Life, *to commence in Futuro*, and *at full Age makes Livery*. G. Crook holds clearly that this is good Feoffment; Quære of *Feme Covert*, for her Deed is void. 2 Roll Rep. 109 Trin. 17 Jac. B. R. Anon.

9. Infant, *Reverſioner in Fee of an Advowſon*, during the Eſtate for Life *grants next Avoidance*, and at full Age reciting the ſaid Grant conceſſit & confirmavit prædictam Advocationem Habend' quando contigerit vacare. This is a Confirmation during the Life of the Tenant for Life. Hetl. 20. Trin. 3 Car C. B. Stevens and Croſs v. the Biſhop of Lincoln, Holmes and Halworth.

If an Infant grants an Advowſon, and at full Age confirms it, all is void. Arg. Godb. 304. cites 26 H. 8. 2.

10. Aſſumpſit was againſt an Infant that *contracted for a Coach and Horſes and gave his Obligation* for the Money; afterwards, *on his coming to full Age, he promis'd Payment*. Per Cur. The *Obligation is only voidable and extinguiſhes the Contract*, and ſo the Aſſumpſit at full Age is without Conſideration. And by Wilde J. the Infant may *plead non aſſumpſit*, and his Infancy is ſufficient Evidence; And Judgment for the Defendant Niſi. 3 Keb. 798. pl. 55. Trin. 29. Car. 2. B. R. Tapper v. Davenant.

(L) Offence in Cheating or Impoſing upon Infants. How puniſhed.

1. H. Knowing that S. was within Age *procur'd him to acknowledge a Recognizance of Debt to him for Wares ſold*; for which after the Death of S. he was fined 100 l. and impriſoned. And note other ſuch Caſes, viz. **Calmadey's Caſe** and **Herlakendon's Caſe** were cited for Precedents of the Court, that they being Infants were inticed to enter into Recognizances and Statutes by thoſe who knew them to be within Age. Mo. 555. pl. 752. Paſch. 41 Eliz. in the Star-Chamber. Strangeways v. Hicks. Noy 96. S. C. accordingly.

2. A *Fine* was levied *by an Infant of the Age of* 13. The *Court fined* Sir Nich. Roe and the other *Commiſſioners, and threatned all that had a Hand* in the promoting it. Freem. Rep. 78. Trin. 1673. C. B. Petty's Caſe.

(M) Pleadings.

1. *Confeſſion* of an Infant *of a Plea in Formedon which abates the Action of the Infant* was taken; quod nota. Br. Coverture, pl. 81. cites 3 E. 3. and Fitzh. Enfant 14.

2. An Infant who is *vouch'd* may *appear the firſt Day, and render the Action*. Br. Coverture, pl. 58. cites 18 E. 3. and Fitzh. Voucher 12.

3. In Aſſiſe Infant *pleaded Ne unques Accouple* &c. *againſt the Plaintiff*, and certified it againſt him by the Ordinary, and yet the Aſſiſe was awarded in Point of Aſſiſe, becauſe the Infant cannot be convicted Diſſeiſor by his Confeſſion or Nient Dedire, but by Verdict or the like. Br. Coverture, pl. 38. cites 28 Aſſ. 52.

4. *Aſſiſe* is brought *by an Infant by Guardian*; the Infant came and *diſavow'd the Suit*, and was of the Age of 17 Years. Perſey ſaid this ſhall not be accepted; for it may be that it is by Dureſs, and this is a Retraxit which is a Bar; Shard dubitavit et adjornatur. Br. Coverture, pl. 39. cites 28 Aſſ. 52. Brooke makes a Quære and ſays, ſee 34 Aſſ. 5. that in ſuch a Caſe Thorp would not ſuffer the Infant to diſavow, but awarded the Defendant to anſwer, quod nota.

5. An Infant who brought *Mortdanceſter* by Prochein Amy would have *diſavow'd his Suit*, and was not ſuffered; for Infant. Br. Coverture, pl 73. cites 34 Aſſ. 5.

6. An Infant Plaintiff *ſhall not confeſs Deed of Leaſe for* Term of *Life without Impeachment of Waſt* pleaded againſt him in Quid Juris clamat, but it ſhall attend till his full Age. Br. Coverture, pl. 7. cites 43 E. 3. 5.

7. In Aſſiſe it was agreed, that *nothing ſhall be ſaid to be Nient dedit of an Infant*, ſo that where Releaſe of the Anceſtor of the Plaintiff in Aſſiſe with Warranty was pleaded to be made to J. and his Heirs, que Eſtate the Tenant has, and the Plaintiff ſays that J. had nothing but for Term of Life, Remainder in Tail to the Plaintiff, and that the ſaid J. is dead, and he entered as in his Remainder, and the Tenant ſaid that the Remainder in Fee was to the right Heirs of the ſaid J. for Default of Iſſue of the Plaintiff, and thereupon they were adjourn'd, and at the Day of Adjournment the Tenant, who was an Infant, ſaid that at the Time of the Releaſe J. was ſeiſed in Fee, which Matter he cannot ſay after Adjournment; yet it was held that the Aſſiſe ſhall be at Large thereof in Advantage of the Infant, becauſe nothing ſhall be held to be Nient dedit of him; quod nota. Br. Coverture, pl. 8. cites 44 E. 3. 10.

Br. Coverture, pl. 14 cites 48 E. 3. 34.

8. *Scire Facias to execute a Fine* levied *by R. M. to W.* ſur Conuſance de droit come ceo &c. and *W. rendered to R. M. for Life, the Remainder to the Father of the Plaintiff whoſe Heir he is* &c. and that *R. is dead*, and the *Plaintiff as Heir in Tail pray'd Execution*, and the Tenant ſaid that *R. M. who levied the Fine* had no ſuch &c. *but for Life*, the *Reverſion to him, and this Eſtate continued and R. M. died, and he enter'd*, and the *Plaintiff who was an Infant*, and *by Guardian confeſs'd it*, and it was held by the beſt Opinion that the Confeſſion ſhall not be taken, by Reaſon that he is an Infant. Br. Confeſſion, pl. 8. cites 48 E. 3. 33.

Br. Coverture, pl. 14 cites S. C.

9. For per Belk. an Infant ſhall *not be bound by for Nihil dicit where he is Plaintiff*; *contra* where he is *Defendant*; For there the Plaintiff ought to be anſwered. Br. Confeſſion, pl. 8. cites 48 E. 3. 33.

10. And per Kirton and Belk. where an Infant *avows for Rent* &c. and the *Plaintiff pleads Releaſe of the Father of the Infant*, there he ſhall anſwer to the Deed, Contra Wich. Br. Confeſſion, pl. 8. cites 48 E. 3. 33.

Br. Coverture, pl. 14. cites S. C.

11. But it was agreed, that in *Aſſiſe* brought *by an Infant*, and *Recovery is pleaded againſt him* he ſhall anſwer to it. Br. Confeſſion, pl. 8. cites 48 E. 3. 33.

Br. Coverture, pl 14 cites S C.

12. *But* if *Deed with Warranty and Aſſets* be *pleaded*, the Aſſiſe ſhall inquire of the Circumſtances for the Infant. Br. Confeſſion, pl. 8. cites 48 E 3. 33.

Br. Coverture, pl. 14 cites S. C.

13. *But* if ſuch Deed and Aſſets be pleaded *in Formedon* on *Præcipe quod reddat*, Parol ſhall demur. Br. Confeſſion, pl. 8. cites 48 E. 3. 33.

14. And per Belk. in Scire Facias *Deed of the Anceſtor inroll'd with Aſſets deſcended* is pleaded againſt an Infant Plaintiff, and the Infant pleads, that Riens per Deſcent the Plea ſhall not be taken, but the Parol ſhall demur. Et adjornatur. Br. Confeſſion, pl. 8. cites 48 E. 3. 33.

15. A

15. An Infant *might join the Miſe by Battel*; For it ſhall be tried by Champion; But he cannot be try'd by Battel in Appeal; For this ſhall be done in proper Perſon, and therefore the Defendant *ſhall not join Battel* againſt an Infant in Appeal. Br. Coverture, pl. 79. cites 9 E. 4. 34.

16. In a *Writ of Right* it was agreed by Danby and Moyle, that an Infant ſhall *not be permitted to confeſs the Action* by reaſon of his Infancy, quod nota. Br Coverture, pl 79. cites 9 E. 4. 34.

17. Where a Man *preſcribes that an Infant may alien when he can meaſure an Ell of Cloth*, he ought *to ſhew of what Age the Infant was when he aliened*, and that he then could meaſure an Ell of Cloth. Br. Coverture, pl. 66. cites F. N. B. Dum fuit infra Ætatem.

18. Againſt a *Deed inrolled* a Man may plead *Infancy*, though none can plead *Non eſt Factum*. Per Manwood Ch. B. 2 Le. 65. in pl. 89. Paſch. 31 Eliz. in the Exchequer, in Sir Wm Pelham's Caſe.

19. Error upon a Judgment in C. B. in an *Ejectione Firmæ* brought *by a Guardian in Socage*, becauſe he has *not ſhewn in the Writ that the Heir was within Age at the Time* &c. But by the Court it is yet good, and Judgement affirmed. Noy 135. Trin. 7 Jac. B. R. Symonds v. Barham.

20. In *Replevin againſt three*, they all made Cognizance by Attorney, and Judgment being given for the Plaintiff a Writ of Error was brought in B. R. and the *Error aſſigned* was, *that one of the three Defendants was an Infant*, but it was diſallowed; for per Holt Ch. J. *this Matter was pleadable in Abatement, and therefore not aſſignable for Error.* 3 Salk. 197 pl. 13. Mich. 2 W. 3. Score v. Bowles.

21. In *Aſſumpſit for Money lent, and* for Money *laid out to the Uſe of* the Defendant's Wife dum ſola. Upon non Aſſumpſit pleaded it was on a Reference agreed by the Judges, that *the Infancy* of the Feme at the Time of the Promiſe *might be given in Evidence* as it uſually hath been of late. 1 Salk. 279. Paſch. 5 W. & M. in C. B. Darby v. Boucher.

(N) Caſes in Equity as to Infants.

1. A. Being to convey Lands to B. he *between the Date and Execution of the Conveyance to B. conveyed the Lands to J. S. an Infant*, wherefore B. had an Order againſt A. and the Infant was concluded. Toth. 172. cites 11 Nov. 6 Eliz. Altham v. Ld. Morley. And Ibid. cites 6 Jan. 36 Eliz. Preſton v. Trinity (College) and Wood.

2. An Infant *Plaintiff* was *committed to the* Priſon of the *Fleet for not obeying a Decree.* Toth. 172. cites 11 & 12 Eliz. Oliver and King v. Challoner.

3. The Defendant made *ſecret Conveyances (pending the Suit to defraud the Plaintiff* being *an Infant*; The Defendant was bound by Recognizance to diſcharge all Eſtates ſo made. Toth. 172. cites 12 Eliz. Digman v. Hamon.

4. A Bill of Review becauſe the Decree was againſt an Infant; My Lords Declaration was, that it ſhall *bind an Infant* as well as at full Age. Toth. 133. cites Mich. 7 Car. Cromwell v. Carey.

5. A. died leaving a Widow and a Son. The Widow being about to Marry J. S. ſhe and the Son and J. S. agreed by Articles that J. S. ſhould

ſhould take Adminiſtration, and ſhould enter into a Statute to pay ſo much Yearly till he ſhould come of Age. J. S. entred into the Statute and took Adminiſtration, and with the Perſonal Eſtate purchaſed Lands in Fee, but died much indebted, and in Arrears to the Plaintiff, and becauſe the *Eſtate* could not be *during the Minority* of the Son and Heir of J. S. who was an Infant, it was *decreed againſt the Infant and his Guardian*, that the Plaintiff, the Conuſee, ſhould hold till he is ſatisfy'd his Debt and Arrears. N. Ch. R. 45. Anno 1649. Morton v. Kinman and Poplewell.

6. If an Infant *ſuffers a Decree* againſt him by Conſent, he may at any Time reverſe it for that Error of his being an Infant; Otherwiſe if he be *Defendant by an Adverſary Bill*, and a Decree be pronounced; Per Ld. K. Bridgman 3 Ch. Rep. 21. 10 Nov. 1666. Anon.

7. A Meſſenger of the Court may be ſent to bring in an Infant, and when he comes in the *Court may aſſign one of the Six Clerks* as a *Guardian to appear and anſwer*; Per Sir John Churchill, but not approved of Per Ld. Keeper. 2 Chan. Caſes 164. Trin. 36 Car. 2. Anon.

8. It was ſaid that there was no Precedent in Equity that the Parol ſhould Demur, but that Infants were Suable there, and Ld. North cited the Caſe of Baron Weſton v. Dandy, which was thus, viz. Baron Weſton had a *Debt* due to him *by Bond*, *wherein the Heir was bound*, but it happened that for *three Deſcents the Heir was ſtill an Infant*, and ſo the Parol demurred at Law, till the Intereſt much exceeded the Penalty of the Bond; And Mrs. Danby having been all along *Guardian to theſe Infants* and *received the Profits* of the Eſtate, and converting them to her own Uſe, the Baron therefore brought an Action againſt her, and called her Adminiſtratrix to theſe Children; but the Baron's Policy did not prevail. Vern. 173, 174. Trin. 1683. in Caſe of Creed v. Covile.

9. Whether Chancery will *decree Satisfaction of a Bond-Debt of the Anceſtor's* out of the Profits of the Real Eſtate, *during the Minority of the Heir*, where there is a Deficiency of Perſonal Aſſets; Maſter of the Rolls declared he thought ſuch a Decree juſt, and if ſuch Caſe came before him he would decree accordingly; Sed dubitatur. Vern. 428. pl. 403. Hill. 1686. March v. Bennet.

10. An Heir, together with other young Heirs, is *drawn in to buy Goods at extravagant Prices, and to accept of Aſſignments of bad Securities, joined in giving Securities for the Monies agreed on.* He ſhall be relieved on paying the Value of the Goods which came to his Hands, and *ſhall not be Anſwerable for his Companions*. 2 Vern. 77. pl. 71. Trin. 1688. Lamplugh v. Smith.

The Plaintiff was likewiſe a young Heir, and had been drawn in to buy Ribbands and braided Wares &c. at an extravagant Price &c. the Caſe being the ſame in Effect with the Caſe immediately preceding, had the like Rule. 2 Vern. 78. pl. 72 Trin. 1688. Whitley v. Price.

11. This Court has often decreed *building Leaſes* for 60 Years of Infants Eſtates where it is for their Benefit; Per Cur. 2 Vern. 225. in pl. 204. Paſch. 1691. in Caſe of Cecil v. Salisbury (Earl of).

12. A. ſeiſed of *Freehold and Copyhold* Land ſurrenders to the Uſe of his Will, and then deviſes to B. *all his Goods, Chattels and Eſtate whatſoever, upon Condition* that ſhe pay his Debts and Legacies, and makes B. Executrix and dies. On a Bill by the Creditors for Sale of the Eſtate, the perſonal Eſtate being deficient, the Court thought the Words, with other Circumſtances of the Caſe, would paſs the Lands, and decreed a Sale, and the Heir to join when he comes of Age, but he being an Infant, Day was given him to ſhew Cauſe after he comes to Age. Ch. Prec. 37. pl. 38. Mich. 1691. Lumley v. May.

13. *A*

13. *A. agreed to give her Son other Lands in lieu of Lands intailed*, and gives the intailed Land by Will to her Daughter, and the *Son gives Bond to ſuffer the entailed Lands to be enjoyed as ſhe by Will had deviſed them.* The *Son dies, and leaves D. his Son an Infant*, who brought Ejectment; The Bond was not ſuable againſt him becauſe an Infant; Per Cur. the Infant being in Poſſeſſion of the Lands that came in Recompence, we will at preſent only *quiet the Plaintiff's Poſſeſſion* in the entailed Lands *till ſix Months after the Infant comes of Age*, and then *he may ſhew Cauſe* if he thinks fit. 2 Vern. 232. pl. 212. Trin. 1691. Thomas v. Gyles. Equ. Ab. 281. (B) pl. 5. S. C.

14. The King as Pater Patriæ has the Directions of Charities, Infants, and Ideots, Lunaticks &c. and ſo fall under the Directions of Chancery, where the Intereſt of Infants is ſo far regarded that no *Decree againſt an Infant* ſhall be made without having a Day given him *to ſhew Cauſe after his full Age.* By his *Prochein Amy* he may *call his Guardian to Account*, even during his Minority. If a Stranger enters and receives the Profits of an Infant's Eſtate he will in Equity be looked upon as Truſtee for the Infant; Per Ld. Somers. 2 Vern. 342. Hill. 1697. in Caſe of Cary v. Bertie. In Caſes of *Truſts* Infants are always bound to the Decree of this Court, and ſo where the *will of the Anceſtor is conteſted*; and there is

ſcarce any Caſe where an Infant has Time to ſhew Cauſe but where it is neceſſary he ſhould join in a Conveyance to compleat the Eſtate, and where ſuch Conveyance is of the Inheritance, as Foreclolures &c. Per Cur. 9 Mod. 128. Hill 11 Geo. in Caſe of Whitchurch v. Whitchurch.

15. Lands *deviſed to be ſold for Payment of Debts* may be decreed to be ſold without giving the Heir a Day to *ſhew Cauſe*, tho' an Infant, for in this Caſe nothing deſcends to him; Per Wright Keeper. 2 Vern. 459. pl. 391. Hill. 1701. Cook v. Parſons. But if he had been decreed to have *joined in Conveyance*, there he

muſt have had a Day after he came of Age. Ibid. ——Chan. Prec. 37. Lumly v. May.——An Infant Heir, in Caſe of a Will deviſing the Lands to Truſtees to pay Debts, who ſold the ſame was decreed to *relinquiſh his Right* to the Purchaſor and his Heirs when he ſhall come of Age. Fin. R. 480. Trin. 30 Car. 2. Travel v. Danvers

Tho' the Truſtees in the Caſe above of Cook v. Parſons might have ſold without coming to the Court for the Directions, yet if they do come it may be a Queſtion, if the Infant Heir ought not to have a Day to ſhew Cauſe; Per Ld. K. Ch. Prec. 185. S. C.

16. The Effects of an Infant's *Anſwer to a Bill in Chancery* is to no other Purpoſe than to make proper Parties ſo as to have an Opportunity to take Depoſitions, and to examine Witneſſes to prove the Matter in Queſtion, and an Infant is never concluded by any Matter contained in his Anſwer by his *Guardian*. Carth. 79. Mich. 1 W. & M. in B. R. in Caſe of Eccleſton v. Speke. If an Infant puts in an Anſwer by Guardian and there is *a Decree* againſt him, *without any*

Day given him *to ſhew Cauſe*, ſuch Anſwer ſhall not be read or admitted as Evidence againſt him when he comes of Age; *But* if *a ſuperannuated Defendant* puts in an Anſwer by his Guardian it ſhall be read againſt him at any Time after, for he is ſuppoſed to grow worſe, and is not to have a Day to ſhew Cauſe; Per Lord Keeper. Abr. Equ Caſes 281. Trin. 1704. Sir Richard Leving v. Lady Caverley.——Chan. Prec. 229 S. C. & S. P. agreed per Curiam accordingly.

17. An *Eſtate is given to B. and the Heirs of her Body, and if ſhe left no Sons and only two Daughters, the Eldeſt to pay the Younger* 300 *l. and to have the whole Eſtate.* She leaving only two Daughters, and the *Eldeſt neglecting to pay the* 300 *l. the Younger brought a Bill for an Account of Profits, and for Poſſeſſion of half the Eſtate*; and at the Rolls obtained a Decree, that the Defendant ſhould pay the 300 l. with Intereſt from the Mother's Death in ſix Months, or in Default thereof, to account for Profits of a Moiety; and the Moiety to be ſet out by Commiſſioners, and the Plaintiff to hold and enjoy it accordingly. Upon an Appeal to the Lord Keeper the Decree was to ſtand as to the Account of Profits and Partition; But the Defendant being an Infant,

the Words *hold* and *enjoy*, which amounts unto a Foreclosure, to be ſtruck out, or Defendant to have a Day after ſhe comes of Age to ſhew Cauſe. 2 Vern. 479. pl. 434 Hill. 1704. Gundry v. Baynard.

Infant is not *concluded* by any Thing contained in the Guardian's Anſwer. Carth. 79. Eccleſton v. Speke.—— A. ſeiſed in Fee deviſed his Land to his Wife for payment of his Debts and dies, leaving an Infant his Heir. The Creditors brought a Bill and the Infant was made Defendant, who anſwer'd by Guardian, and the Eſtate decreed to be ſold. The Infant was allowed to *put in a new Anſwer upon her coming to Age*, (the Decree not being made abſolute) and the Maſter of the Rolls ſaid, he underſtood that this was a Matter of Courſe, and that when the Court gave him Liberty to ſhew Cauſe, it was not Reaſon to tie up his Hands from ſhewing Cauſe. Wms's Rep. 504 Mich. 1718. Fountain v Cain and Jeffs. —— S. P. by the Maſter of the Rolls, and ſaid he had granted the ſame upon a Petition Ex Parte. 2 Wms's Rep 403. Hill. 1726. and ſame Point then decreed by Ld. C. King, aſſiſted by his Honour. Sir John Napier v. Lady Eſſingham. And a Note is added by the Reporter; that the *Conſequence of putting in a new Anſwer is*, that he may examine Witneſſes de Novo to prove his Defence, which may be different from what it was before. Ibid.

18. Regularly an Infant's *Anſwer by his Guardian* ſhall not be *read*, but if the Cauſe be brought to Hearing *at his Requeſt* after his full Age it may. But the Infant at his full Age might (as his right Way is) have applied to the Court, and ſet forth how he is grieved by the Decree, and might have had Leave to *amend or alter his Anſwer* or any Part of it, or put in a new One, but he not having done ſo, it ſhall be preſum'd that he abides by that Anſwer, and ſo it was read againſt him; Per Ld. Cowper. Gilb. Equ. Rep. 4. Hill. 6 Ann. Ld. Guernſey v. Rodbridges.

An Executor or Overſeer who has Power by the Will to act in every Thing for the Advantage of the Infant, may lay out Part of the Perſonal Eſtate in a Purchaſe of Lands in the Infant's Name. But if he lends the Money on a bad Security he muſt anſwer it out of his own Pocket. Chan. Prec. 273. pl. 222. S. C.

19. Chancery may *decree an Executor or Truſtee to purchaſe* Lands for an Infant, and conſequently may confirm a Purchaſe made by them for an Infant without a Decree. Gilb. Equ. Rep. 11. Hill. 7 Ann. in Chancery. Terry v. Terry and Ragget.

20. If a Man during a Perſon's Infancy *receives the Profits of an Infant's Eſtate, and continues to do ſo for ſeveral Years after*, the Infant comes of Age before any Entry is made on him, yet he ſhall account for the Profits throughout, and not during the Infancy only; Decreed. Abr. Equ. Caſes 280. Paſch. 1699. Yallop v. Holworthy.

21. Infant *Deviſee of Lands in Mortgage, where by an after Part of the Will all Teſtator's Debts* in general *were made payable out of other Lands* had *by her own Bill ſubmitted to pay off this Mortgage*; But the Maſter of the Rolls ſaid, that he muſt take Care of the Infant, and not ſuffer her to be caught by any *Miſtake of her Agent*, and ordered that paying the Coſts of the Day ſhe might amend her Bill. 2 Wms's Rep. 387. Mich. 1726. Serle v. St. Eloy.

And his Lordſhip's Secretary acquainted the Court that Mr. Vernon in Caſe of an Erroneous Decree againſt an Infant uſed always to adviſe the bringing of an *original Bill to ſet it aſide, but* in ſuch a Bill *to allege ſpecially the Errors in the former Decree.* Ibid.

22. Where an Infant conceives himſelf *aggrieved by a Decree*, he *may apply for Redreſs as ſoon as he thinks fit*, without ſtaying till he comes of Age. Neither is he bound to proceed by way of Re-hearing, or Bill of Review, but may impeach the former Decree *by way of original Bill*, in which it will be enough for him *to ſay the Decree was obtained by Fraud and Colluſion, or that no Day was given him to ſhew Cauſe* againſt it. Wms's Rep. 737. ſays it was ſo held Mich. 1721. in the Caſe of **Richmond v. Tayleur.**

23. An Infant, when *Plaintiff*, is as much bound, and as little privileged, as one of full Age. Per Ld. C. King. 2 Wms's Rep. 519. Hill. 1728. Ld. Brook v. Ld. and Lady Hertford.

24. Bill

24. Bill to have a Diſcovery of the Defendant's Title to Lands in B mortgaged to the Plaintiff, and likewiſe to have an Account of the Rents and Profits thereof &c The Caſe was, the Defendant's Father having Occaſion to borrow the Sum of 300 l. the *Defendant was employed by his Father to ſolicit the Plaintiff to lend that Sum upon a Mortgage* of the Lands in B. which the Father made Affidavit of that he was ſeiſed in Fee, and that the Lands were free from Incumbrances; The *Defendant being then about the Age of 20 Years, did carry a Feoffment in Fee and Fine of the Lands of the Defendant's Father to the Counſel of the Plaintiff*, and the *Title was approved of, and the Money ſent, and a Mortgage made* to the Plaintiff, and the *Defendant was a Witneſs to the Execution of the Mortgage-Deed, and likewiſe to the Payment of the Money.* The *Defendant's Father, after the Defendant came of full Age, took 100 l. more* upon the ſame Mortgage, and the *Defendant was privy to that Tranſaction, but not a Witneſs to the Deed or Payment of the Money.* The *Defendant by his Anſwer ſays, that at the Time of making the original Mortgage, he had heard the Lands were ſettled upon him after the Death of his Father, but had never ſeen the Settlement.* The Defendant after the Death of his Father refuſes to pay the Mortgage, and claims the Lands as Remainder-man in Tail by Virtue of a Settlement by his Grandfather upon the Marriage of his Father &c. Counſel for the Plaintiff inſiſted that the Defendant, though an Infant at the Time of making the Mortgage, was liable to make a Satisfaction becauſe he was Party to the Fraud, and was privy to the whole Tranſaction, and aiding and aſſiſting to the Cheat, and that though an Infant cannot bind himſelf by Contract at Common Law, yet he is liable to Actions of Tort, as Treſpaſs, Caſe for Words &c. So is he liable to a Forfeiture upon a Condition in Fact, or implied &c. So in Equity he is liable to make Satisfaction for a Fraud &c. Per Cowper C. If an Infant having a Remainder upon an Eſtate for Life be a Witneſs to a Mortgage made by Tenant for Life, I do not think this would bind the Infant, becauſe if he was made a Party to the Deed, and ſealed it, yet that would not bind him, and that is a much ſtronger Caſe, yet I am of Opinion in this Caſe the Defendant is liable, and ought to make Satisfaction to the Mortgagee, becauſe at the Time of this Tranſaction he was very near being of full Age, and ſolicited the Plaintiff to lend the Money, and produced this Feoffment in Fee to his Father, (which appears now to be forged) and was principally concerned all along in the Fraud, when he knew at the ſame Time, as he admits by his Anſwer, that his Father was but Tenant for Life, with Remainder to himſelf. *If an Infant is old and cunning enough to contrive and carry on a Fraud*, I think in a Court of Equity *he ought to make Satisfaction for it.* Decreed accordingly. MS. Rep. Mich. 1 Geo. in Canc. Watts v. Creſwell.

25. In all Decrees againſt Infants even in the plaineſt Caſes a *Day muſt be given them to ſhew Cauſe when they come of Age.* Per Lords Commiſſioners. 2 Wms's Rep. 120. Hill. 1722.

Where there is a Decree Niſi Cauſa againſt an Infant he may, on his coming of Age and before the Decree made abſolute, put in a new Anſwer. Wms's Rep. 504. pl. 145. Mich. 1718. Fountain v. Caine.

26. If a *Decree* be made *againſt an Infant* and a *Bill is brought to ſet it aſide for Fraud*, yet if it be not fraudulent, though it may not be in every Reſpect ſo equitable as it ought to be, but the Court was fairly and fully appriſed of every Thing at the making the Decree Ld. C. Macclefield ſaid the Decree might be juſt, and therefore he would not ſet it aſide, but that had any Fraud or Surprize upon the Court been

been proved, he would have done it. Wms's Rep. 734. Mich. 1721. Richmond v Tayleur.

Ibid. in a Note of the Reporter, ſays that an Infant's Anſwer by his Guardian is not Evidence againſt him, becauſe the Infant is not ſworn, and *it is only for making proper Parties*, and cites Carth 79. Eccleſton v. Petty. And where an Infant is Defendant the Service of the Subpæna to hear Judgment muſt be on the Guardian and not on the Infant. See Wms's Rep. 643. **Taylor v. Atwood.** But where a Defendant puts in an Anſwer to a Bill brought by an Infant, who does not reply to it, in ſuch Caſe it ſeems, the Anſwer muſt be taken to be true, in Regard the Defendant, for want of a Replication, is deprived of an Opportunity of examining Witneſſes to prove his Anſwer; And he ought not to ſuffer for ſuch Omiſſion in the Plaintiff. So ruled at the Rolls, with ſome Warmth, by Sir Joſeph Jekyll, in the Caſe of **Thurſton** *and* **Dechair**, an Infant v. **Mutton & Ux'**. Trin. 1733. In which the Reporter was of Counſel with the Plaintiff, and much oppoſed the reading of the Anſwer; for that the Plaintiff being an Infant could admit nothing, and it might be very Miſchievous, if by Reaſon of the Neglect of the Plaintiff the Infant's Guardian, or Prochein Amy, in not putting in a Replication to the Anſwer, ſuch Anſwer ſhould be read, and admitted to be true, though never ſo detrimental to the Infant's Inheritance. Ideo quære.

27. An *Infant's Anſwer cannot be given in Evidence againſt him* becauſe *it is not the Infant's Anſwer, but the Guardian's*, and the Guardian is ſworn, and not the Infant. 3 Wms's Rep. 237. Hill. 1733. in Caſe of Wrotteſly v. Bendiſh.

28. An Executor, Adminiſtrator or Truſtee for an Infant neglects to ſue within ſix Years; the *Statute of Limitations ſhall bind the Infant*. 3 Wms's Rep. 309. Trin. 1734. Wych v. Eaſt India Company.

(O) Equity; where an Infant is Truſtee.

1. 7 *Ann. cap.* 19. *S.* 1. *IT ſhall be lawful for any Perſon under the Age of 21 Years by the Direction of the Court of Chancery or Exchequer, by an Order made upon hearing all Parties on the Petition of ſuch Perſon for whom ſuch Infant ſhall be ſeiſed or poſſeſs'd in Truſt, or of the Mortgagor or Guardian of ſuch Infant, or Perſon intitled to the Monies ſecured upon any Lands whereof any Infant ſhall be ſeiſed or poſſeſſed by way of Mortgage, or of the Perſon intitled to the Redemption to convey any ſuch Lands as the Court ſhall by Order direct, and ſuch Conveyance ſhall be good in Law.*

It muſt be a Truſt *expreſly limited*, and not by Implication only. Quære M. 4. Nov. 1738. Warner v. Moore. — A *Feme Covert Infant Truſtee* is not within the ſaid Statute, for ſhe is not capable to do it, and the Husband is not capable. At the Rolls, Eodem Die in another Caſe

2. A Petition being exhibited upon this Act in Chancery ſet out the Conveyances in Truſt to ſuch and ſuch, and that ſuch a one being *Survivor was dead, and the Eſtate in Law devolved upon an Infant*, who was in Court; the Declaration of Truſt was alſo read, and the Conſent of the next Heir at Law to the Infant required, and then an Order was made for the Infant, by her Guardian, to convey over the Truſt-Eſtate to Ceſty que Truſt, and the Conveyance to be ſettled by the Maſter. Ch. Prec 284. pl. 226. Paſch. 1709. Anon.

4. On the Marriage of A. with M. a Settlement was made, in which *A. was Tenant for* 99 *Years, if* he ſo long live, *Remainder to Truſtees during the Life of A.* Remainder *to the firſt &c. Son of that Marriage in Tail*, Remainder *to the firſt &c. Son of any other Marriage*, Remainder over. They have a Son, and afterwards the Wife and both Truſtees died. The Son being upon a Treaty of Marriage with J. S. which was like to be advantageous to the Family, a Bill was exhibited by the Father and Son againſt the *Heir of the ſurviving Truſtee, an Infant, to join in making a Tenant to the Præcipe* in order to ſuffer a Common Recovery

covery for making a Settlement on the Son's Marriage. Ld. C Parker decreed accordingly, and that the Maſter direct a proper Conveyance, in which the Truſtee ſhould join. It was then inſiſted that the Heir of the Truſtee (tho' an Infant) was a Truſtee within the Stat. 7 Anne 19. and therefore it was *pray'd that the Infant Truſtee might levy a Fine*, which muſt be good unleſs reverſed during his Infancy. But his Lordſhip ſaid, he did not know how he could direct the Judges or Commiſſioners to take a Fine from an Infant, but let the *Maſter direct a proper Conveyance.* Wms.'s Rep. 536. 538. Trin. 1719. Winnington v. Foley.

5. Infant to whom a Truſt-Eſtate deſcends &c. is obliged to aſſign &c. by the late Act, and in a Caſe where a Freehold and *Inheritance came to an Infant who was a Feme Covert* Motion was made in C. B. for Leave to examine her, and the Court made a Rule to do it, non obſtante Minoritate ſua. Hill. 6 Geo. C. B. Ld. Fitzwilliams and Ux.

6. Where A. had purchaſed a Burgage-Tenure in Truſt, and the Truſtee died, and his Heir, an Infant, *acknowled'd that he was only a bare Truſtee, and Proof being read that the Money was paid by A. though the Receipt in Writing was given to the Infant's Father*, but A. had been always in Poſſeſſion of the Writings and Eſtate, being 40 s. a Year, Ld. C. King ſaid he was ſatisfied that this was but a Truſt reſulting by reaſon of A.'s Paymcnt of the Money, and it being of ſo ſmall Value, and it being ſaid his Lordſhip had made a like Order before, he ordered (though only upon a Motion or Petition and Reference to a Maſter) that the Infant convey, ſince a Decree would coſt the Value of the Fee Simple; But that *for the future, where the Truſt is not declared in Writing he would leave the Ceſty que Truſt to bring his Bill and have a Decree.* 2 Wms.'s Rep. 549. Trin. 1729. Ex Parte Vernon.

7. A. owed ſeveral Debts, and by his Will *deviſed Lands in Fee to an Infant, charged with all his Legacies*; The Infant is not a Truſtee within the Stat. 7 Ann. cap. 19 as to ſo much of the Lands as may ſuffice for the Payment of the Debts and Legacies. 3 Wms's Rep. 389. in a Note of the Reporter cites Trin. Vac. 1730. at the Rolls. Anon.

8. The *Statute* enabling Infant-Truſtees to convey, *extends only to plain and expreſs Truſts*, not to ſuch as are implied or conſtructive only. 3 Wms's Rep. 387. Mich. 1735. Goodwyn v. Liſter.

(P) Allowances in reſpect of Infants.

1. A the Father deviſed Lands and 40 l. in Money to his Son and Daughter; the Mother and her ſecond Husband entered on the real Eſtate, and poſſeſſed himſelf of the perſonal Eſtate of Teſtator, and paid his Debts and Legacies, and *bred up and educated* the Infants, which amounted to more than the Income of the real Eſtate and the Intereſt of the 40 l. The Mother died, the *Father-in-law* offered a fair Account by his Bill, ſo that he might be allowed *for Neceſſaries*, and to pay the Defendant, now Guardian to the Infants, the Surplus, he being indemnified by this Court; which was decreed, and that the now Guardian give Security to pay the ſaid 40 l. with Intereſt to the Infant according to the Will. Fin. Rep. 2. Mich. 25 Car. 2. Hall v. Yates.

Vern. 443. 446. S. C. but not S. P.

2. Where an *Infant recovers by a Decree of the Court*, the Court may, with the Approbation of the Infant's Relations, *allot the Infant a Maintenance, though no Proviſion is in the Truſt* for that Purpoſe, and this is founded on natural Equity; Per Cur. 2 Vern. 236. pl. 219. Trin. 1691 Englefield v. Englefield.

3. 600 l. per Ann. was allowed by Chancery for the Maintenance of an Infant out of his Eſtate. *A Fit of Sickneſs* coſt 143 l. extraordinary, which was allowed over and above his quarterly Maintenance; Per Ld. Macclesfield. Chan. Prec. 559. pl. 343. Hill. 1720. Lady Shaftsbury's Caſe.

4. In a *Foreclosure againſt an Infant*, though the Infant *has ſix Months after he comes of Age to ſhew Cauſe* &c. yet he cannot ravel into the Account, nor even redeem, but only ſhew an Error in the Decree. 3 Wms's Rep. 352. Hill. 1734. Mallack v. Galton.

5. An Allowance of Maintenance to a Guardian *muſt be in regard to what the Infant then had*, and not to what falls in afterwards. 3 Wms.'s Rep. 368. Trin. 1735. in Caſe of Chaplin v. Chaplin.

See Tit. Age (A) &c.

(Q) Equity. In what Caſes the Parol ſhall demur in Equity.

1. WHETHER the Parol ſhall demur in *Equity* in Caſe of a *Deſcent of a Truſt* to an Infant? See Vern. 173. in pl. 167. Trin. 1683. Creed v. Covile.

2. The Parol ſhall not demur in *Prior Incumbrances*, nor in *Truſts for Sales*, but in *Equities of Redemption* only. G. Equ. Rep. 66. Paſch. 7 Ann. in Canc.

3. Bill by a Bond Creditor *againſt the Heir and the Executor of the Obligor to have a Satisfaction of a Debt due upon the Bond out of perſonal and real Aſſets*; the *Heir inſiſts that as to him the Parol ought to demur*, for that he is an Infant, and the Bill ſeeks to charge his Inheritance, which came to him by Diſcent from the Obligor; the Parol ſhall demur until the Defendant comes to his full Age, as well in this Court as at Law, which was not denied by Attorney-General Counſel pro Quer'. Ordered that the Cauſe ſhould ſtand in Statu Quo until the Infant Heir come to full Age; but as to the other Defendant the Executor decree to account and make a Satisfaction out of perſonal Aſſets as far as they would go; Per King C. MS. Rep. Trin 12 Geo. Hazard v. Dixon.

1. *Lands are given to A and his Heirs for three Lives. A. dies*; his *Heir* does not take by Diſcent, ſo as to have his Age, or to make the Parol demur, but *takes as Special Occupant*; though had it been *in the Caſe of Lands in Fee deſcending* on an Infant, the *Parol ſhould have demurred* in Equity as well as at Law. 3 Wms.'s Rep. 368. Trin. 1735. in Caſe of Chaplin v. Chaplin.

For more of Enfants in General, See **Age, Fines, Guardian, Recoveries** and other Proper Titles.

For payment of legacies in the case of Infants, see tit. Devise I. D. & L. D. & my reference there

Enterpleader.

Enterpleader.

(A) Garniſhment.

Fol. 732.

Of the *Plaintiff and Garniſhee.* [Or of whom it ſhall be.]

1. IF a Statute be acknowledged to a Dean and Chapter, and delivered to B. till certain Conditions performed, **though this** B. is one of the Chapter, **yet if the** Conuſor brings Detinue **againſt him, he may ſay that it was delivered upon Condition, and** Garniſhment ſhall be granted againſt the Dean and Chapter. 13 H. 4. 8.

2. In Detinue of a Writing, the *Defendant ſaid that it was delivered to him by the Plaintiff and one B who is dead, upon certain Condition to be performed to deliver* &c. and if the Condition be performed or not he does not know, and *prayed Garniſhment P. Son and Heir of B. becauſe the Charter concerned Inheritance*, and had it without averring the Death returned by the Sheriff, viz. upon Surmiſe; Quod Nota. Br. Garniſhee, pl. 26. cites 21 E. 3. 41.

3. If the *Defendant confeſſes that the Garniſhee has broke the Condition*, this ſhall not prejudice the Garniſhee. Br. Garniſhe, pl. 33. cites 39 E. 3. 22.

4. In Detinue of Goods, the *Defendant ſaid that they were delivered to him upon Condition, that if A. performed certain Conditions to the Plaintiff*, that they ſhould be delivered to A. and otherwiſe to the Plaintiff, and *prayed Garniſhment to A.* and had it, notwithſtanding that A. be *a Stranger, and had no Writ pending thereof.* Br. Garniſhe, pl. 38. cites 14 E. 4 2.

(B) *How* it is to be * *prayed.*

* This by the Plea in Roll ſeems to be miſprinted for [Pleaded]

1. IN Detinue, **if the** Defendant ſays it was delivered by the Plaintiff and another upon certain Conditions **&c. this is good,** without ſhewing what **the Conditions were.** 3 H. 4. 18. b. **adjudged.** Br. Garniſhe &c. pl. 17. cites S. C. and ſays the Reaſon ſeems to be, becauſe the Defendant and one of the Parties ſhall not try the Conditions in the Abſence of the other. —— Fitzh. Garniſhe, pl. 19 cites S. C.

2. Action of Detinue *of a Bag of Evidences, and of a Charter ſpecial*, and the *Defendant ſaid, that they came to his Hands as Executor, and that F. had entered into Part of the Land, and prayed Garniſhment by Scire Facias againſt F.* and per Marten he ſhall not have Scire Facias but *where he confeſſes the Poſſeſſion of the Thing demanded, and makes Privity of the Bailment*; Quære inde, For Cockyn and Marten held that Scire Facias lay well. Br. Garniſhe, pl. 1. cites 3 H. 6. 35.

(C)

(C) What ſhall be a good *Counterplea* of Garniſhment.

Br. Garniſhe &c pl. 6. cites S. C. & S. P. per Marten. —— But Garniſhee cannot plead ſuch Plea, becauſe by ſuch Plea he varies in the Bailment from what was pleaded by the Defendant. Br. Garniſhe &c. pl. 39 cites 20 E. 4. 13.

1. IN Detinue upon a Delivery to re-deliver, if the Defendant ſays it was delivered by the Plaintiff and another &c. it is a good Counterplea to the Garniſhment that the Delivery was by himſelf alone, abſque hoc that it was delivered by him and the other &c. 3 H. 6. 29. b.

2. In Detinue of a Writing, the *Defendant ſaid that it was bailed to him upon Condition by the Plaintiff and he who is named in the Writing, and prayed Garniſhment againſt him, and he had another Writ againſt the Defendant of the ſame Writing returnable now, and was demanded, and was nonſuited*, and yet notwithſtanding the Nonſuit Garniſhment was granted againſt him; Quod Nota. Br. Garniſhe, pl. 14 cites 41 E. 3. 24

3. In Detinue, the *Plaintiff counted of a Bailment by J. G. to the Defendant to bail to the Plaintiff*, and the *Defendant ſaid, that the ſame J. G. had brought another Writ of Detinue againſt him returnable at the ſame Court, and counted upon a Bailment made by himſelf to the Defendant to rebail to him*; The *Plaintiff ſaid, that it was bailed to the Defendant to bail to him, abſque hoc that it was bailed to the Defendant upon certain Conditions performed to rebail to the ſaid J. G. Modo & Forma*, & alii e contra. Br. Enterpleader, pl. 4. cites 3 H. 6. 43.

4 Detinue *of two Obligations, one in which he was bound to T. H. and and another by which T. H. was bound to him*, the *Defendant ſaid, that they were deliver'd upon certain Condition* &c. and pay'd Garniſhment againſt *T. H.* and had it, who came by Scire Facias, and *ſaid that the Obligations were deliver'd to the Defendant upon Condition that if the Plaintiff ſtand to the Arbitrement of A. B of all Actions* &c. *and this Award perform'd of his Part that then every one ſhall have Livery of his own Obligation, and if the one fulfils the Award and the other breaks it, that he who fulfills it ſhall have Livery of both Obligations, provided always that the ſaid Award be made before Eaſter next, and ſaid that the Arbitrator did not make any Award before Eaſter, and pray'd Livery of his own Obligation.* Port. upon his Conuſance pray'd Livery of the Obligation of the Plaintiff and had it, and further pray'd Livery of the other Obligation; for he ſaid that the Obligation was deliver'd upon Condition to ſtand to the Arbitrement &c. as above, and this fulfill'd as above that then the Obligation ſhould be deliver'd as above generally, and *ſaid that after Eaſter they awarded that the ſaid T. H. ſhould do ſuch Things and ſhew'd what, which are not done, and that the Plaintiff ſhould do ſuch Things, and ſhewed what, abſque hoc that the Obligation was deliver'd to the Defendant upon Condition to ſtand to the Award of the ſaid Arbitrator with ſuch Proviſo as above, and pray'd Livery* Markham ſaid, You ought to ſhew that you have perform'd the Award of your Part; Newton ſaid No; But Paſton contra, and that he ought to ſhew it, for it is ſhewn that he ought to perform the Arbitrement. Port. ſaid I plead ſo for my Speed, but not de Rigore Juris only. Brooke ſays, it ſeems that he ſhall ſhew it de Rigore Juris, and the other ſhall maintain the ſame Iſſue alleging the Condition to be perform'd of his own Part. Br. Garniſh, pl. 31. cites 21 H. 6. 52.

5. In

5. In Detinue the Defendant *pray'd Garniſhment* and had it *againſt the Baron and Feme*, which was *challeng'd inaſmuch as it ſhall be intended of the Livery of the Baron only, and he ſhall have Action*, and therefore he ſhall be warned only, and yet well here; For *the one is Original* and *the other is Judicial*, and there is a *Diverſity where two are warned where only one ſhould be warned*, and *where one is warned alone where two ſhould be warned.* Br. Garniſh, pl. 43. cites 8 E. 4. 15.

(D) Garniſhment.

[What Pleas the Garniſhee may plead.]

1. THE Garniſhee ſhall not plead other Plea but Conditions performed. 20 H. 6. 29. b. Fitzh. Garniſhe, pl 9. cites S. C.

2. The Garniſhee ſhall not ſay that he hath performed the Condition, contained in the Obligation for which the Writ is brought. 20 H. 6. 29. b. Fitzh. Garniſhe, pl. 9. cites S C. & S. P. but he muſt plead that the Condition upon which the Obligation was delivered is performed.

3. Detinue againſt an Abbot, the Defendant pray'd Garniſhment againſt R. by reaſon of Delivery upon Condition &c. and R. came and *ſaid* upon the Scire Facias *that the Abbot is depos'd, Judgment of the Writ of Scire Facias*, and the Opinion of the Court was, that he ſhall not plead in Abatement of it, quod nota; For per Babb. it is his own Writ, and by him he ſhall not plead in Abatement of the Writ of Deliverance. Br. Garniſhe, pl. 4 cites 3 H. 6. 4.

(E) What Pleas the Garniſhee may plead.

1. IN Detinue, the Defendant ſays it was delivered by the Plaintiff and B. upon Condition, and prays Garniſhment. B. comes and ſays that he ſolely delivered it, and it is not a Plea, for he is warned to anſwer whether the Conditions are performed or not, and therefore the Plea varies. 12 E. 4. 13. b. Curia. Dubitatur, * 3 H. 6. 50. † 14 H. 6. 11. *Fitzh Garniſh, pl. 4. cites S. C. † Fitzh. Garniſhe, pl. 7. cites S. C. —— Br. Enterpleder, pl. 15. cites S C. that if Garniſhee comes and ſays that it was delivered by him alone, the Plaintiff ſhall recover the Writing; For by the Garniſhment the Defendant is out of Court, and cannot rejoin to the Plea of the Garniſhee. Br Enterpleader, pl. 15. cites 14 H. 6. 11. —— Br. Charters de terre, pl. 43. cites S. C. —— S. P. Br. Garniſhe, pl. 39. cites 20 E. 4. 13. —— Br. Enterpleder, pl. 24 cites S. C. —— S. P. for if he ſhould be allowed to plead ſo, the Plaintiff ſhould have Delivery againſt the Defendant, and yet the Garniſhee ſhould have Action againſt the Defendant

2. The Garniſhee ſhall not ſay they were delivered upon other Conditions than the Defendant hath ſaid, for the Garniſhment is only to know whether the Conditions are performed, and if the Defendant hath miſtaken the Conditions he ſhall be charged by both, and ſo the Garniſhee at no Miſchief. ‡ 40 E. 3. 11. b. 3 H. 6. 50. || 21 H. 6. 35. ¶ 14 H. 6. 11. b. Contra 43 E. 3. 28. b.

Defendant alſo, he having as here charged himſelf to both; Per Paſton; And by him the Garniſhee cannot vary from the Condition alleged by the Defendant; For ſhould he do ſo, the Plaintiff ſhould have Delivery as above, and the Defendant ſhall be charged by his Folly; quod Cockain did not deny. Br. Garniſhe &c. pl. 6. cites 3 H. 6. 50. —— And Nota, that where the *Defendant* in Writ of Detinue *admits the Writ and the Count*, and prays Garniſhment, the Garniſhee when he comes ſhall not plead in Abatement of the Writ or the Count which the Defendant has admitted; Quod Nota per Curiam. Br. Garniſhe &c. pl. 6. cites S. C.—He ſhall not plead to the Writ, nor caſt *Protection* after Appearance. Br. Garniſhe &c. pl. 9 cites 20 H. 6. 28. by Newton and Askew.

‡ Br. Garniſhment, pl. 12 cites S. C. — Fitzh. Garniſhment, pl. 28. cites S. C.

‖ Br. Garniſhe &c. pl. 30. cites S. C. — Fitzh. Garniſhe, pl. 16. cites S. C.

¶ Fitzh. Garniſhment, pl. 7. cites S. C. —— Br. Enterpleder, pl. 15. cites S. C.

Fol. 733. N.B. there is no pl. 4. in Roll.

3. **The Garniſhee cannot Plead that they were** delivered to the Defendant and a Stranger **not named.** 3 H. 4. 7. b.

Br. Garniſhe &c. pl. 27. cites 7 H. 4. 34.—Fitzh. Garniſhe, pl. 6. cites S. C. ——In Detinue the *Garniſhee ſhewed two Conditions, and that he had performed them, and demanded Delivery*; The *Plaintiff ſaid, that they were delivered upon thoſe Conditions and others, which the Garniſhee has not performed, abſque hoc that thoſe are all* &c. Br. Garniſhe, pl. 41. cites 9 H. 6. 14.

5. But **vide 7 H. 6. 3. 4. b. 40. b. that the Defendant ſays, that it was** delivered upon Condition, without ſhewing any Condition, and **when the** Garniſhee **comes he** ſhall ſhew the Conditions, **and the** Plaintiff may ſay **it was delivered** upon other Conditions in certain, and traverſe **other Conditions alledged.**

Fitzh. Garniſhment, pl. 16 cites S C —Br. Garniſhe &c. pl. 30. cites 21 H. 6. 36.

6. **In Detinue upon a Bailment** in one County, **the** Defendant **ſays it was** bailed by him in another &c. **the Garniſhee cannot** traverſe the Bailment in this County, **for it is** admitted by the Defen- 21 H. 6. 35 **adjudged.**

——And See pl. 1. 2 ſupra in the Notes.

7. **The Garniſhee ſhall not plead** a Grant of the Plaintiff by Deed after the Delivery, **that he ſhould have the Deed** upon certain Conditions **performed,** which he had performed. **Contra** 20 H. 6. 29.

Br Garniſhe, pl. 12. cites 40 E. 3. 11. S. P. —— Fitzh. pl. 28 cites S. C.

8. **The Garniſhee cannot plead an** Accord between himſelf and the Plaintiff after the Delivery to do other Things &c. without Writing. 40 E. 3. 12.

* Br. Garniſhe, pl. 16. cites S. C. — Fitzh. Garniſhe, pl. 32. cites S. C — Br. Garniſhe &c. pl. 33. cites S. C.

9. **The Garniſhee may plead the** Releaſe **of the Plaintiff** after the Delivery of all Debts and Claims, **and bar him.** * 49 E. 3. 13. b. **Dubitatur,** 39 E. 3. 23. **adjudged of all Actions Releaſe, Contra** † 20 H. 6. 28. b.

† Br. Garniſhe, pl. 9. cites S. C. ——Fitzh. Garniſhe, pl. 9. cites S. C.

10. **The Garniſhee may plead a** Releaſe **of the Plaintiff made to him.** 3 H. 6. 18.

In Detinue of a certain Deed obligatory, the Garniſhe pleaded Releaſe of all Actions Perſonal Meſne between the Delivery and the Releaſe Judgment ſi Actio, and was held good by Markham and Paſton in avoiding Circuity of Action; For otherwiſe the Plaintiff ſhould recover in this Action, and ſhould after be barr'd in Debt upon the Obligation. But by Newton and Aſcue contra. For each is Actor againſt the other, and one Actor cannot plead in Bar againſt the other

11. So **he may plead his Releaſe** of all Actions Perſonal after the Conditions broke. **Dubitatur** 14 H. 6. 11.

12. But not **ſuch Releaſe made of Actions Perſonal** before the Conditions broke. 14 H. 6. 11.

ther, and each of them ſhall make Title to the Writing, and either of them may recover Dama-ges. Br. Garniſhe &c pl 9. cites 20 H 6. 28. and takes Notice that it is not adjudged, but cites 39 E 3. 22. that it was adjudged a good Plea.

13. **The Garniſhee cannot plead** that the Writing is not his Deed generally or ſpecially, **for though it be an Eſcrow, yet if the Condition be performed the Plaintiff ſhall have it.** 9 H. 6. 55. b. 11. H. 6. 6.

14. **As he cannot plead that he was** under Age at the making **the Obligation, for this is in Bar of the Thing.** 11 H. 6. 11.

15. Detinue by A. upon Bailment in indifferent Hands, and the *Defendant had Garniſhment againſt the Executors of the other Party, who appear'd* by the Garniſhment, and the *Plaintiff ſhew'd Indenture of the Bailment, in which it appear'd that the Plaintiff and R. were oblig'd in the Writings demanded*, by which the *Garniſhee pleaded it to the Counter-plea becauſe R. is not named, by which his Releaſe may diſcharge all the Actions*, and by this the Plaintiff took nothing by his Writ, quod nota. But *this is rather by the Confeſſion of the Plaintiff than by the Plea.* Br. Garniſhee, pl. 32. cites 24 E. 3. 24.

Br. Brief, pl. 198. cites S. C. and ſays that the Executors came and ſaid that they had another Co-executor, viz. D. who is alive, not

Named; Judgment of the Writ; And it was doubted if any other Garniſhment ſhould iſſue, and the Plaintiff ſhewed Indenture of the Bailment &c.——Thel. Dig. 199. Lib. 13 cap. 12. S. 1. cites Paſch. 24 E. 3. 5. 24. S. C. and Hill. 12 H. 4. 18.

16. Detinue *of a Writing of a Statute Merchant*, the *Defendant pray'd Garniſhment* and had it, and at the Day the *Grrniſhee came, and the Defendant made Default*, and the *Plaintiff pray'd Diſtreſs to deliver to him the Writing, and the Garniſhee to him likewiſe*, and yet becauſe the *Plaintiff had counted before of Garniſhment to deliver upon Condition*, therefore by Award *they enterpleaded* before any Livery, and thereupon the *Garniſhee pleaded Releaſe of the Plaintiff of all Actions made Meſne between the making of the Writing and the Livery*, and yet becauſe the Detinue is determined thereby, therefore the Plaintiff was barr'd by Award, and this is good to avoid circuity of Action. Br. Charters de terre, pl. 39. cites 39 E. 3. 22.

17. In Detinue the *Defendant pray'd Garniſhment, becauſe the Writing was deliver'd to him upon certain Condition* &c. *and ſhew'd what*, and had it, and the *Garniſhee ſhew'd another Condition*; there per Thorp the Plaintiff ſhall recover and the Garniſhee is at no Miſchief; For he may have another Writ againſt the Defendant, and recover againſt him by his pleading of the falſe Condition. Br. Garniſhe pl. 11. cites 40 E. 3. 11.

18. Detinue *of a Writing, the Defendant alledged delivery to him upon Condition*, and pray'd Garniſhment and had it, and the *Garniſhee confeſsed the Condition but ſaid that Accord was made between them that he ſhould make Eſtate of the Manor of D. for Life the Remainder to the Plaintiff, and that the Plaintiff ſhould be there, and then the Deed ſhould be delivered to him, and* ſaid *that he was always ready and the Plaintiff did not come, and pray'd Livery of the Writing*, and becauſe it was *accorded in another Matter than the Condition pleaded* by the Defendant, and *he did not ſhew Writing of this Accord*, and alſo he might have made the Eſtate the Remainder to the Plaintiff tho' the Plaintiff did not come, therefore the Plaintiff recovered by award; For he *did not ſay in the Negative that if the Plaintiff did not come that no Eſtate ſhould be made.* Br. Garniſhe. pl. 12. cites 40 E. 3. 11.

19. In Detinue of *an Obligation*, the *Defendant ſaid that it was delivered by the Plaintiff and T. B. upon certain Conditions, and he did not know if the Conditions were performed or not, and pray'd Garniſhment againſt*

T.

T. B. who came upon the Scire Facias, and *ſaid that it appeared by the Obligation that he and three others were bound who are not Warned*; Judgment if he ſhall Anſwer; et non Allocatur; For *it may be that the Garniſhee only ſealed and delivered the Deed, and the other three not*, and therefore he was awarded to Anſwer. Br. Garniſhe, pl. 16. cites 49 E. 3. 13.

20. Garniſhee *pleaded Releaſe made to him by the Plaintiff after the Obligation of all Debts, Treſpaſſes and Claims*, and the beſt Opinion was that it is no Plea; For *nothing is demanded againſt him in this Action but againſt the Defendant, and the Obligor cannot be damnified in this Action* as he ſhall be in Debt, and therefore it is a good Plea in Debt upon an Obligation, but not in this Garniſhment, et adjornatur &c. Br. Garniſhe, pl. 16. cites 49 E. 3. 13. and by 20 H. 6. 28. every one is Actor againſt the other, therefore no Plea, and ſee 39 E. 3. thereof.

21. Garniſhee pleaded in Abatement of the Writ *that the Bailment was made to the Defendant, and to another not named* &c. Quære. Thel. Dig. 199. lib. 13. cap. 12. S. 2. cites Mich. 3 H. 4. 5.

22 In Detinue the *Garniſhee* came and *pleaded to the Writ becauſe the Bailment was by two, and the one alone brought the Action*, and though Garniſhee cannot plead to the Writ which the Defendant has affirmed, and to which he is a Stranger, yet becauſe it is apparent therefore per Cur. *both ſhall bring the Action in Common* by the Opinion of the Court, and this as Amicus Curiæ. Br. Garniſhe, pl. 22. cites 12 H. 4. 18.

Thel. Dig. 200. lib. 13. cap. 12 S. 3. cites 3 H. 6. 38. S. C.

23. In Detinue *of an Obligation* the *Defendant ſaid, that it was delivered to him by the Plaintiff and one Hillibrond, upon certain Condition to be performed, to deliver to the Plaintiff, but if not then to the Defendant, and he did not know if the Conditions are performed* &c. and prayed a Scire Facias againſt Hillibrand to warn him, and had it, and the *Garniſhee* came and *ſaid that where the Scire Facias is Hillibrondius his Name is Hillibrondus*; Judgment of the Writ. Strange ſaid *he is obliged* to me in an Obligation *by the Name of Hillibrondius*; Judgment &c. and the Opinion of the Court was that the Garniſhee ſhall not have the Plea. Br. Garniſhe, pl. 2. cites 3 H. 6. 37.

Thel Dig. 199. lib. 13. cap. 12 S. 3. cites S. C.

24. In Detinue the Defendant prayed Gsrniſhment upon Condition to deliver &c. by which upon the Scire Facias returned the *Garniſhee* came and *pleaded that the Plaintiff is excommunicated*; Judgment if he ſhall be anſwered; and per Cur. he ſhall have the Plea, and is Party well enough before that he has made Title to the Writing; for Judgment of the Damages ſhall be given againſt him, by which the *Plaintiff ſhewed Letters of Abſolution pending the Writ*; Weſtbury demanded Judgment of the Writ becauſe he was once diſabled pending the Writ, et non allocatur. Br. Garniſhe, pl. 3. cites 3 H. 6. 40.

Such Plea is not good either in Abatement of the Sci Fa. or of

25. Where *Writ* is brought *againſt an Abbot, Garniſhee cannot ſay that the Abbot is depoſed* in Abatement of the Scire Facias. Thel. Dig. 199. lib. 13. cap. 12 S. 3. cites 3 H. 6. 41.

the Original. Thel. Dig. 186. lib. 12. cap. 17. S. 9. cites S. C.

26. *Detinue by a Feme Sole* where the *Count was that the Bailment was made by the Plaintiff*, the Garniſhee was *not received to ſay that the Feme was Covert with ſuch a one at the Time of the Bailment* in Abatement of the Writ or Count. Thel. Dig. 200. lib. 13. cap. 12. S. 3. cites 3 H. 6. 51.

Thel. Dig. 200. lib. 13. cap. 12. S. 4. cites Paſch. 7 H. 6. 36. S. C.

27. In Detinue the *Defendant pray'd Garniſhment by Delivery of the Writings upon Condition*, and had it; The *Plaintiff counted of Delivery at D. in Middleſex*, and the *Garniſhee ſaid that at another Time the Plaintiff brought ſuch a Writ againſt the Defendant, and ſuppoſed the Bailment*

Bailment at C. in London; *Judgment of the Writ* ſuppoſing it in Middleſex. Babb. [bid him] anſwer, For the Defendant has admitted the Writ good, therefore you ſhall not abate it. Br. Garniſhe, pl. 27. cites 7 H. 6. 34.

28. The Garniſhee ſhall not plead *falſe Latin* to the Writ *as Party*, but as Amicus Curiæ. Br. Garniſhe, pl. 42. cites 9 H. 6. 39. S. P. And ſo of Matter apparent in the Count, but no foreign Matter. Thel. Dig. 200. lib. 13. cap. 12. S. 5. cites S. C.

29. In Attaint it was agreed arguendo that *Garniſhee ſhall not plead to the Writ of Detinue to abate it*, but *in a Thing apparent as Amicus Curiæ*, and *not foreign Matter*, and he *ſhall have Oyer of the Declaration*, but the *Plaintiff ſhall not declare de novo againſt him*; but per Babb. if he *comes at the firſt Day he* ſhall have Oyer of the Declaration, but if he comes by the Exigent, not. Br. Garniſhe, pl. 8. cites 9 H. 6. 38, & 39.

30. In Detinue if the *Defendant prays Garniſhment becauſe the Obligation in Demand was deliver'd to him and one C. upon certain Conditions* &c. and the *Garniſhee* comes and *ſays that he alone delivered the Obligation*, the *Plaintiff ſhall recover the Writing*; For now they do not agree in the Livery, and the Defendant is out of Court by the Garniſhment, and cannot reply or rejoin to the Plea of the Garniſhee; quod nota. And if the Defendant ſays falſely it is his Folly, and if the Garniſhee ſays falſely this is his Folly. Br. Charters de Terre, pl. 43. cites 14 H. 6. 11.

31. *Scire Facias* iſſued *againſt the Feme and another as Executors* of ſuch a one; the *Feme ſaid that ſhe was Covert with ſuch a one who is in full Life* &c. Thel. Dig. 200. lib. 13. cap. 12. S. 6. cites Hill. 21 H. 6. 29. Quære.

32. Per Newton, *where Defendant alleges the Delivery to be by the Plaintiff and J. N. upon certain Conditions, and does not ſhew what in certain*, there the *Garniſhee may vary* from thoſe Conditions; *But where* the Defendant *ſays that the Bailment was made by the Plaintiff and J. N. upon Condition by the Plaintiff alleged*, and prays Garniſhment, there the *Garniſhee cannot vary from the Conditions* alleged by the Plaintiff; and ſo to the Place, where the Defendant ſays that the Day, Year and Place in the Declaration, the Plaintiff and J. N. bailed upon certain Condition, and prays Garniſhment, there the Garniſhee cannot vary from the Place, and this affirmed to be the Entry per Brown Prothonotary; by which it was agreed, that the Plaintiff recover againſt the Defendant his Chattels, and his Damages againſt the Garniſhee, and 14 H. 6. 11. agrees with Newton. Br. Garniſhe, pl. 30. citas 21 H. 6. 35.

33. In Detinue the *Garniſhee ſhall plead Recovery of the Writings in Demand, in Action of Detinue againſt the Defendant and the Plaintiff before the Bailiffs of D. in D. upon ſuch an Action, where the Bailiffs of D. had Conuſance of the Plea*, and a good Plea. *Quære* if the Defendant ſhall not be charged again, becauſe he has not denied the Detinue now? and if the Recovery be good, by Reaſon that the Sheriff in Juſticies granted this Conuſance to the Bailiffs? Br. Garniſhe, pl. 46. cites 34 H. 6. 47.

34. In Detinue the *Defendant pray'd Garniſhment and had it*, and came the *Garniſhee*, and *ſaid that at another Time he brought ſuch an Action by Juſticies* before the Sheriff, *where the Defendant had Garniſhment of the now Plaintiff who made Default, and* this *Garniſhee there recover'd the Thing in Demand againſt the now Defendant, and pray'd thereof Livery*, and it was in Doubt if the Defendant ſhall have charg'd himſelf to the Plaintiff now by his Folly, becauſe he had not pleaded

the ſame Recovery in Bar, Quære; For it ſeems that as long as *Execution is not made* a Man ſhall repair to his *new Original*, and then ſhall plead De Novo, Quære; For now the Defendant had Notice that the Judgment was given againſt himſelf, Nota. Br. Detinue, pl. 11. cites 34 H. 6 47.

35. In Detinue of Charters the *Defendant pray'd Garniſhment againſt J. N.* and had it, and the *Garniſhee* came and *ſaid that J. P. gave the Land to the Feme now Plaintiff and her firſt Baron, and to the Heirs of the Baron, and the Baron died without Iſſue, and the Garniſhee is Heir to him, and the Donor deliver'd the Evidences to the Baron in Salvation of his Inheritance, after whoſe Death his Feme got the Evidences and took another Baron now Plaintiff, who alien'd in Fee and deliver'd the Evidences to the Defendant, and the Garniſhee as Coſin and Heir of the firſt Baron*, and ſhew'd how Coſin, enter'd for Alienation to his Diſinheritance, and ſo it belong'd to him to have the Evidences &c. And per Laken, the Feme ſhall have the Charters for Term of her Life, but Littleton contra, and that by the Alienation they belong'd to the Heir; Laken ſaid, No, Sir, For we cannot have Cui in Vita after the Death of the ſecond Baron; but Littleton ſaid, Yet we may have them during the Life of the ſecond Baron; *But* by him in this Caſe becauſe the Eſtate was made to her and her firſt Baron, and to the Heirs of the Baron without Deed, and the ancient Charters deliver'd to the Baron alone in Salvation of his Inheritance, the Feme can have none of them. Contra of the Deed of the ſame Eſtate, though it had been deliver'd to the Baron alone; For all that touches his Eſtate ſhe ſhall have, and no more. Br. Charters de terre, pl 11 cites 34 H. 6. 1.

39 The *Garniſhment* iſſued *againſt Baron and Feme upon Surmiſe that both were Parties to the Bailment*, and the *Baron* came and *prayed Judgment of the Writ of Scire Facias* brought againſt him and his Feme &c. Yet he was put to anſwer, but with a Saving to them. Thel. Dig. 200. Lib. 13. cap. 12. S. 8. cites Mich. 8 E. 4. 16.

40. The Garniſhee ſhall plead *Outlawry* in the Plaintiff. Thel. Dig. 200. Lib. 13. cap. 12. S. 7. cites 11 E. 4. 14.

(E. 2) Writ, Proceſs &c. in Garniſhment, againſt whom.

1. IN Detinue the *Defendant pray'd Garniſhment againſt the Baron and Feme*, and had it, and the *Baron return'd Dead*, and a new Garniſhment iſſued againſt the Feme, quod nota. Br. Garniſhment, pl. 15. cites 44 E. 3. 33. 34.

2. *Obligation was deliver'd upon Condition*, viz, *If the Obligor Plaintiff pay* 20 *l. to J. K.* that the *Deed ſhall be deliver'd to him*, or *otherwiſe* to deliver it *to the Obligee*, and the *Obligee brought* Action of *Detinue*, and the *Defendant pray'd Garniſhment againſt J. K. to ſay why he did not receive the Money, and the Plaintiff to have delivery of the Deed*, and had it, and the *Sheriff return'd Nihil*, and *at the Alias he return'd that J. K. was dead*, by which *Garniſhment iſſued againſt the Heir and Executors*, and the *Sheriff return'd that he had neither Heir or Executors, and that the Biſhop of D. adminiſter'd* becauſe he died Inteſtate, by which *Proceſs iſſued againſt the Biſhop who came by Attorney, who receiv'd the* 20 *l. upon Condition*, that is to ſay, If his Maſter ought to have them to retain them, and otherwiſe re-deliver them to the Court, and found thereof Surety. Br. Garniſhe, pl. 44. cites 48 E. 3. 30.

3. Condition

3. Condition of the delivery of a Deed is *to deliver it to the Maker if he by reaſonable Garniſhment levy a Fine to the Obligee* 15 *Paſch.* &c. and *the Obligee ſued Writ of Covenant* to levy the Fine, and the *Sheriff return'd the Obligor ſummon'd*, this is not ſufficient Garniſhment; For he ought to be warn'd by the Party himſelf. Br. Conditions, pl. 39. cites 11 H. 4. 18.

4. In Detinue of Charters the Defendant pray'd Garniſhment againſt J. N. and had it, and *four Scire Facias's and all return'd Nihil*, and the Plaintiff pray'd Delivery of the Writing; Hank. ſaid, You cannot; For he ought to be warn'd, and it was ſaid to him by the Court, that *he ſue till he be warned*, quod nota. Br. Garniſhe, pl. 21. cites 12 H. 4. 9.

5. In Detinue *the Defendant pray'd Garniſhment againſt two*, and the *one was dead*, by which *new Garniſhment* iſſued againſt him who was alive, *without Proceſs againſt the Executors* of the other who was dead. Br. Garniſhe, pl. 23. cites 12 H. 4. 23.

6. In Detinue of two Writings the Defendant *pray'd Garniſhment againſt two*, and had it, and the Scire Facias *return'd that the one was warned and the other dead*, and the Scire Facias was abated as it ſeems; For it was awarded that he ſhould ſue a *new Scire Facias*, and it does not appear if againſt the Executors only, or againſt the one, and the Executors of the other. But by 19 H. 6. 32. *the one had Idem dies, and a new Scire Facias againſt the other*. Br. Garniſhe, pl. 24. cites 14 H. 4. 1.

7. By the *Death of Garniſhee*, the Writ ſhall not abate, but *Re-ſummons ſhall Iſſue againſt the Defendant*, and *Scire Facias againſt the Executors of the Garniſhee*. Br. Garniſhe, pl. 7. cites 9 H. 6. 36.

8 In Detinue of an Obligation the *Defendant ſaid, that it was deliver'd to him by the Plaintiff and one C. upon certain Condition* &c. and becauſe *C. is dead* pray'd Garniſhment againſt his Executors and had it, and it does not appear if they were were named or not; It ſeems they were not. Br. Garniſhe, pl. 34. cites 14 H. 6. 11.

9. In Detinue the Defendant pray'd *Garniſhment againſt two*, and Scire Facias iſſued, and the Sheriff *return'd the one warned and the other dead*, by which iſſued *Scire Facias againſt the Executors* of the Deceaſed, and *Idem dies to the other* who was return'd warned. Per Markham, by the Death of the one the firſt Scire Facias was abated, therefore the new Scire Facias ought to have been awarded againſt the one, and the Executors of the other; But Newton and tot. Cur. was againſt him, and that it was well as above, quod nota. Br. Garniſhe, pl. 29. cites 19 H. 6. 9.

And ſuch a Caſe the ſame Year, fol. 55. where he who was warned was compell'd to anſwer, quod nota, and Quære; For it was ſaid there, that the Contrary thereof was adjudg'd Anno 24 Ibid.

10. If the *Sheriff returns the Garniſhee warned*, and *does not ſay by Tales* &c. *Probos et Legales homines*, yet this is good if the Garniſhee appears; Contra if the Garniſhee makes Default. Br. Garniſhe, pl. 45. cites 33 H. 6. 31.

11. In Detinue the *Defendant ſhew'd that the Writing was deliver'd by the Plaintiff and J. N.* and *pray'd Garniſhment* againſt him *in the County of E.* which was *return'd Nihil*, and *Alias iſſued*, and *return'd as above*, by which he *pray'd Garniſhment in the County of N. upon ſurmiſe of Aſſets there*, and had it. Br. Garniſhe, pl. 36. cites 6 E. 4. 11.

(F) [Garniſhment.]

Judgment.

S. P. and the Plaintiff and Defendant were in Miſericordia. Br. Garniſhee &c. pl. 13. cites 40 E. 3. 29. and ſo are all the Editions, but it ſeems it ſhould be as here in Roll, 40 E. 3. 39. and there the Year Book ſays, Et ſic vide & nota &c. Mich. 39 E. 3. fol. 29. the Garniſhee cannot have Judgment to recover by the Default of the Defendant. —— Fitzh. Garniſhe, pl. 29. cites S. C.

1. IF the Garniſhee comes at the Day, and the Plaintiff and Defendant make Default, the Garniſhee ſhall recover. 40 E. 3. 39.

Fitzh. Garniſhe, pl. 29 cites S. C.

2. If there be an Enterpleader in Raviſhment of Ward, he that is not Party to the Writ may plead the Releaſe of the Plaintiff. 20 H. 6. 29.

3. If the Garniſhee be returned warned, and does not appear, no Damages ſhall be recovered. 20 E. 4. 13. b.

(G) In what *Actions*.

Br. Enterpleader, pl. 17. cites S. C.

1. IF one brings Detinue upon a Bailment, and the other upon a Trover, there ſhall be an Enterpleader. 39 H. 6. 36. b.

—— Fitzh. Enterpleder, pl. 9. cites S. C. —— In this Caſe, and ſo if the Defendant is charged with a ſeveral Bailment by each of the Plaintiffs, there they ought to have ſeveral Actions; Roll Rep. 130. and ſays, that according to this are 19 H. 6. 3. 9 H. 6. 17. 17 H. 6. 22. and 39 H. 6. 36. But the Reporter adds a Remark, that 39 H. 6. is adjudged contra as to the Trover.

2. If A. brings *Quare Impedit againſt B. of the Advowſon of C.* and *B. brings ſuch a Writ againſt A.* there *if A. will aver that the ſecond Quare Impedit is brought of the ſame Avoidance as the firſt is brought*, then they ſhall enterplead upon the Writ of elder Date, and otherwiſe not. Br. Enterpleader, pl. 26. cites 19 H. 6. 68.

3. *In Writ of Ward and Account* Garniſhment does not lie, *but if two ſeveral Writs of Ward* are brought there lies Enterpleader, and in *Debt* Garniſhment does not lie. Br. Garniſhe, pl. 38. cites 14 E. 4. 2.

Br. Garniſh, pl. 39. cites S. C.

4. If *Garniſhee* will *bring Detinue againſt the Defendant*, then the Plaintiff in the firſt Action and he ſhall interplead; Quod Nota. Br. Enterpleder, pl. 24. cites 20 E. 4. 13.

(H) For what *Cauſes*.

[Or the Reaſon of Enterpleader.]

Fitzh. Enterpleder, pl. 9. cites S. C.

1. THE Cauſe of Enterpleader is, for that the Defendant ſhall not be charged to two ſeverally where no Default is in him. 39 H. 6. 36. b.

2. In

2. In Detinue of Charters againſt one, the *Defendant cannot have Scire Facias to warn a Stranger to ſee if he can make Title, if he does not confeſs the Poſſeſſion of the Charters demanded and make Privity of Bailment*, Contra Babb. and Cokayne, therefore Quære; and per Marten they may *open the Bag*, Contra Babb. and Cokayne. Br. Enterpleder, pl. 3. cites 3 H. 6. 35.

3. *But* it ſeems there, that *no Enterpleader can be unleſs both the Parties have ſeveral Actions pending*. Ibid.

(I) Upon *what Delivery*.

1. Enterpleader ſhall be upon a joint Delivery or ſeveral. 39 H. 6. 36. b. S. C. & S. P. cited Roll Rep. 130.

(K) At what *Time* it ſhall be made.

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1. If the Goods [the Writs] are not returned at one Time, but one declared the laſt Term, and the Defendant imparled, and now the other brings an Action, yet they ſhall enterplead. 39 H. 6. 36. b. Fitzh. Enterpleder, pl. 9. cites S. C.

(L) *In what Caſes* there ſhall be an Enterpleader.

1. If two brings ſeveral Detinues againſt J. S. for the ſame Thing, if the Defendant will acknowledge the Action of one without a Prayer of Enterpleader, they ſhall not interplead upon the Requeſt of the other, for the Enterpleader is given for the Security of the Defendant, that he be not twice charged, and he hath waived that Benefit. 18 E. 3. 22. b. Fitzh. Enterpleder, pl. 14. cites S. C.

2. Though the Garniſhee cannot vary in the Bailment from the Plea of the Defendant, as to ſay that the Delivery was by him alone, where Defendant had pleaded that it was by the Garniſhee and the Plaintiff, yet he may have Writ of *Detinue againſt the Defendant* alſo, and there the Plaintiff and he ſhall interplead. Br. Garniſhee &c. pl. 39. cites 20 E. 4. 13.

3. Where the *Garniſhee comes*, and the *Defendant makes Default*, yet none of them ſhall have Delivery of the Writing, but ſhall enterplead. Br. Garniſhe, pl. 33. cites 39 E. 3. 22.

4. Detinue *of two Obligations*, the *Defendant ſaid, that M. had another Writ againſt him of the ſame Obligations returnable the ſame Day, which two Plaintiffs delivered to him the Writings upon Condition* &c. and he his ready to render to whom the Court ſhall award, and the Plaintiffs appear'd, and were awarded to enterplead. Br. Enterpleader, pl. 8 cites 12 H. 4. 18.

5. *But* if the Writs had been *returned at diverſe Days* another Proceſs ſhould have been awarded. Ibid.

6. If *ſeveral Præcipe* quod reddats *are brought againſt one Tenant*, they ſhall not enterplead tho' Damages are to be recovered, but *when one has recovered, the Tenant is diſcharged againſt the others.* Br. Enterpleader, pl. 4. cites 3 H. 6. 43.

7. If *one* be *found Heir to the Tenant of the King in one County*, and *another found Heir in another County*, there they ſhall enterplead before any of them ſhall have Livery. Br. Enterpleader, pl. 5. cites 9 H. 6. 17.

8. Where they *do not agree in Bailment*, they ſhall not enterplead; For here *is no Privity*, and if the Defendant ſays falſely it is his Folly, and if the Garniſhee ſays falſely it is his Folly. Br. Enterpleader, pl. 15. cites 14 H. 6. 11.

9. If *I bail Deeds which concern the Land of my ſecond Feme, to rebail to me or my Heirs and die*, and my *Heir by my firſt Feme brings Detinue*, and the *Heir by the ſecond Feme likewiſe*, they ſhall interplead; Per Forteſcue, quod Curia conceſſit. Br. Enterpleader, pl. 11. cites 19 H. 6. 3. 4 19.

10. It was agreed Arguendo, that if *Diem clauſit extremum iſſues*, and *one is found Heir*, and *a Melius Inquirendo iſſues*, and *another is found Heir*, and *both come into the Chancery and pray Livery*, they there ſhall enterplead before either of them ſhall have Livery. Br. Enterpleader, pl. 6. cites 35 H. 6. 19.

11. Detinue *of a Cheſt with Charters*, the *Defendant ſaid* at the Diſtreſs *that it came to him as Executor, and that J. N. had brought ſuch a Writ againſt him of the ſame Cheſt and Charters in the ſame County, returnable at the ſame Day* that the Diſtreſs in the other was return'd, *and brought the Cheſt into Court, and prayed that the might enterplead*, and they were *awarded to enterplead upon the eldeſt Writ, and not upon the Original return'd now.* Br. Enterpleader, pl. 7. cites 37 H. 6. 23 & 33 H. 6. 25.

12. *And* Per Cur. if the Writs had been *in diverſe Counties, or returnable at diverſe Days*, they cannot enterplead, but the Writs ſhall be awarded returnable at one and the ſame Day, and then they ſhall enterplead. Ibid.

13. *But* if they *vary in Declaration, as* the *one declares of a Cheſt ſeal'd, and the other of a Cheſt, and ſhews what is in the Cheſt*, they ſhall not enterplead. Ibid.

14. *But* it was ſaid, that 38 H. 6. *two Writs* were brought *in two Counties*, and *each declared by Invention*, and they were awarded to enterplead. Ibid.

15. Enterpleader ſhall *not* be granted *unleſs Defendant alleges that both Parties demand one and the ſame Thing.* Br. Enterpleader, pl. 22. cites 8 E. 4. 6. by all the Juſtices.

16. Traverſe, *two Offices were*, by the *one* it was *found General Tail and a Daughter Heir*, and by the *other ſpecial Tail* and the *Daughter traverſed*; For *the other claimed as Coſin and Heir Male*; Per Conisbie *where two claim by one and the ſame Anceſtor* they ought to enterplead. Br. Enterpleader, pl 16. cites 21 H. 7. 35.

17. *And* Per Palmes, where *one is found Heir and within Age*, and *another is found Heir to this ſame and of full Age*, they ſhall enterplead; For it is to one Anceſtor, and by one Title. Ibid.

18. *Contrà* where they claim *by ſeveral Titles* as here, to which Grevel and Conisby agreed. Ibid.

(M) In

(M) In what Caſes for *a Collateral Reſpect.*

1. IF Two bring * ſeveral Detinues, **they ſhall not enterpleaded, if their** Writs **be** not returnable at one and the ſame Day. 9 H. 6. 18. **Curia.**

* Againſt one and the ſame Perſon. Br. Enterpleader, pl. 5. cites 9 H. 6. 17.

2. **If two bring ſeveral Detinues, and the Defendant prays that they may enterplead,** they may interplead if they are preſent in proper Perſon. 17 E. 3. 70. b.

3. But not if **they or** any of them are not **preſent in proper Perſon.** 17 E. 3. 70. b.

4. But **a** Writ ſhall iſſue to warn them to come in proper Perſon **at a Day.** 17 E. 3. 70. b.

5. If ſeveral Perſons bring ſeveral Writs of Right of Ward, returnable at the ſame Day, **and the Defendant pleads &c. and prays that they may interplead, yet they ſhall not interplead without ſuing a** Scire Facias againſt them, to whom the Plea is not pleaded, to be in Court at a certain Day. 30 E. 3. 4. b. **adjudged.**

Fitzh. Enterpleder, pl. 16. cites Hill. 30 E. 3. 5.—If *two bring ſeveral Writs of Ward againſt one and the ſame Defendant*, there *upon the Matter ſhewn in Form* by the Defendant, there the Plaintiffs ſhall enterplead the one with the other. Br. Enterpleader, pl. 27. cites 24 E. 3.

6. If *ſeveral Writs* of Detinue [are brought], and the *one declares of Bailment in the County of M.* and the *other in the County of D.* there they ſhall not be compelled to enterplead, but the *Defendant ſhall anſwer to both*; For it is in ſeveral Counties, and was of a Box of Charters. Br. Enterpleader, pl. 14. cites 14 H. 6. 2.

7. If *two bring ſeveral Actions of Detinue of a Box ſealed with certain Charters, the one of Bailment in one County*, and the *other of Bailment in another County*, yet if the Defendant prays it they ſhall enterplead as well as if both Actions were in one and the ſame County; For the *Bailment is not material, but the Detinue.* Br. Enterpleader, pl. 19. cites 5 E. 4. 25.

(N) In what Caſes.

Privity upon Actions.

1. IF **two bring** ſeveral Detinues **of Charters, and the** one counts of a Bailment to re-deliver, **and** the other **demands them** by Title to the Land, **they ſhall not interplead, becauſe there is not any Privity of Bailment between them, and the Defendant is not chargeable to him who makes Title to the Land but for the Land, but to the other for the Bailment, and** if he re-delivers to his Bailor, he is not chargeable to the other, **and ſo he is at no Miſchief.** * 19 H. 6. 3. **Contra.** † H. 6. 17.

* Br. Enterpleder, pl. 11. cites S. C.—— Fitzh. Enterpleder, pl. 7. cites S. C.—Br. Travers per &c. pl. 68. cites 19 H. 6. 3. 19.——† Br. Enterpleder, pl. 5. cites S. C.——Fitzh. Enterpleder, pl. 5. cites S. C.

2. In

2. In a Detinue one Plaintiff demands a Bag of Charters, and another Plaintiff demands certain Charters in the Bag, as belonging to him, againſt an Executor, becauſe the were in his Hands, but not upon any Bailment; quære whether they ſhall interplead, 3 H. 6. 36.

* Fitzh. Enterpleder, pl. 2 cites S. C. —— Br Enterpleder, pl 4. cites S. C. —— Ibid. pl. 11. cites 19 H. 6. 3. 4 19. ——Br. Traverſe per &c. pl. 68. cites 19 H. 6. 3. 29.

3. If one brings Detinue againſt B. and counts upon a Delivery to re-deliver to him, and another brings Detinue againſt him alſo, and counts ſo alſo, and if here be not any Privity of Bailment between them yet they ſhall enterplead to avoid the double Charge of the Defendant, and alſo becauſe the Court cannot know to whom to deliver the Deed if both recover. * 3 H. 6. 44. Curia, for perhaps the Defendant found it. Dubitatur, 11 H. 6. 19. b.

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4. [And] upon ſuch ſeveral Detinues, if the Defendant ſays that he found it, and traverſes the Bailment, they ſhall enterplead, for then he is chargeable as well to the one as to the other. * 7 H. 6. 22. † 19 H. 6. 3. Curia.

* Br Enterpleder, pl. 9. S. P. [without any mention of the Traverſe] where the two Writs were returnable the ſame Day cites S. C.——Fitzh Enterpleder, pl 3. cites S. C.

† Br. Enterpleder, pl. 11. cites 19 H. 6. 3. 4. 19. ——Fitzh. Enterpleder, pl. 7. cites S. C —— Br. Traverſe per &c. pl. 68. cites S. C.

Br. Enterpleder, pl. 11. cites 19 H. 6. 3 4. 19. ——Fitzh. Enterpleder, pl. 7. cites S. C.——Br. Traverſe per &c. pl. 68. cites S. C.

5. So if he ſays that they delivered it jointly, abſque hoc that they delivered it as they have counted. 19 H. 6. 3. b.

* Fitzh. Enterpleder, pl. 2. cites S. C.—— † Fitzh. Enterpleder, pl. 7. cites S. C.—— Br. Enterpleder, pl. 11. cites S. C.

6. But it is otherwiſe if he does not traverſe the Bailment, for if there was a Bailment he is chargable only to the Bailor, and may plead in Bar againſt the others. * 7 H. 6. 22. † 19 H. 6.

Br Enterpleder, pl. 5 cites 9 H. 6. 17 S. P.

7. If two Detinues are ſeverally brought againſt an Executor becauſe of his Poſſeſſion, they ſhall enterplead, becauſe he is not more chargeable to one than the other. 9 H. 6. 18.

Br. Enterpleder, pl. 5. cites 9 H. 6. 17. S. P.

8. So for the ſame Reaſon, if they are brought againſt a Man who found the Thing demanded, they ſhall enterplead. 9 H. 6. 18.

Fitzh. Enterpleder, pl. 7. cites S. C.

9. In Detinue, if they count of ſeveral Bailments, the Defendant may ſay it came to his Hands as Executor, abſque hoc that he had it of their Delivery, and then the Plaintiffs ſhall interplead. 19 H. 6. 3.

* S.P. agreed per Cur and yet there is no Privity by which they ſhould interplead. Br Enterpleder, pl. 4. cites 3 H 6. 43. ——— S. P. [without any Mention of the ſeveral Writs being brought at the ſame Day] Br. Enterpleder, pl. 5. cites 3 H. 6. 43, 44.

† Br. Enterpleder, pl. 5. cites S. C.

‡ Fitzh. Enterpleder, pl. 7. cites S. C.

10. If two bring ſeveral Writs of Ward againſt me at the ſame Day, they ſhall enterplead * 3 H. 6. 44. † 9 H. 6. 17. b. Curia. ‡ 19 H. 6. 3. b.

11. But otherwiſe if they bring Raviſhment of Ward. 9 H. 6. 18. b.

12. In

12. **In Detinue, if the Plaintiff** counts of a Delivery to re-deliver, the Defendant ſhall not have a Scire Facias againſt any **other** but him that was privy **to the Delivery.** 3 H. 6. 44.

It was agreed, Arg. that the Defendant in Writ of Detinue ſhall *not* have a Sci. Fa. to warn a Stranger *without alleging Privity of Bailment.* &c. pl. 5. cites S. C. ——— Br. Enterpleder, pl. 4 S P. cites 3 H. 6. 43. Br. Garniſhe

13. **If two bring ſeveral Writs of Detinue, and** each counts upon a Delivery at ſeveral Places in the ſame County to re-deliver, **if** the Defendant ſays **the Delivery was by the Plaintiffs** upon Condition, and does not acknowledge whether the Condition is performed, **they ſhall interplead, becauſe the** Defendant cannot traverſe the Place **of the Delivery, this being in the ſame County.** 8 H. 6. 30. **b. adjudged.**

Br. Enterpleder, pl. 10. cites S. C. and that the Scire Facias iſſued well; For non conſtat judicialiter whether the two Actions are of one and the ſame Writing till both have counted. ——— Fitzh. Enterpleder, pl. 4. cites S. C.

14. **But it had been** otherwiſe if **Deliveries had been** in ſeveral Counties, **for there the Defendant might have traverſed the Place.** *8 H. 6. 31. † 14 H. 6. 2.

* Br. Enterpleder, pl. 10. cites S. C. ——— Fitzh. Enterpleder, pl. 4 cites S. C. † Br. Enterpleder, pl. 14. cites S. C.

15. **If one brings Detinue, and** counts of a Delivery by himſelf and one J. S. in equal Hands, upon Condition **&c. if** J. S. brings Detinue alſo **againſt the ſame Defendant,** and counts of a Delivery by himſelf alone, **they ſhall not enterplead upon this Matter.** 14 H. 6. 11. **b. Quære.**

16. Detinue of Charters *by one who counted by Title to the Land as Heir*, and *J. N. brought ſuch a Writ againſt the Defendant returnable the ſame Day, and counted upon Bailment made to the Defendant*, and the *Defendant brought the Charters into Court*, and ſaid that he was ready to deliver them to whom the Court ſhould award, and prayed that the Parties interplead, and the Opinion of Babb. Fulthorp, and Martyn was, that they ſhould interplead, but Paſton contra, becauſe the one counted upon Bailment, and this is the Folly of the Defendant; and Brown Clerk ſaid, that 3 H. 6. they interpleaded, where the one counted as Heir, and the other upon Bailment; For it *may be, that at the Time of the Bailment the Defendant did not know of the Title.* Br. Enterpleader, pl. 5. cites 9 H. 6. 17.

17. And there it was agreed, that *he who finds a Deed, and an Executor ſhall not be charged but only to him who Right has; Contra upon ſeveral Bailments*; For there is Folly in the Defendant. Ibid.

18. Where a Man is to bring a Party into Court by Garniſhment, he ought to make Privity of the Bailment, viz. *that it was bailed by both upon Condition* &c. and pray Scire Facias againſt the other. Br. Enterpleader, pl. 5. cites 9 H. 6. 17.

(O) At what *Time* it ſhall be.

1. IN ſeveral Writs of Ward by divers againſt one Man, if they pray that they may interplead, though all the Writs of the Plaintiffs are returnable at one Day, and ſo they have Day all to this Day, yet Proceſs ſhall iſſue to warn them, and they ſhall not enterplead before Garniſhment. 30 E. 3. 5. b.

2. In Detinue, the *Defendant prayed Garniſhment*, and had it, and Scire Facias &c. and *at the Day another Man brought another Writ* of Detinue *returnable the ſame Day*, and *all appeared*, and the *Defendant prayed that they might interplead*, and per Littleton and Choke they cannot; For the *Defendant is out of Court* to pray it by reaſon of the Prayer of the firſt Garniſhment; *Quære*. Br. Enterpleader, pl. 23. cites 11 E. 4. 11.

3. If A be *found Heir to B. by one Office of Land held of the King in Capite, and C. is found Heir to him likewiſe to the ſame Land by another Office*, and *both are within Age*, there they have no Remedy but to ſtay till full Age, and then they ſhall interplead. Br. Enterpleader, pl. 28. cites 1 H. 7. 14.

(P) Upon *what Writ* it ſhall be.

1. THE Enterpleder ſhall be upon the Original. 22 E. 4. 49.

2. If two bring ſeveral Detinues, the Enterpleader ſhall be upon the Original of the eldeſt Date, if the other hath not counted upon his Original.

3. So it ſhall be though he that is Plaintiff in the Original of lateſt Date had firſt counted. * 3 H. 6. 20. † 19 H. 6. 4. b. Curia. ‡ 39 H. 6. 37. b. || 12 H. 4. 18.

* Br. Enterpleder, pl. 2. cites S. C. — Fitzh. Enterpleder, pl. 1. cites S. C. —— And in ſuch Caſe there is no Miſchief; For he who brings the ſecond Writ ſhall have every Advantage which he might have had in his own proper Writ in which he was Plaintiff. Br. Enterpleder, pl. 26. cites 19 H. 6. 68.

† Br. Enterpleder, pl. 11. cites 19 H. 6. 3. 4. 19.

‡ Br. Enterpleder, pl. 17. cites 39 H. 6. 36. S. P.

|| Br. Enterpleder, pl. 8. cites S. C.

Fitzh. Detinue, pl. 14. cites S. C.

4. [But] if the Writs are of one and the ſame Date, he that firſt comes and demands an Anſwer, or counts, ſhall be Plaintiff, and the Enterpleader ſhall be upon his Original. 19 H. 6. 4. b.

Fitzh. Detinue, pl. 14. cites S. C.

5. Or otherwiſe he ſhall be Plaintiff whom the Court ſhall aſſign, in ſuch Caſe where the Writs are of one and the ſame Date. 19 H. 6. 4. b.

6. Upon Enterpleader he, who has the *Writ of elder Date, firſt* counts againſt the other, and the other ſhall defend, and ſo they did. Br. Enterpleader, pl. 11. cites 19 H. 6. 3. 4. 19.

7. He who has *Writ of younger Date* ſhall anſwer to the other who has Writ of Elder Date. Br. Enterpleader, pl. 17. cites 39 H. 6. 36.

8. *Three*

8. *Three ſeveral Writs* of Detinue *of Charters* were *brought againſt one and the ſame Man*, and were awarded to enterplead at the Prayer of the * Defendant upon the Matter ſhewn, and the Evidence tender'd, and they enterpleaded *to the Writ of elder Date*, and ſo they interpleaded every one againſt the other ſeverally, and the Bar of the one is his Title againſt the Plaintiff, and the other, and ſo *three Iſſues*. Br. Enterpleader, pl. 20. cites 4 E. 4. 9.

* All the Editions of Br. are (Plaintiff) but it ſhould be (Defendant) and ſo is the Year-Book.

(Q) Upon an Enterpleader, *who ſhall keep* the Thing demanded.

1. IN ancient Time **the Thing demanded ought to** remain in Court. 12 H. 4. 6.

2. But now **the uſe is, that the** Defendant ſhall keep it **till it be tried, and not the Court.** * 12 H. 4. 39 H. 6. 38. H. 4. 6.

* Br. Garniſhe, pl. 22. cites 12 S. C.

3. In ſeveral Rights of Ward, **if the** Parties **are awarded to enterplead, they** may pray that the Defendant find Sureties to keep **the Infant,** and to have him in Court at a Day, **and it ſhall be granted.** 30 E. 3. 5. b.

4. But **the** Plaintiffs ſhall not find Sureties not to take **the Ward** in the mean Time. 30 E. 3. 5. b.

5. Pending the Writ **for the Thing, the** Defendant cannot deliver **it** to any Party without award **of the Court.** 12 H. 4. 6. b. Curia.

Fitzh. Garniſhe, pl. 22. cites S. C.

6. **If the** Defendant prays Garniſhment, **and the** Garniſhee **comes** and pleads againſt the Plaintiff, **the Defendant cannot after deliver the Writing to the Plaintiff.** 39 E. 3. 23.

7. *Ward by the King againſt E.* who *ſaid that ſhe did not claim any Thing but by Cauſe of Nurture, and that H. S. had brought ſuch a Writ againſt her, and that the Infant is here ready at the Bar*, as he ought upon this Plea, *ready to deliver to whom* &c. and therefore Day was given to a certain Day to enterplead &c. and at the Day they *both appear'd and pray'd that the Infant might be deliver'd to them in common quouſque* &c. et non allocatur; For it is not forma Juris. Br. Enterpleader, pl. 12. cites 24 E. 3. 38. 65.

8. In Detinue the Defendant pray'd Garniſhment againſt D. and had it, and at the Day the *Garniſhee came*, and the *Defendant made Default*, and *neither the Plaintiff or the Garniſhee could have Livery before they had enterpleaded*, quod nota, by which the *Garniſhee barr'd the Plaintiff by his Releaſe of Actions.* Br. Enterpleader, pl. 13. cites 39 E. 3. 22.

(R) *Pleader*

(R) *Pleader by* the *Defendant after* an *Enterpleader.*

[And to what Purpoſes the Defendant ſhall be ſaid to be in Court or not]

When he hath pray'd Garniſhment *and has Proceſs againſt the Garniſhee.* Br. Garniſhe, &c. pl. 20. cites S. C.

1. WHEN the Defendant hath prayed Garniſhment he is out of Court to plead any Plea. 12 H. 4. 6. b.

Br. Garniſhe &c. pl. 20. cites S. C.

2. But he hath a Day in Court to deliver the Writing to whom the Court ſhall award it. 12 H. 4. 6. b.

3. The Defendant is not demandable before Judgment given, but then he is, becauſe he is to deliver the Thing demanded. 12 H. 4. 7. b.

4. After the Garniſhee comes in, and pleads againſt the Plaintiff, the Defendant cannot ſay the Conditions are broke on the Part of the Garniſhee, and ſo the Plaintiff ought to have Judgment. 39 E. 3. 23. Curia.

5. In Detinue of an Obligation *Defendant ſaid that it was delivered to him by the Plaintiff and one M. to hold till certain Conditions were performed, and then to deliver to the Plaintiff*, and prayed Scire Facias againſt M. to enterplead, and *brought the Writing into Court which was not ſealed, and ſaid that he is ready to deliver it to whom the Court ſhould award* &c. and by the Opinion of the Court, becauſe it is not ſealed, the Parties cannot enterplead upon it; for it is not ſuch a Deed as the Plaintiff demands, and if the Plaintiff ſhall grant it he ſhall not recover other Deed; Quære inde; and ſo ſee that upon ſuch Demand of Enterpleader, the Deed *ought to be brought into Court*; Nota. Br. Enterpleader, pl. 1. cites 2 H. 6. 16.

6. *Two Perſons brought ſeveral Writs* of Detinue againſt the Defendant *of a Charter*, the *one* conveyed *as Heir to the Brother, and the other as Heir to the Siſter*; the Defendant *ſaid, That no ſuch Brother*, and ſo to Iſſue. Br. Enterpleader, pl. 2. cites 3 H. 6. 20.

7. In Detinue of an Obligation the *Defendant prayed Garniſhment and ſhewed the Writing*; The *Plaintiff ſaid that the Writing which the Defendant ſhew'd is only an Eſcrowe without Seal, and not the Obligation which he demanded*, and the *Defendant ſaid that it is the ſame Obligation which was bail'd to him.* And per Marten, if the Garniſhment ſhall be granted upon Eſcrowe the Plaintiff by this accepts it to be the Deed which he demands, Quære; for the *Defendant here confeſs'd the Detinue of the Obligation implicative.* Br. Garniſhe, pl. 40. cites 2 H. 6. 16.

(S) Judgment

(S). Judgment.

1. IF an Enterpleader be prayed by the Defendant between the Plaintiff and T. S. upon the Count of the Plaintiff, which ſuppoſes it to be delivered to him or T. S. upon Condition, and the Plaintiff and T. S. appear at the Return, and the Defendant makes Default, yet they ſhall enterplead, and the Plaintiff ſhall not have Judgment. 39 E. 3. 22. b. becauſe the Plaintiff himſelf hath ſuppoſed it to be upon Condition.

2. If two bring ſeveral Detinues for one Thing, and the Defendant prays that they enterplead, and delivers the Thing to the Court, and before the Award of the Enterpleader one diſcontinues his Suit, the other ſhall not have Judgment to recover, becauſe they were not awarded to enterplead. 11 H. 6. 19. b.

3. But otherways it had been if he had diſcontinued his Suit after the Enterpleader awarded. 11 H. 6. 19 b.

4. If a Recovery be had upon an Enterpleader, Judgment ſhall be given to recover the Thing demanded againſt the Defendant, and not againſt the Garniſhee, * 3 H. 6. 18. † 7 H. 6. 45. 30 E. 3. 6. b. adjudged.

* Fitzh. Judgment, pl. 1. cites S. C. —— † Br. Garniſhee &c. pl. 28. cites S. C. —— S. P Br Detinue, pl. 47. cites 1. E. 5. 3. —— Br. Charters de Terre, pl. 5. cites 9 H. 6. 36. —— Br. Garniſhe &c pl. 7. cites S C. —— So upon Judgment given for the Plaintiff upon a *Demurrer* in Law. Br. Garniſhe &c. pl. 10. cites 27 H. 6. 2.

5. So the Garniſhee ſhall recover it againſt the Defendant. 3 H. 6. 40. b.

[S. 2] [Damages.]

6. If the Defendant prays Garniſhment to know whether the Conditions are performed, and the Garniſhee comes and ſays nothing, yet the Plaintiff ſhall not recover any Damages againſt the Defendant, becauſe he was not bound to deliver it till very Notice of the Performance of the Condition. 9 H. 6. 39. b.

In Detinue of Writings after that the Garniſhee has pleaded, if the Plaintiff recovers the Judgment of the Writings it ſhall be againſt the Defendant and of the Damages againſt the Garniſhee. Br. Detinue, pl. 9 cites 33 H. 6 27.

7. If the Garniſhee comes the firſt Day, and cannot deny the Conditions to be broke, or makes Default, the Plaintiff ſhall not recover any Damage againſt him, becauſe he hath not delayed him, which is the Cauſe that Damages are given againſt a Garniſhee. 8 H. 6. 11.

Fol. 737.

In Detinue *of two Writings*, where the *Defendant prayed Garniſhment*, and the Scire Facias ſerved againſt the *Garniſhee*, and he *made Default*, there the *Plaintiff recovered againſt the Defendant*, but no Damages. Br. Detinue de biens, pl 25. cites 21 H. 6. 35. —— S P. And per Aſcue, where the *Garniſhee appears* and the *Plaintiff makes Default*, the Garniſhee ſhall recover againſt the Plaintiff his Damages, ad quod non fuit reſponſum. Br. Damages, pl. 73. cites 21 H 6. 35. 36. —— If he comes and ſays nothing the Plaintiff ſhall recover the Writing detained, but without Damages. Br. Damages, pl. 90. cites 36 H. 6. 26.

‡ By several Writs. Br. Damages, pl. 10. cites 9 H 6. 18.

8. If two bring Detinue ‡ against another, and they interplead, he that recovers shall recover Damages against the other. 8 H. 6. 5. 9 H. 6. 18.

——— Br Damages, pl. 68. cites 8 H. 6. 4. 5. S. P. accordingly, because each is Actor against the other; Per Strange.

‖ Fitzh. Garnishe, pl 9 cites S. C. ——— S. P. Br. Garnishe, pl. 47 cites 1 E. 5. 3.

9. If the Garnishee pleads with the Plaintiff, and it is found against him by Verdict, the Plaintiff shall recover Damages against him. 49 E. 3 13. b. 7 H. 6. 45. b. 8 H. 6. 5. 10 H. 6. 8. b. ‖ 20 H. 6. 29. b.

——— Judgment shall be of the Thing detained against the Defendant, and of the Damages against the Garnishe. Br. Detinue de Biens, pl. 47. cites 1 E. 5. 3. ——— Br. Charters de Terre, pl. 5. cites 9 H 6. 36. ——— Br Garnishe &c. pl. 7. cites S. C. ——— S. P. But the Body of the Garnishe shall not be put in Execution because he was not Party to the first Writ, quod Nota, but it shall be of Goods or Chattels or Land. Ibid. pl. 28. cites 7 H. 6. 45. ——— Br. Executions, pl. 49. cites S. C.

* Fitzh. Judgment, pl 1. cites S C. ——— Plaintiff *demurred* in Law *to the Plea of the Garnishee and adjudged for him*, and Judgment was given of Damages against the Garnishee. Br. Garnishe &c. pl 10. cites 27 H. 6. 2. and cites 49 E. 3. to the contrary, because it is upon Demurrer which is the Default of the Court; For there is no other Delay in the Garnishee, but in Default of the Court by their not giving Judgment immediately.

10. The same Law if he plead with the Plaintiff, and it be adjudged against him by the Court. 49 E. 3. [13.] 3. b. * 3 H. 6. 18.

Br. Garnishe &c. pl. 10. cites 49 E. 3. 4, that the Garnishee was warned and made Default, and the Plaintiff recovered the Writings, but no Damages against the Garnishee, nor against the Defendant.

11. So if it be adjudged against him upon Default. † 8 H. 6. 5. But the Garnishee, if it pass with him, shall not recover Damages against the Defendant. Contra, 3 H. 6. 40. b.

† Br. Damages pl. 68. cites S. C for by the Interpleader of the Garnishee the Defendant is wholly excused of Damages, and the Garnishee has taken Matter on himself.

‡ Br. Damages, pl. 68. cites S C. — Fitzh. Damages, pl. 21. cites S. C.

12. [But] If the Inquest pass for the Garnishee he shall recover Damages against the Plaintiff. ‡ 8 H. 6. 5. 13 H. 4. Damage F. 131. 9 H. 6. 39. ‖ 20 H. 6. 29. b.

‖ Fitzh Garnishe, pl. 9. cites S. C. ——— S. P. Br. Detinue de Biens, pl. 47. cites 1 E. 5. 3. —— Br. Garnishe, pl. 7. cites S. C.

* Br. Damages pl. 68. cites S. C. — Fitzh. Damage, pl 21. cites S. C.

13. So if two bring Detinue against another, and upon his Prayer, they enterplead, if the Inquest pass for him who enterpleads upon the Original of the other, he shall recover Damages against the other. * 8 H. 6. 5.

S. P. and not against the Defendant --Br. Enterpleder, pl. 5. says Quod Nota, and cites 9 H. 6. 17. ——See pl. 8 S. C & S. P.

Br. Damages, pl. 68. cites 8 H. 6. 5. of which 8 H. 6. 11. is a Continuation. ——Fitzh. Damage, pl. 21. cites 8 H. 6. 4. which is the Comencement of this Case cited here.

14. The Recovery against the Garnishee is for the Delay after the Writ purchased. 8 H. 6. 11.

S. P. *And where the Garnishees had Assise against the*

15. Detinue *of a Box of Charters against P.* who came and *said that the Box was delivered to him by the Plaintiff and two others*, and pray'd Scire Facias against them, and had it, who *came and made Title to the Land and pray'd Livery*, and the *Plaintiff shewed Feoffment made to one*

Que

One Eſtate he has, and pray'd Livery, and it was long in Doubt whoſe Deeds were in the Box, and to whom they belonged, and at laſt Thirn *opened the Box and delivered to every one the Evidences which to him belonged*; quod nota; and the Plaintiff recover'd Damages againſt him who came by Scire Facias &c. Br. Garniſhe, pl. 18. cites 7 H. 4. 7.

Plaintiff of thoſe Charters now in Demand and recover'd by Default, yet the Plaintiff ſhall not recover his *Damages* in this Action of Detinue to the value of the Land, per tot. Cur. Br. Charters de terre, pl. 18. cites S. C.

16. In Detinue the *Defendant ſaid the Writing was delivered to him by the Plaintiff and one R. upon certain Conditions to be performed to deliver to the Plaintiff, and if not to deliver it to the ſaid R.* and pray'd Garniſhment againſt R. to know if the Conditions were performed &c. and there it was agreed that the * *Judgment of the Writing* upon the Enterpleader between the Plaintiff and the Garniſhee *ſhall be againſt the Defendant*, for he has the Poſſeſſion thereof, *and of the Damages it ſhall be againſt the Garniſhee*, quod nota. Br. Detinue de biens, pl. 3. cites 3 H. 6. 18.

* S P. Br. Detinue de biens, pl. 9. cites 27 H. 6. 2. —— Br. Garniſhe, pl. 10. cites S. C.

17. *And* it is ſaid elſewhere, that the Proceſs of the Execution thereof is *Diſtringas againſt the Defendant* to deliver the Writing, and *Fieri Facias againſt the Garniſhee* of the Damages. Ibid.

18. If a Man brings ſeveral Writs of Detinue againſt three, and they enterplead, he for whom the Jury paſſes ſhall have Damages againſt the other; For *every one is Actor againſt the other*. Br. Damages, pl. 68. cites 8 H. 6. 4. 5.

19. Where the *Plaintiff recovers* the *Judgment ſhall be of the Charters demanded, and if they are burnt, there he ſhall recover all in Damages*. Br. Detinue de biens, pl. 27. cites 21 H. 6. 35.

20. Note, that the *Entry is that he recover the Writings againſt the Defendant*, and that he have Delivery againſt the Garniſhee. Br. Detinue de biens, pl. 25. cites 21 H. 6. 35.

21. The *Judgment of the Writings ſhall be againſt the Defendant*, and *of the Damages againſt the Garniſhee if he pleads*; quod nota. And there it was *upon Demurrer*, and the Plaintiff recovered Damages againſt the Garniſhee. Br. Damages, pl. 11. cites 27 H. 6. 2.

S. P. Br. Damages, pl. 67. cites 7 H. 6. 4. — S. P. And if it be found for the Garniſhee, he ſhall recover Damages againſt the Plaintiff, quod nota. Br. Damages, pl. 140. cites 1 E. 5. 3. 4. —— S. P. Br. Damages, pl. 68 cites 8 H. 6. 4. 5.

22. *And* the ſame Year, fol. 4. the *Garniſhee was returned Warned*, and *made Default*, and therefore the Plaintiff recovered, and no damages againſt the Garniſhee, nor againſt the Defendant; For there he is not delay'd by the Garniſhee. Br. Damages, pl. 11. cites 27 H. 6. 2.

23. *And* in the ſame Caſe above it was ſaid, that where the *Judgment* is upon Demurrer *upon the Plea of the Garniſhee* the Plaintiff ſhall recover no Damages; For there the Delay is in Defectu Curiæ. Br. Damages, pl. 11. cites 27 H. 6. 2.

24. In Detinue, the Defendant prayed Garniſhment, and had it, and the *Scire Facias returned* the *Garniſhee did not come*, by which the Plaintiff *recovered the Thing demanded, and no Damages* againſt the Defendant, nor againſt the Garniſhee. Brooke ſays it ſeems that the Defendant appeared at the firſt Day. Br. Damages, pl. 191. cites 27 H. 6. 4.

(T) How

(T) [How pl. 2. And] *How much* Damage. [pl. 1.]

Br. Damages, pl. 68. cites S. C. accordingly by Martin and Strange, and says that at Dayanother Paſton and Strange held that he ſhall recover according to the Diſcretion of the Juſtices. Quære.——Fitzh. Damage, pl. 21. cites 8 H. 6. 4. S. C.

1. IF the Plaintiff counts but to the Damage of 20 l. yet more Damage may be given to him againſt the Garniſhee, for he does not declare this againſt the Garniſhee, 8 H. 6. 5.

Fitzh Enterpleder, pl. 17. cites S. C.

2. In ſeveral Writs of Ward brought by Two, if the Defendant prays that they enterplead, and after the Plaintiffs agree, and pray that it be delivered to them in common, yet the Court ſhall not ſuffer it. 24 E. 3. 24. b.

(U) When the Recovery is had, what *Remedy* there ſhall be *againſt him that has the Thing.*

Fitzh. Garniſhe, pl. 29. cites S. C.

1. A Scire Facias ſhall be awarded againſt the Defendant who has the Cuſtody of the Thing demand. 39 H. 6. 38.

2. A Diſtreſs ſhall iſſue againſt him to deliver the Thing. 40 E. 3. 39.

—— Br. Charters de terre, pl. 5. S P. cites 9 H. 6. 36. —— Br. Garniſhe &c. pl. 7. cites S C. —— Ibid. pl. 13. S. P. cites 40 E. 3. 29. but it ſhould be 40 E. 3. 39. as in Roll.

3. In Detinue of Charters the *Defendant alleged Livery by the Plaintiff and two others, and prayed Garniſhment againſt them*, and had it, and at the Day *they made Title to the Charters, and the Plaintiff made other Title*, by which the Court had the Box, and delivered to every Man thoſe which to him belonged Br. Enterpleader, pl. 25. cites 7 H. 4. 3.

4. Where the *Plaintiff recovers*, the *Judgment ſhall be of the Chattels demanded*, and *Diſtreſs ſhall iſſue againſt the Defendant to deliver the Chattels*. Br. Detinue de biens, pl. 25. cites 21 H. 6. 35.

Br. Scire Facias, pl. 4. cites S. C.

5. A Man ſhall not have *Scire Facias* in Detinue of Charters *to warn a Stranger*, unleſs he acknowledges the Poſſeſſion of the Charters, and makes Privity of Bailment; per Marten; And by him the Court may *open the Bag to ſee what belongs to him, and what to the other, in the Abſence of the one Party*, which Cokain and Babb. expreſsly denied, and ſaid that they cannot judge to whom they belong by ſeeing them, and that Scire Facias lies againſt a Stranger; Quære inde. Br. Charters, pl. 2. cites 3 H. 6. 35.

6. The granting of *Scire Facias upon Garniſhment in Detinue againſt the Heir of J. N. and againſt the Ordinary, upon a Surmiſe that he is dead without Executors*, is not Error; Per Brian. Br. Error, pl. 195. cites 14 E. 4. 1.

For more of Enterpleader in General, See other Proper Titles.

Entry.

Entry.

(A) *Congeable.*

In what Caſes. [And How.]

1. IF the Conuſee of a Statute ſues an Extent, by which the Lands of the Conuſor are ſeiſed into the Hands of the King, and after a Liberate is ſued, the Conuſee may after enter into the Land before the Liberate executed, for this Liberate is a ſufficient Warrant for his Entry. Dubitatur, P. 38 Eliz. B. R. between † *Butler and Wallis.* Intratur, 37 El. Rot. 206. P. 40, 41 Eliz. B. R. (*) between *Sir Thomas Gerrard and Candiſh*, per Curiam, where the Entry was not good, becauſe the Liberate was void, being made to the Sheriff to deliver the Land to himſelf.

† Cro. E. 463 (bis) pl. 15. S C. per 3 Juſtices, but Gawdy e contra

2. If the King ſeizes certain Lands, upon which an Ouſter le Mayn is ſued to the Eſcheator to deliver this Land to the Party again, he may after enter into the Land before any Execution of the Writ. P. 38 El. B. R. agreed, becauſe there is a Judgment given before that the Hands of the King ſhall be removed.

* Fol. 738.

Cro. E. 463. (bis) pl. 15. S.P. per Curiam, in the Caſe of Butler v. Wallis.

3. upon an Elegit, if the Sheriff takes an Inquiſition, though the Sheriff does not deliver the Land to the Party Plaintiff, yet the Plaintiff may enter preſently after the Inquiſition taken, before the Return thereof to the Court, without any Liberate to him directed. Hill. 8 Car. B. R. between *Liſter and Bromly*, per Curiam. Intratur, P. 8 Car. Rot. 68. where an Action on the Caſe was brought againſt the Sheriff, for returning that he had delivered the Land to the Plaintiff upon the Inquiſition taken, where he refuſed to deliver it, and ſo the Return falſe, though it was objected he might have entered; But the Court ſaid, this was only in Mitigation of Damages, and his Return falſe, and therefore an Action upon the Caſe lay againſt him.

4. In Aſſiſe, the *Lord diſtrained* for Rent *pending Aſſiſe of the ſame Rent*; The Aſſiſe ſhall abate; Quod Nota; For *Diſtreſs* is in Law an Entry into the Rent, as it ſeems. Br. Aſſiſe, pl. 302. cites 29 Aſſ. 52.

5. In Aſſiſe, *Tenant in Tail is bound in a Recognizance*, and the *Land is delivered in Execution by Elegit*, as the Moiety of the Land which the Recogniſor had, and the Tenant in Tail died; The Iſſue in Tail may well enter; Quod Nota, by Judgment. Br. Entre Cong. pl. 77. cites 38 Aſſ. 5.

6. In Aſſiſe, *Tenant in Tail after Poſſibility* of Iſſue extinct *aliens with Warranty*, he in Remainder, or in Reverſion, may enter notwithſtanding the Favour of the Warranty; Quod Nota. Br. Entre Cong. pl. 84. cites 43 Aſſ. 24.

7. If the *Tenant in ſpecial Tail has Iſſue and aliens*, the Iſſue cannot enter; For he cannot be Heir in the Life of his Father. Br. Taile & Dones, pl. 31. cites 45 E. 3. 25.

8. Where a *Feoffment* is made *upon Condition*, which *Feoffee dies ſeiſed*, ſo that there are *divers Deſcents*, there if the *Condition be broken before the Deſcents*, or after, the Feoffor or his Heir may enter notwithſtanding the Deſcents, for the Land is bound by the Conditions, as it is where a Man recovers Land, and does not enter till after Deſcent. Br. Ent. Cong pl 130. cites Littleton, fol. 94.

9. Where a *Man willed that his Executors ſhould ſell*, and died, and the *Heir entered and was diſſeiſed*, the Executors may ſell, and therefore the *Vendee may enter*, for he has Title of Entry only. Br. Entre Cong. pl. 138.

10. If a Man *enters with Force upon his Diſſeiſor*, by which he is reſtored, yet the Diſſeiſee [who was the firſt Diſſeiſor] may enter, or have Aſſiſe. Br. Entre Cong pl. 110. cites 22 H. 6. 18.

11. *Tenant dies without Heir* by which *the Lord entred by Eſcheat*, there he who by *Right has Paramount* may enter; for a Diſcent takes away an Entry, but Eſcheat does not take away an Entry. Br. Entre Cong. pl. 112. cites 37 H. 6. 1.

12. If *Diſſeiſor*, *Intruder* or *Abator enfeoffs his Father and dies ſeiſed*, and the Land deſcends to the Offender, the Party may enter. Br. Entre Cong. pl. 119. cites 5 H. 7. 6.

13. *So* if ſuch Offender *enfeoffs a Stranger who dies ſeiſed*, and *his Heir enters and enfeoffs the Offender*, the firſt Diſſeiſee may enter; but againſt *Strangers* the Deſcent ſhall hold Place; per Keble, which was not denied. Br. Entre Cong. pl. 119 cites 5 H. 7. 6

14. If *J. infeoffs N.* and after it is *enacted that all Eſtates made by J. to N. ſhall be void*; there J. may enter upon N. Br. Entre Cong. pl. 89. cites 5 H. 7. 31.

15. A Man may enter after the Year or within the Year by *Fine Executory*. But ſee Fitzh. Entre Congeable in Fitzh. 51. that after Deſcent after ſuch Fine he cannot enter, but ſhall have *Scire Facias againſt the Tertenant*. Br. Entre Congeable, pl. 108. cites 15 H. 7. 5. and ſays, this appears by the Argument there.

16. Leſſee for Years Remainder for Life, *Remainder in Tail to Leſſee for Years. Leſſee for Years made a Feoffment in Fee with Warranty* and died. Remainder-man for Life died. Reſolved that the Entry of the Iſſue in Tail is lawful, notwithſtanding that the *Diſſeiſin was done to another Eſtate* than that which was to be bound by the Warranty. Le. 39. pl. 105. Paſch. 26 Eliz. C. B. King v. Cotton.

17. *What may be reduced by a Real Action may be reduced by an Entry*, as in one Acre in the Name of more, and this was obſerved by the Court for an infallible Rule. Noy. 108. Trin. 2 Jac. C. B. Nichol's Caſe.

18. Where one has *Judgment* to recover, (if his Entry be lawful) he may enter without *Scire Facias*, and without ſuing Execution; Per Cur. D. 379 b. pl 26. Marg. cites Mich 3 Jac. B. R.

29. If *Tenant for Life levy a Fine*, Remainder in Tail may enter now or have five Years after the Death of Tenant for Life, for they are two ſeveral Titles, one by Forfeiture, and the other by Determination of the Eſtate, and for this to have two ſeveral five Years, for if he compels the Remainder-man to enter preſently, he ſhall be *bound by all the Charges of Tenant for Life*. Arg. Litt. Rep. 217. Mich. 4 Car. C. B. Thomas v. Kenns.

30. After *Recovery in Ejectment* one may enter *without the Sheriff*, for the Aſſiſtance is only to preſerve the Peace. Per Cur. 2 Sid. 156. Paſch 1659. in a Nota.

(A. 2) By whom it may be.

1. IF the *Tenant in Præcipe quod reddat aliens pending the Writ*, and the *Demandant recovers* by Judgment, and the *Tenant brings a Writ of Error* as he may well and *recovers*, the *Alienee may enter*. Br. Entre, Cong. pl. 51. cites 12 Aſſ. 41.

2. If my *Tenant for Life* be *diſſeiſed* and *will not enter*, yet I cannot enter. Per Finch, for clear Law. Br. Entry Cong. pl. 120. cites 40 E. 3. 5.

3. A Man of *non ſane Memoriæ made* a Deed of *Feoffment and Letter of Attorney* to deliver Seiſin of the Land in Chivalry and died, the Friend of the Heir within Age entred, there the Lord may enter for the Ward, for the *Feoffment is void*; *Contrary if he himſelf had made the Livery*, as it ſeems, and it ſeems here that none can enter but the *Privies*, for the Lord pleaded entry of the Friend of the Heir, and not by himſelf immediately. Br. Entry Cong. pl. 106. cites 7 H. 4. 12.

4. If *Leſſee for Life of a Diſſeiſor makes Feoffment*, and the *Diſſeiſee releaſes to the Feoffee, the Entry* of the Diſſeiſor for the Forfeiture is not congeable; Per Littleton. Cited D. 339. a. pl. 44. in Caſe of Blackaller v. Martine.

5. *Tenant for Life*, the *Remainder for Life*, *the Remainder in Tail*, the *Remainder to the Remainder for Life*, *Tenant for Life*, *and he in Remainder for Life joined in a Feoffment by Deed*; Per Curiam he in Remainder in Tail may enter for Forfeiture of both their Eſtates; for he in Remainder joining, is particeps criminis. If the Tenant for Life himſelf had made a Feoffment, he in Remainder for Life might not enter, becauſe he had not Eſtate of Inheritance. D. 239. a. pl. 44 Mich. 16 & 17 Eliz. Blackaller v. Martine.

6. Leaſe to three for 80 Years, and in the End of the ſaid Leaſe was a Clauſe, that *if they died within the ſaid Term, that then the Leſſor might enter*. A. Grantee of the Reverſion makes a *new Leaſe* thereof to B. for 21 Years to *begin after the Expiration*, Determination, or Surrender of the former Leaſe. The three Leſſees died within the Term. B. cannot enter before A. has entered, for it is in the Election of A. if he will take Advantage of the Condition and defeat the Leaſe, but that ought to be by Entry, and none can make ſuch Entry but Leſſor himſelf, or by his expreſs Directions. 3 Le. 269. pl 363. Paſch. 33 Eliz. C. B. Anon.

(A. 3) Barr'd. By what Act.

1. IN Aſſiſe, it was held and adjudged, that where one abated upon another and the *Abator or Diſſeiſor made a Feoffment* or Leaſe for Life, and ſo over, ſo that one is in by defegſible Title and hath Cauſe of Warranty by Reverſion or ſuch like, that in this Caſe *he upon whom* the Abatement or Diſſeiſin was made *cannot enter upon him, who has Warranty againſt other Perſons*, notwithſtanding that there be not any Deſcent to take away the Entry, but only the Loſs of the Warranty.

Warranty. Br. Entre Cong. pl. 48. cites 1 Aſſ. 13. and 11. E. 2. accordingly. Contrary at this Day.

2. He who *diſtrains* for Rent, and has Clauſe of Re-entry in his Leaſe for Non-Payment cannot re-enter; quod nota, by reaſon that he has diſtrained. Br. Entre Cong. pl. 53. cites 14 Aſſ. 11.

3. In Aſſiſe, the Tenant *pleaded in Bar that he was bound in a Statute Merchant in 20 l. to the Plaintiff who ſued Execution*, and had this Land in Execution, and after granted to the Defendant by Indenture, that if he paid the 20 l at a certain Day he may enter, and that he paid and entred, and a good Bar. Br. Aſſiſe, pl. 227. cites 20 Aſſ. 7.

So of Releaſe of all Actions. Br. Entre Cong. pl. 109. cites 19 H. 6. 4. 4. If the *Diſſeiſee releaſe all Actions Perſonal*, yet he may enter; Quod nota. Br. Entre Cong. pl. 54. cites 17 Aſſ. 25. *For* the Right, nor the Entry, is not releaſed by theſe Words, All Actions.

S. P. Br. Entre Cong. pl 102. cites 18 E. 4. 13. *And* he may enter within Age, or at full Age, at his Pleaſure, to defeat the Warranty. 5. In Aſſiſe an *Infant* may enter notwithſtanding *Collateral Warranty* be deſcended upon him, *where his Entry was lawful before*; Per Shard, Stanton and Birton; and hence it ſeems, that the contrary is Law, if his Entry was not lawful before. Br. Entre Cong. pl. 65. cites 28 Aſſ. 28. ——*But* it ſeems that *if a Deſcent be* had *meſne between the full Age and the Entry* he cannot enter Br Entre Cong. pl. 102. cites 18 E. 4. 13.—*Contrary upon a Recovery or* an *Eſtate Conditional.* Br. Ibid.

6. In Aſſiſe, *Tenant for Life is diſſeiſed*, he in *Reverſion may enter*; Per Perſey, which was denied by Fincheden; Quod nota bene inde. Br. Entre Cong. pl. 11. cites 45 E. 3. 21.

7. In Writ of Entry in the Per & Cui, if the *Tenant vouches him in the Per*, he *may enter into the Warranty and plead to the Writ by Falſifying the Entry*, quod tota Curia conceſſit. Br. Enter en le Per, pl. 21. cites 22 H. 6. 13.

(A. 4) Revived.

1. *Diſſeiſor is diſſeiſed*, and *ſecond Diſſeiſor levies a Fine*, and the Year and Day paſs *without Claim of firſt Diſſeiſee*, but *ſecond Diſſeiſee makes Claim* within the Time, now the firſt Diſſeiſee is bound as to the Entry upon the laſt Tenant in Poſſeſſion; but if *ſecond Diſſeiſee enters*, as he may by reaſon of his Claim, now the firſt Diſſeiſee ſhall enter upon him; Arg. Mo. 346. cites 6 E. 2 Fitzh. tit. Continual Claim.

Admitted. Arg. Mo. 349. 2. *Tenant makes Feoffment pending the Writ*, and the *Demandant recovers*, the Feoffee is bound as to the Demand; but if the firſt Tenant reduce the Poſſeſſion by *reverſing the Recovery for Error*, the Feoffee upon the ſame Tenant ſhall re-enter; Arg. Mo. 347. cites 21 E. 3. and 12. Aſſ. pla. Ultimo.

3. In Aſſiſe it was found by Verdict, that *Tenant in Tail aliened in Fee*; The *Alienee died ſeiſed, and three Heirs after him*, and the *Iſſue of the third Heir had the Deed of Tail in his Hand*, and being in his Bed dying ſent for the Iſſue in Tail, and ſaid to him, that he had Right to have the Tenements compriſed in the Deed by Force of the Tail, and delivered him the Deed, and *ſurrendered the Land* to him by

by Parol, and after died in the House of the same Tenements, and the Issue in Tail entred by this Render by the Tail, and the Heir of him who surrendered ousted him, and he him re-ousted, and the Heir of him who surrendered brought Assise, *and the Surrender was awarded good*, and the Entry of the Issue in Tail good, and the Plaintiff barred of the Assise. Br. Entre Cong. pl. 70. cites 34 Ass 2.

4. If Land be *given to A. and to B. and C. his Feme, and to the Heirs of the Body of the Baron and Feme*, and after the *Donor releases to A. and to B. and C. and their Heirs*, and the *Baron and Feme have Issue*, and the *Baron dies*, and *A. aliens the Moiety in Fee*, * C. may enter by reason of the Tail for the Alienation to her Disinheritance; But if the Issue dies after without Issue, then the Alienee of A. may re-enter, for the *Alienation of A. was good before to sever the Jointure for Term of Life, and to give his Part of the Fee-simple*, and therefore when the Tail is extinct the Fee-simple shall take Place. Br. Entre Cong. pl. 136. cites 45 Ass. 7.

* Ibid. pl. 87 cites S. C.

5. If an Infant *be a Disseisor, and another* Man *disseise him and dies seised*, and *his Heir* is *in by Descent*, the Entry of the first Desseisee is taken away; *But if the Infant enters* or recovers, the first Disseisee may enter; and so see that the Entry of one shall give Advantage to a Stranger. Br. Entre Cong. pl. 38. cites 4 H. 6. 7. 3.

6. A *Disseisor made a Gift in Tail, Remainder over in Fee*, if the *Donee dies* and *his Heir is in by Discent*, the Entry of the Disseisee is taken away; *But if* the *Issue dies without Issue*, and he in *Remainder enters*, the Entry of the Disseisee is revived, for *he is in as Purchasor*. Br. Entre Cong. pl. 92. cites 9 H. 7. 24.

7. *But if a Descent be had from the Disseisor to his Heir*, by which the Entry of the Disseisee is taken away, and after the *Issue dies without Heir*, so that the *Lord enters by Escheat*, yet the Entry of the Disseisee is not revived, for he affirmed the first Estate. Br. Entre Cong. pl. 92. cites 9 H. 7. 24.

8. *But if the Disseisor himself dies without Heir, and the Lord enters by Escheat*, the Disseisee may enter, for *there was no Descent*. Br. Entre Cong. pl. 92. cites 9 H. 7. 24

9. *And* if a *Feme* be a *Disseiseress*, and *dies seised*, and *her Baron is Tenant by Curtesy*, the Disseisee may enter upon him. Br. Entre Cong. pl. 92. cites 9 H. 7. 24.

10. *But if* the *Tenant by the Curtesy dies, and the Heir of the Feme enters*, the Entry of the Disseisee is not lawful upon him; which was agreed by all the Court, quod mirum! For per Littleton, in this last Case, the *Descent* is *only of a Reversion*, which *does not take away an Entry*. Br Entre Cong. pl. 92. cites 9 H. 7. 24.

11. If a *Disseisor* be, and he *aliens*, and *Alienee dies seised*, and *his Heir enters*, the Entry of the Disseisee is tolled; But if the *Disseisor be Heir to the Alienee*, then he may enter becaufe he was Party to the Wrong; Per Moyle for Law, which was not denied. Br. Entre Cong. pl. 3. cites 33 H. 6. 5.

12. *Tenant in Tail makes Feoffment with Warranty*, and dies; the Issue recovers by *Formedon* becaufe *no Assets* descended; yet *if Assets descend afterwards* the Tenant shall have Sci. Fa. to re-have the Land. Arg. Mo. 347. cites Pl. C. 110. [a. Mich. 2 M. 1.] Fulmerston v. Steward.

(A. 5) Scire Facias. In what Caſes Entry is not lawful without a Scire Facias.

1. IT is agreed in Treſpaſs that where a Man *recovers Land and makes a Feoffment*, and after the *Judgment is revers'd by Error*, the Party cannot enter before he has had a *Scire Facias againſt the Feoffee*, for he was not a Party to the Reverſal. Br. Entre Cong. pl. 132. cites 4 H. 7. 10. 11.

2. *But* where *Attainder* of Treaſon or ſuch like is *revers'd by Parliament*, the Party *may enter* without a Scire Facias *againſt the Patentee*, and *otherwiſe upon the King*. Br. Entre Cong. pl. 132. cites 4 H. 7. 10. 11.

(B) Where an Entry *into Part* ſhall be an Entry *for the Whole*.

4 Le. 14. pl. 50. Hill. 31 & 32 Eliz. C. B. Anon. S. P. —— 4 Le. 8. pl. 35.

1. IF a Diſſeiſor leaſes ſeveral Parcels of Land to ſeveral Men for Years, and after the Diſſeiſee enters upon one in the Name of all, this is a good Entry for the Whole, becauſe there is but one Tenant to the Præcipe, who is the Diſſeiſor, who is only Tenant of the Freehold. P. 6. Ja. B. between *Dampart and Honour.*

Hill. 27 Eliz. Holland v. Hopkins, S. P. but ſays Quære if the Leſſees of Diſſeiſor had been Tenants for Life; becauſe he might have his Action againſt them. —— Co. Litt. 252. b. S P and ſame Diverſity, and in the Caſe of Leaſes for Years the Diſſeiſee might have one Aſſiſe againſt the Diſſeiſor, becauſe he remained Tenant of the Freehold for all the Acres, and therefore one Entry ſhall ſerve for the Whole. —— But Entry into the Franktenement of one Perſon is not an Entry into the Franktenement of another Perſon. And 28. in pl. 64. Mich. 14 & 15 Eliz. —— Same Diverſity as above as to Leſſees for Years and Leſſees for Life. D 337. b. Marg. pl. 37. cites Mich. 42 & 43 Eliz. B. R. Goodman v. Gerners, and Dalton v. Brown. —— As to Leſſees for Years, the Entry upon one in the Name of all Lands in the ſame County was held good by Jones, Doderidge and Crew, becauſe the Freehold is in one only and within the ſame County D. 337 Marg. pl. 37. cites Hill. 22 Jac. and Paſch. 1 Car. B. R. Argoll v Cheyney. —— Palm. 402. S. C. held accordingly. —— Lat. 71. S. C

The Entry in this Caſe is good for no more than the Acre enter'd into

2. [But] If a Man be diſſeiſed of two ſeveral Acres by two ſeveral Perſons, and after enters into one Acre in the Name of both, this is not any Entry into the other Acre. M. 8 Ja. between *Champernoon and Hall*, per Curiam.

and ſo it is though the ſeveral Acres lay all in one County; For each Diſſeiſor is a ſeveral Tenant of the Freehold, and the Entry of a Man to re-continue his Inheritance muſt enſue his Action for Recovery of the ſame, and as he muſt have ſeveral Actions againſt them for Recovery of the Land ſo his Entry muſt be ſeveral. Co. Litt. 252. b —— Dal. 88. pl. 2. Anno 15 Eliz. Anon. S. P.

3. *Two purchaſed to them and to the Heirs of one*, and *Ceſty que Vie alienes the Whole*; the other may *enter into* the Whole, the *one Moiety for Diſſeiſin* to him, *and the other for Alienation* to his Diſinheritance. Br. Entre Cong. pl. 52. cites 13 Aſſ. 7.

4. In Aſſiſe, if my *Father dies ſeiſed of one Acre* of Land *in D. in his own Right*, *and of another Acre* of Land *there jointly ſeiſed with his Wife*, who

who ſurvives him, and I *enter into the Acre of which my Father was ſole ſeiſed in the Name of all* the Lands and Tenements whereof my Father died ſeiſed in D. this does not give any Entry but in this Acre, and not in the other, becauſe I have no Right to enter into the other living my Mother; quod nota. Br. Entre Cong. pl. 80. cites 39 Aſſ. 16.

5. If I have *Title to two Acres* of Land *in one Vill*, and my Title *is taken away in the one Acre*, but not in the other; if I *enter into that where my Entry is toll'd, claiming the other Acre alſo*, and in the Name of both Acres, *this is not any Poſſeſſion* in me but only of that Acre where I have enter'd, *but if my Entry had been congeable in the ſame Acre* into which I enter'd *claiming the other* Acre at the Time of my Entry, *this had been a good Entry* and a good Poſſeſſion of both Acres to have an Aſſize. Keilw. 20. b. pl. 5. Hill 12 H. 7. Anon.

6. If a Man be *diſſeiſed of two Acres in ſeveral Counties*, and the Diſſeiſee enters *into one* Acre *in the Name of both* Acres, yet this Entry ſhall not extend to the Acre lying in another County, in which Acre Entry was not made. Perk. S. 229.

Br. Entre Cong. pl 35. cites 22 H. 6. 10. Per Paſton and Portington, S. P.

7. It is ſaid that if a Man be *diſſeiſed of two Acres* in one County, and he *entered into one* of the Acres, *claiming the ſaid Acre only*, and *maketh a Deed of Feoffment of both Acres unto a Stranger, and makes the Livery* of Seiſin according to the Deed *in the Acre in which he enter'd*, that both Acres ſhould paſs unto the Feoffee, becauſe that this Claim is nothing to the Purpoſe, becauſe he had Right of Entry before &c. and both Acres are in one County, ſo as his Entry into one Acre ſhall be Entry into both Acres, notwithſtanding the Claim &c. againſt which it may be ſaid that the Acre into which the Feoffor did not enter ſhall not paſs by the Feoffment; for when a Man is out of Poſſeſſion of a thing ſeverable he is at Liberty to continue his Poſſeſſion in it, in which Part he will, and ſhall not be compelled for to re-continue his Poſſeſſion unto all in Deſpight of him. Perk. S. 232. cites 9 H. 7. 25.

If one *diſſeiſes me of two ſeveral Acres in one County*, and I *enter into one of them generally, without ſaying in the Name of both*, this ſhall reveſt only that Acre wherein Entry is made. Co. Litt. 252. b.

8. If *Lord and Villein* be, and the *Villein purchaſe two Acres of Lands in Fee lying in one County*, and Poſſeſſion of them is executed to him accordingly, and the *Lord* of the Villein *enter into one Acre, not claiming the other Acre*, and afterwards makes a Deed of Feoffment of both Acres unto a Stranger, and makes Livery of Seiſin in the Acre in which he hath entered according to the Deed, yet the Acre into which he did not enter ſhall not paſs by the Feoffment &c. Perk. S. 234.

9. An Entry of a Man to re-continue his Inheritance or Freehold *muſt enſue his Action* for the Recovery of the ſame; As if three Men diſſeiſe me ſeverally of three ſeveral Acres of Land, being all in one County, if I enter into one Acre in the Name of all the Reſt, this is only good for that Acre which I entred into; for every Diſſeiſor hath a ſeveral Freehold, and therefore I muſt bring ſeveral Actions. &c. Co. Litt. 252. b. cites Mich. 14 & 15 Eliz. Ld. Arundel's Caſe.

10. So if one diſſeiſe me of three Acres of Lands, and after leaſes theſe three ſeveral Acres to three ſeveral Men for their Lives, there the Entry of the Diſſeiſee upon one of the Leſſees is not good for the Reſt; but if the Diſſeiſor had letten theſe three Acres to three ſeveral Men for Years, an Entry into one in the Name of all the three Acres would reveſt the Whole. Co. Litt. 252. b.

11. If *A. diſſeiſes B. of Lands in three Towns*, and *levies a Fine with Proclamations of the Lands in one Town to C. in Fee*, and the *Diſſeiſee* within five Years *enters into the Lands in the other two Towns only, (being in the Poſſeſſion of the Diſſeiſor) in the Name of all the Lands in the three Towns*,

And. 28. pl. 64. Croke v. Maſon. S. C. this

was no Entry into the Lands of which the Fine was levied; same Reason.

Towns, by this the Eſtate of the Conuſee in the third Town was not deveſted, becauſe he was in by Title. Kelw. 213. a. pl. 22. Mich. 14 & 15 Eliz. Brook v. Meaſon.

For the Conuſee was in by Title. Bendl. 207. pl. 243. S. C. adjudged, and for the

12. A *Copyholder ſurrendered to the Uſe of his Will, and* thereby *deviſed the Land to his Wife for Life*, the *Remainder over to his Son in Tail, and died*, the *Wife entred and died*, a *Stranger did intrude upon the Lands, and* thereof *made three ſeveral Feoffments to three ſeveral Perſons*, he in the *Remainder entered upon one of the ſaid three Feoffees in the Name of all the Lands ſo deviſed, and made a Leaſe of the whole Land*; And by Clench and Wray it was a good Entry for the Whole, and by conſequence a good Leaſe of the Whole; Gawdy contrary; Note, *all the Lands were in one County*. Le. 36. pl. 46. Trin. 28 Eliz. B. R. Troublefield v. Troublefield.

13. The Caſe was this, *Three ſeveral Perſons did occupy three ſeveral Houſes in B. to which J. S. had Right*, and *J. S. went to one of the Houſes and entred, and afterwards went away, leaving him who occupied the ſaid Houſe upon the Land*; and *then he enter'd into another of the Houſes, and* then *went from that, leaving him who occupied the ſame before upon the Land*; and *then he enter'd into the third Houſe, and there ſealed a Leaſe for Years unto another Man of that Houſe, and naming the two other Houſes*; and the *Leſſee brought an Ejectione Firmæ for the two Houſes in which the Leaſe was not delivered*, and the Opinion of the Court was againſt him, that he was barred in the Action; for the Entry or Continuance of him, who occupied the ſame before, did defeat the Entry of the Plaintiff or Leſſor; and the Plaintiff was forced to be Nonſuited. Godb. 72. pl. 87. Mich. 28 & 29 Eliz. B. R. The Earl of Kent's Caſe.

14. When a Freehold is out of a Perſon, if the *Diſſeiſee enters generally into one Parcel*, this ſhall not re-continue both, for it *may be that the Diſſeiſor or the Feoffee had a Warranty*, and therefore the general Entry into one Parcel ſhall not re-continue both. Co. de Fin. Lect. 15.

But if the Lands lie in ſeveral Counties there muſt be ſeveral Actions and conſequently ſeveral Entries Co Litt. 252. b.

15. If *one diſeiſes me of one Acre at one Time, and* after diſſeiſes me *of another Acre in the ſame County at another Time*, in this Caſe my Entry into one of them in the Name of both is good, for that one Aſſiſe might be brought againſt him for both Diſſeiſins. Co. Litt. 252. b.

16 But if I *enfeoff one of one Acre of Ground upon Condition, and at another Time I enfeoff the ſame Man of another Acre in the ſaid County upon Condition alſo*, and *both the Conditions are broken*, an Entry into one Acre in the Name of both are not ſufficient, for that I have no Right to the Land, nor Action to recover the ſame, but a bare Title, and therefore ſeveral Entries muſt be made into the ſame, in reſpect of the ſeveral Conditions. *But an Entry into one part of the Land in the Name of all the Land* ſubject to one Condition is good, although the Parcels be ſeveral and in ſeveral Towns. Co. Litt. 252. b.

17. *Where the Poſſeſſion is in no Man, but the Freehold in Law is in the Heir that enters*, there the general Entry into one Part reduces all into his actual Poſſeſſion. And therefore if the *Lord enters into a Parcel generally for a Mortmain*, or the *Feoffor for a Condition broken*, or the Diſſeiſee into Parcel generally, the Entry ſhall not veſt nor deveſt in theſe or like Caſes but for the Parcel. Co. Litt. 15. b.

18. But *when a Man dies ſeiſed of ſeveral Parcels in Poſſeſſion, and the Freehold in Law is by Law caſt upon the Heir, and the Poſſeſſion in no Man*, there

there the *Entry into Parcel generally* ſeems to veſt the actual Poſſeſſion in him in the Whole. *But* if this *Entry* in that Caſe be *ſpecial*, viz. that he enters only into that Parcel and no more, there it reduces that Parcel only into actual Poſſeſſion. Co. Litt. 15. b.

19. If a Man hath *Cauſe to enter into any Lands or Tenements in divers Towns in one and the ſame County*, if he *enters into one Parcel of the Lands* or Tenements which are *in one Town*, *in the Name of all* the Lands or Tenement into the which he hath Right to enter, within all the Towns of the ſame County, by ſuch Entry he ſhall have as good a Poſſeſſion and Seiſin of all the Lands and Tenements whereof he hath Title of Entry, as if he had entred indeed into every Parcel. Litt. S. 417.

20. If *three Men diſſeiſe me ſeverally of three ſeveral Acres* of Land, being *all in one County*, and *I enter in one Acre in the Name of all* the three Acres, this is good for no more but for that Acre which I entred into, becauſe every Diſſeiſor is a ſeveral Tenant of the Freehold, and as I muſt have ſeveral Actions againſt them for the Recovery of the Land, ſo my Entry muſt be ſeveral. Co. Litt. 252. b.

21. So it is if *one Man diſſeiſes me of three Acres* of Ground *and lets the ſame ſeverally to three Perſons for their Lives* &c. There the Entry upon one Leſſee in the Name of the Whole, is good for no more than that Acre that he has in his Poſſeſſion. Co. Litt. 252. b.

If a Man be *diſſeiſed of three Acres by one Man*, and the *Diſſeiſſor lets ſeverally the ſaid three Acres to three Perſons for Years*, there the Entry upon one of the Leſſees in the Name of all the three Acres ſhall re-continue, and reveſt all the three Acres in the Diſſeiſee; For that the Diſſeiſee might have had one Aſſiſe againſt the Diſſeiſor, becauſe he remained Tenant of the Freehold for all the three Acres, and therefore one Entry ſhall ſerve for the Whole. Co. Litt. 252. b.

22. If *one diſſeiſes me of one Acre at one Time*, *and* after diſſeiſes me *of another Acre in the ſame County at another Time*, in this Caſe my Entry into one of them in the Name of both is good; for that one Aſſiſe might be brought againſt him for both Diſſeiſins. Co. Litt. 252. b.

23. If *I enfeoff one of one Acre* of Ground *upon Condition*, *and at another Time I enfeoff the ſame Man of another Acre in the ſame County upon Condition alſo*, and *both the Conditions are broken*, an Entry into one Acre in the Name of both is not ſufficient; For that I have no Right to the Land, nor Action to recover the ſame, but a bare Title, and therefore ſeveral Entries muſt be made into the ſame in reſpect of the ſeveral Conditions. Co. Litt. 252. b.

But an Entry into one Part of the Land in the Name of all the Land ſubject to one Condition is good, althouth the Parcels are ſeveral, and in ſeveral Towns, and ſo Note a Diverſity between ſeveral Rights of Entry, and ſeveral Titles of Entry by Force of a Condition. Co. Litt. 252. b.

24. If Lands lie in ſeveral Counties there muſt be *ſeveral Actions*, and Conſequently ſeveral Entries. Co. Litt. 252. b.

25. The Entry of an Attorney or Leſſee *into one Acre in Poſſeſſion of A. in the Name of other Lands*, ſhall veſt all in the ſame County which are *in Poſſeſſion of other Leſſees for Years*, if the *Freehold be in one Perſon.* Palm. 402. Paſch. 1 Car. B. R. Argol v. Cheyney.

25. It was held, that where a Man would recover the meſne Profits *in an Action of Treſpaſs*, he muſt prove Entry into every Parcel, and not into one Part in the Name of all. Clayt. 35. pl. 61. Aug. 11 Car. Gledel's Caſe.

26. If there is a Manor-Houſe, and Demeſne Land belongs to it, and one Lord enters into the Land, and the other Lord into the Houſe, the *Poſſeſſion* of the *Houſe* ſhall not be the Poſſeſſion of the *Demeſnes*, nec e converſo. 2 Sid. 75. Paſch. 1658. Crouch v. Wills.

(C) Entry to the Uſe of another.

In what Caſes the Entry *of one to the Uſe of another* ſhall *ſettle the Poſſeſſion* in him *without Agreement*, and in what not.

Br. Continual Claim, pl. 6. cites S. C. but S. P. does not appear there. —— Br. Entre Cong. pl 41. cites S. C. but S. P. does not appear there.

1. IF the Baron enters to the Uſe of his Feme, where the Entry of the Feme is lawful, this ſettles the Poſſeſſion in the Feme preſently, without any Agreement. 14 H. 6. 25. b.

Br. Continual Claim, pl. 6. cites S. C. but not S. P. —Br Entre Cong. S. C. but S. P. does not appear. —— Co Litt. 245. a. ad finem, S. P. —— Ibid. 258. a. S. P.

2. So if a Man enters to the Uſe of an Infant into Lands where his Entry is lawful, this ſettles the Poſſeſſion in him before Agreement by the Infant. 14 H. 6. 25. b.

Co. Litt. 245. b. ad finem. —— Ibid. 258. a. —Mo. 450. pl. 613. S. P. admitted per Cur. —— If one diſſeiſes me, and a Stranger enters upon the Diſſeiſor for me, this Entry takes away the Diſſeiſin; Per Roll Ch. J. Sty. 370. Paſch 1653.

3. So if the Entry be to the Uſe of one of full Age, where the Entry is lawful, this veſts the Poſſeſſion in him before Agreement. 34 E. 3. Entry Congeable 50.

For the Entry of one for two ſhall not be the Entry of the other, where the Entry is not lawful. Br. Entre Cong. pl. 69. cites 31 Aſſ 33. and 1 H. 6. and 8 H. 6. 16. accordingly.

4. If a Man enters to the Uſe of one of the Plaintiffs, where the Entry is not lawful, this veſts nothing in him before Agreement, becauſe he ſhall be a Diſſeiſor by the Agreement. 34 E. 3. Entry Congeable 50.

Br Continual Claim, pl. 6. cites S. C. & S. P. —— Br. Entry, pl. 41. cites S. C.

5. So if a Man enters to the Uſe of an Infant, where his Entry is not lawful, this veſts no Poſſeſſion in the Infant. 14 H. 6. 25. b.

So where one Coparcer enters, claiming for her and her Siſter who is an Infant, ſhe of full Age is a Diſſeiſoreſs only, and the other who is an Infant not. Br. Entre Cong. pl. 60. cites 26 Aſſ. 39.

6 If a Man diſſeiſes me, and I make continual Claim, and after he dies, and this deſcends to two Coparceners, upon whom I enter, by which the Coparcenary is defeated, if after one enters, claiming to the Uſe of herſelf and her Coparcener, yet nothing veſts in the other before Agreement, for their Entry is not lawful. 14 H. 6. 26.

7. So

7. So **if a Man enters** upon two Jointenants, where his Entry is lawful, **by which the Jointenancy is defeated, if after one enters to the use of both, yet nothing vests in the other before Agreement.** 14 H. 6. 25. b.

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As where Diſſeiſor infeoffs Baron and Feme, and the Diſſeiſee re-entered, and the Baron re-entered claiming to him and his Feme, this veſts nothing in the Feme, becauſe the Jointenancy was defeated by the Regreſs of the Diſſeiſee, and ſo he that enters by Tort, as the Baron here does, cannot by his Claim veſt any thing in the Feme Covert, in Infant, nor in a Stranger to the Entry. Br. Entre Cong. pl. 6 cites S. C — And cites 1 H. 6. 6. to the ſame Purpoſe —— S. P unleſs they enter actually. Br. Continual Claim, pl. 6. cites S. C. But Brooke ſays, it ſeems if the Stranger agrees after, this will make him a Diſſeiſor. —— Br. Entre Cong pl. 41. cites S C which was in Caſe of a Feoffment made by a Diſſeiſor to a Baron and Feme, and the Diſſeiſee re-entered, a Claim afterwards by the Baron veſted nothing in the Feme.

8. **If** two Coparceners have **a** Right of Action **to certain Land,** but their Entry is not lawful, **and the** one enters to the Uſe of both, **yet nothing veſts in the other till Agreement.** 27 Aſſ. 68. **adjudged.**

Br. Entre Cong pl. 64. cites S. C. & S. P. —— Fitzh. Aſſ. pl. 261. cites S. C.

9. **If** two Jointenants are diſſeiſed, **and the** Diſſeiſor aliens, **and** one **Jointenant** enters **upon the Alienee to the uſe of both, this ſettles the Freehold in both.** 27 Aſſ. 68.

10. **If a Man** commands J. S. to enter **into certain Lands** in his Name, if he has Right, otherwiſe not, **if he enters accordingly, yet if the Commander had no Right, no Eſtate veſts in him by this Entry, becauſe his Command was** conditional. 34 E. 3. 12. **adjudged.**

This is at 34 Aſſ. pl. 12.

11. In Aſſiſe, it was found that the *Son infeoffed his Father of two Parts of the Houſe, and* 20 *Acres of Land for Term of Life, and* that he infeoffed *his Father and his Mother for Term of their Lives*, and after the *Son went beyond Sea* the *Father aliened the whole*, and his *Siſter entered in Name of her Brother if he be alive, and if he be dead in her own Name as Heir to him*, and ſhe was ouſted, and the Son came back and brought Aſſiſe of this Ouſter, and recovered the whole by Award notwithſtanding ſhe was not deputed by the Son to enter. Br. Seiſin, pl. 21. cites 11 Aſſ. 2.

12. In Aſſiſe, it was found that *Tenant in Tail had Iſſue two Daughters and aliened in Fee*, and *died*, and *one Daughter entered*, and ouſted the Feoffee, *claiming to the Uſe of her and her Siſter*; The Feoffee re-entered, and ſhe who re-entered brought Aſſiſe and recovered, and after *the other Siſter entered upon her claiming as Heir*, and the other ouſted her, *and* ſhe *brought Aſſiſe and recovered*, by reaſon that her Siſter entered firſt to the Uſe of both, and recovered upon the ſame Title, and therefore her Siſter may enter with her; Brooke ſays, *Quod mirum!* Br. Entre Cong. pl. 55. cites 21 Aſſ 19.

13. *Guardian entered* claiming the Franktenement to the Heir within Age, *where the Entry was not congeable*, and yet becauſe the Infant was not named in the Aſſiſe rhe Writ was abated, and therefore it ſeems that the Franktenement is in him till he refuſes; Quære; For where one Coparcener entered claiming for him and his Coparcener, he alone brought the Aſſiſe of an Ouſter after and recovered, notwithſtanding that it was pleaded to the Writ that the Plaintiff entered claiming to him and his Companion. But Fiſh ſaid, that he would have a Writ o Error, and, as it ſeems, it is clearly Error where ſuch Entry and Claim is made, and the Entry lawful. Contrary it ſeems if the Entry be not lawful. Nevertheleſs, it ſeems that this Caſe is not Error, for the Caſe was, that *Baron and Feme ſeiſed in Tail*, the *Baron made a Feoffment*, and had *Iſſue two Daughters, who had Iſſue two Sons*, the *Baron*

Baron died, the *Feme entered upon the Feoffee of his Aſſent, claiming at his Will*, and *died*, and *the two Daughters died*, and *one of the Sons entered* upon the Feoffee, *claiming to* the Uſe of *him and his Companion*, the *Feoffee brought Aſſiſe againſt him who entered only*, and recovered by Award, for the *Feme by her Entry was no Diſſeiſoreſs*, and then ſhe did not die ſeiſed of an Eſtate of Inheritance, ſo that the Heir may be remitted; Quod Nota. Br. Entre Cong. pl. 37. cites 24 E. 3. 42.

14. *And where the Entry is not lawful*, there *the Claim to him and his Companion does not veſt Seiſin in his Companion*, and *e contra where* the Entry is *lawful*. Br. Entre Cong. pl. 37. cites 24 E. 3. 42.

Br. Condition, pl. 77. cites S. C.

15. In Quare Impedit, the Defendant made Title, becauſe A B was *ſeiſed of the Land* in Fee *with the Advowſon appendant* and *infeoffed* upon Condition one *R. to re-infeoff* A. B. and *his Feme and G. his Son*, and after *A. B. died*, and *G. the Son died within Age after Requeſt made to re-infeoff him*, and after *J. his Son died alſo within Age*, and *W. his Son being within Age*, one *H. as his Prochein Amy enter'd*, by which the Defendant as Lord ſeiſed the Ward, and the Church voided, and he preſented; And admitted for good Title to have the Ward where the Heir enters into the Land within Age by Condition deſcended; quod nota. Br. Gard, pl. 58. cites E 3. 37.

16 If *a Feme Covert* has Title of Entry into Land, *or* if *Infant* has ſuch *Title of Entry*, and the *Baron or another enters to the Uſe of the Feme or Infant*, this veſts Poſſeſſion in the Feme or Infant; Contra if the Entry be not lawful, and if Diſſeiſor inteoffs two, and the Diſſeiſee re-enters, and after one of the Feoffees re-enters, this is no Remitter to his Companion; Contra if his Entry had been lawful. Br. Remitter, pl. 42 cites 14 H. 6. 25.

17. *By Re-entry of the Tenant at Will after a Diſſeiſin* the *Franktenement is not recontinued to the Leſſor*, as it is by Entry *of a Termor*. Br. Treſpaſs, pl 227. cites 38 H. 6. 27.

A Feoffment by Tenant for Years is a Diſſeiſin, and in ſuch Caſe every one may enter on Behalf of Diſſeiſee where he has a Right of Entry. Cro. C. 170 pl. 16. Mich. 5 Car. B. R. in Caſe of Edgar v. Sorrell.

18. If a Man enters to the Uſe *of him who has lawful Entry*, this veſts the Seiſin and Poſſeſſion in him who has Title of Entry without other Agreement. Br. Seiſin, pl. 50. cites 10 H. 7. 12.

19 *Contra if he has not Title of Entry*, by Juſtices of B. R. For there the Poſſeſſion veſts in thoſe who enter. Br. Seiſin, pl. 50. cites 10 H. 7. 12.

20. If an *Infant makes a Feoffment in Fee*, an *Eſtranger of his own Head cannot enter* to the Uſe of the Infant, for the Eſtate is voidable. Co. Litt. 245. a.

21. If an Infant, or a Man of full Age is *diſſeiſed*, an Entry by a Stranger, of his own Head, is good, and ſo veſts preſently the Eſtate in the Infant or other Diſſeiſee Co Litt. 245. a.

22. If *Tenant for Life makes a Feoffment in Fee*, an *Eſtranger may enter for a Forfeiture in the Name of him in the Reverſion*, and thereby the Eſtate ſhall be veſted in him, Et ſic de ſimilibus. Co. Litt. 245. a.

23. If an Infant or any Man of full Age, have any *Right of Entry* into any Lands, any *Stranger* in the Name, and to the Uſe of the Infant, or Man of full Age, may enter into the Lands, and this regularly ſhall veſt the Lands in them *without any Commandment precedent*, or *Agreement Subſequent*. Co. Litt. 258. a.

24. If a *Diſſeiſor levy a Fine with Proclamations* according to the Statute, a Stranger without a Commandment precedent, or an Agreement ſubſequent within the five Years cannot enter in the Name of the Diſſeiſee

ſeiſee to avoid the Fine, and the Reſolution was grounded upon the Conſtruction of Stat. 4 H 7. cap. 24. Co. Litt. 258. a.

25. *Guardian for Nurture, or in Socage*, may enter in the Name of the Infant, having a Right of Entry, and this ſhall veſt the Eſtate in the Infant *without any Commandment or Aſſent*. 9 Rep. 106. a. Paſch. 10 Jac. 1. in Margaret Podger's Caſe.

(D) Entry to the Uſe another.

What ſhall be a *good Agreement* to ſettle the Eſtate.

IF a Man diſſeiſes another to the Uſe of Baron and Feme, and they agree to it, the Eſtate is in both. 15 E. 4. 15. b. admitted.

2. [But] If a Man diſſeiſes another to the Uſe of a Feme Covert, the Agreement of the Feme without the Husband will not ſettle the Eſtate in the Feme, becauſe her Agreement is void, for her Will is transferred to the Baron.

3. But in this Caſe, the Agreement of the Baron will ſettle the Eſtate in the Feme, though ſhe is no Diſſeiſoreſs thereby, for the whole * will of the Feme is put in the Baron during the Coverture, and he may agree to the Feoffment made to the Wife; Ergo. 12 E. 4. 9. b. Curia. Br. Diſſeiſin, pl. 97. cites S. C. —— Fitzh. Diſſeiſin, pl. 3. cites S. C. —— Br. Agreement, pl. 4. S. C. —— * The Original in Roll is (agree).

4. If the Baron diſſeiſes another to the Uſe of the Feme, this ſhall ſettle the Eſtate in the Feme, for the Baron upon a Diſſeiſin by Another by his Agreement might have ſettled the Eſtate in the Feme, and this Diſſeiſin to the Uſe of the Feme is an Agreement in Law; Ergo. * 44 E. 3. 9. admitted. 44 Aſſ. 26. admitted. Contra † 14 H. 6. 25. b. 7 E. 4. 7. b. * Fitzh. Entre congeable, pl. 33. cites S. C. — † Br. Continual Claim, pl. 6. cites S. C. — Br. Entre congeable pl. 41. cites S. C. but S. P. does not clearly appear.

5. If Baron and Feme enter into Land in the Right of the Feme, where the Feme hath not any Right, the Feme is Tenant of the Land thereby. 35 Aſſ. 5. adjudged. Fitzh. Aſſize pl. 321. cites S. C. —— Br. Coverture, pl. 41. cites S. C. and Brooke ſays, Et ſic Vide that the Feme has no Power to waive the Tenancy during the Life of the Baron.

6. If the Baron ſeiſed in the Right of the Feme aliens in Fee, and after diſſeiſes the Diſcontinuee, claiming his firſt Eſtate, without ſaying any Thing of the Feme, this ſhall veſt nothing of the Tenancy in the Feme, becauſe he does not claim by expreſs Words in the Name of the Feme. 44 E. 3. 9. adjudged per Curiam. 44 Aſſ. 26. the ſame Caſe. Fitzh. Entry Congeable, pl. 33. cites 44 E. 3. 8. S. C.

7. If a Man enfeoffs Baron and Feme of a Manor, and after the Baron and Feme, by Colour of this Feoffment, enter into certain Land which are not Parcel of the Manor, but they thought they were Parcel, yet the Feme ſhall gain nothing in the Land by this, but the whole Eſtate is in the Baron. Quære, 21 Aſſ. 1.

8. If the Guardian enters and diſſeiſes a Man, claiming the Freehold to the Uſe of the Heir, this ſhall ſettle the Freehold in the Heir. 27 Aſſ. 68. ſaid to be ſo adjudged.

9. If a Man leaſes Lands for Years to J. S. and delivers the Deed to J. D to the Uſe of J. S. and after J. D. enters into the Land to the Uſe of J. S without Commandant of J. S. and is ejected, and after J. S. aſſents thereto, he ſhall have an Ejectione Firmæ upon the ſaid Ejectment. P. 44 El. B. R. *Biſhop's* Caſe, per Curiam.

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(E) *What* ſhall be ſaid an Entry into Lands *to reduce his Eſtate.*

1. IF the Diſſeiſee enters into the Land, and continues in the Land with the Diſſeiſor, and manures the ſame Land with the Diſſeiſor, claiming nothing of his firſt Eſtate, yet this is an Entry that will reduce his firſt Eſtate 40 Aſſ. 38. Curia.

28 Aſſ. pl. 42. is a D. P. and ſo is 26 Aſſ. pl. 42. nor does the S. P. appear in Br. Entre Congeable, pl. 61. nor in Br. Damages, pl. 159. nor in Br. Seiſin, pl. 23. cited by Mr. Danv. for that Purpoſe and to correct the miſprinting of Roll.

2. [But] If the Diſſeiſee enters, and takes the Profits as Leſſee at Will of the Diſſeiſor, or in any Manner, this will be an Entry, and reduce his Eſtate. 28 Aſſ. 42 adjudged, but Quære.

Co Litt. 245. b. S. P.

3. If the Diſſeiſee commands a Stranger to put in the Cattle of the Stranger in the Land to feed there, this is an Entry in Law into the Land. 1 E. 4. 3.

4. If A. leaſes to B. for Years, the Remainder to C. in Fee, and A. and B. come upon the Land of Purpoſe, ſcilicet, A. to make Livery and B. to take it, this ſhall not be ſaid any Entry of B. to veſt the actual Poſſeſſion in him till Livery made; for then the Remainder would be void, which would be againſt the Intention of the Parties. Co. Lit. 49. b.

5. If it be agreed between the Diſſeiſor and Diſſeiſee, That the Diſſeiſee ſhall releaſe all his Right to the Diſſeiſor upon the Land, and accordingly the Diſſeiſee enters upon the Land, and delivers the Releaſe to the Diſſeiſor upon the Land, this is a good Releaſe, for the Entry of the Diſſeiſee being for this Purpoſe, ſhall not avoid the Diſſeiſin, for his Intent in this Caſe excludes his Entry to a ſpecial Purpoſe. Co. Lit. 49 cites P. 19 El. B. per Curiam, reſolved.

6. But if the Diſſeiſor makes a Feoffment to the Diſſeiſee and others, there though the Diſſeiſee comes to take the Livery, yet when the Livery is made, the Diſſeiſee is remitted. Co. Lit. 49. b.

Br. Damages pl. 159. cites S. C. that this is no Remitter. — Br. Entre Congeable, pl. 61. cites S. C. Brooke ſays this ſeems not to be an Entry; For if it was an Entry he ſhould have Treſpaſs of the firſt Diſſeiſin and not an Aſſiſe. —— Br. Seiſin, pl. 23. cites S. C. —— Br. Entre Cong. pl. 57. cites 22 E. 3. 14. contra. That the *putting of a Foot into the Land* is a good Entry. But quære, for it ſeems the Year Book is miſquoted.

7. [But] If the Diſſeiſee comes upon the Land, and puts his Foot in, but takes no Profits, but the Diſſeiſor ouſts him, this Entry ſhall not ſettle any Eſtate in him, (at the Election of the Diſſeiſee as it ſeems) for the Diſſeiſee may have an Aſſiſe of the firſt Diſſeiſin. 26 Aſſ. 42. adjudged.

8. If

8 If I have an Houſe and Land adjoining to the Plot of Land in Queſtion between me and another, and I ſtand upon one Piece of Stone-Wall, which is mine own Soil, and put my Hand through a Wall made of Lime and Lathes which ſtands upon the Land in Queſtion, and there delivers a Leaſe ſealed to try the Title, this is a good Entry, though I do not come within the Plot in Queſtion. M. 11 Ja. B. between *Ballard and Richardſon*, per Curiam.

9. If *Leſſee for Life* be, the *Remainder or Reverſion in Fee*, and *Leſſee is diſſeiſed with Warranty, and dies*, and after *Leſſee enters or recovers by Aſſiſe*, becauſe the Warranty does not deſcend upon him, yet this ſhall not reduce the Remainder or Reverſion, but it ſhall be bound by the Warranty, becauſe it was bound before the Re-entry. 44 Aſſ. 35. 2 Roll 740. Voucher (F) pl. 1. Cited 1 Rep 67. in Archer's Caſe.

10. *But* otherwiſe it is if the *Leſſee re-enters before the Death of the Anceſtor*, then the Reverſion or Remainder is not bound by the Warranty, becauſe it does not deſcend upon him, and therefore the Re-entry of Leſſee reduces the Eſtate of him in Reverſion or Remainder, and then the Eſtate upon which the Warranty was annexed is deſtroyed. 44 Aſſ. 35. 2 Roll. 740. Voucher (F) pl. 2.

11. Where *Diſſeiſor infeoffs his Father* or Coſin, *who dies ſeiſed*, and the *Diſſeiſor is Heir*, the Diſſeiſee may re-enter upon him; Per Moile and Chocke, quod fuit conceſſum. Br. Property, pl. 7. cites 34 H. 6. 10.

12. If the *Diſſeiſor dies ſeiſed*, and his *Feme is endowed* by his Heir, the Entry of the Diſſeiſee is *revived for the third Part put in Dower*. Br. Seiſin, pl. 18. cites Littleton, tit. Deſcents.

13. It was agreed, that if a Man has *Title to a Moiety*, or to a *third Part*, or *fourth Part* &c. by this he may enter *into the whole* Land, and this (as it ſeems) is underſtood *before Partition* of the Land clearly. Br. Entre Cong. pl. 103. cites 21 E. 4. 10, 11.

14. If the *Diſſeiſee, at the Requeſt of the Diſſeiſor, comes into the Cellar to ſee it*, or to come to his Houſe to his Daughter's Wedding, *or to dine with him* &c. this is no Entry. Pl. C. 92. b. 93. a. Trin. 3 M. 1.

15. The Diſſeiſee *comes upon the Land to deliver a Releaſe to the Diſſeiſor*; This is no Entry to reveſt the Land in the Diſſeiſee; Arg. Le. 127. pl. 172. Trin. 30 Eliz. cites it as adjudged in C. B. in Waynman's Caſe.

16. If the *Cattle of a Leſſee that is ouſted eſtray into the Land* whereof he is ouſted, this is not any Re-entry to revive the Rent, becauſe they were not put into the Land by the Diſſeiſee himſelf, but went there of their own Accord; Per Anderſon, to which Periam agreed. Le. 110. pl. 169. Paſch. 30 Eliz. C. B. Cibel v. Hills. Gouldsb. 8. pl. 18. Sibil v. Hill, S. C. but S. P. does not appear.

17. *Leſſee* being in Poſſeſſion makes Feoffment and *Livery in the Preſence of Leſſor*, which he may do, and the Leſſor's Preſence cannot diſturb it, but immediately by *Leſſor's being there*, this is an Entry by him, and a *reveſting* the Freehold in him. Cro. E. 322. pl. 10. Paſch. 36 Eliz. B. R. Read and Morpeh v. Erington.

18. A Diverſity is to be obſerved between an *Entry in Law* and an Entry *in Deed*, for that a *continual Claim* of the Diſſeiſee being an Entry in Law, ſhall *veſt* the Poſſeſſion and Seiſin in him *for his Advantage*, but not for his Diſadvantage; and therefore if the Diſſeiſee brings an *Aſſiſe*, and hanging the Aſſiſe he makes continual Claim, this ſhall not *abate* the Aſſiſe, but he ſhall recover *Damage* from the Beginning; but it is otherwiſe of an Entry in Deed. Co. Litt 253. b.

19. If the *Baſtard invites the Mulier to ſee his Houſe, and to ſee Pictures &c. or to dine with him, or to Hawk, Hunt*, or ſport with him, or ſuch like, upon the Land deſcended, and the Mulier comes upon the Land

Land accordingly, this is no Interruption, becauſe he *came in by the Conſent* of the Baſtard, and therefore the coming upon the Land can be no Treſpaſs. Co. Litt. 245 b.

20. *But if* the *Mulier comes* upon the Ground *of his own Head, and cuts down a Tree, or digs the Soil, or takes any Profit*, theſe ſhall be Interruptions, for rather than the Baſtard ſhall puniſh him in an Action of Treſpaſs, the Act ſhall amount in Law to an Entry, becauſe he has a Right of Entry. Co. Litt. 245 b.

21 *So* it is if the Mulier *puts any of his Beaſts into the Ground*, or *commands a Stranger to put in his Beaſts*; Theſe do amount to an Entry, for although in theſe Caſes the Mulier does not uſe any expreſs Words of Entry, yet theſe and ſuch like Acts do, without any Word, amount in Law to an Entry, for Acts without Words may make an Entry, but Words without an Act, cannot make an Entry, (viz Entry into the Lands &c.) Co. Litt. 245 b.

22. If a Man has *Common in the Land of J. S. between Lady-Day and Michaelmas*, and the *Commoner brings an Aſſiſe* of his Common, *and at Chriſtmas puts in his Beaſts*, this ſhall not be any Entry to abate his Writ; for it cannot be intended for the ſame Common; Cited per Fleming Ch. J. as cited by Yelverton J. and which Caſe is agreed to be good Law. 2 Brownl. 238. Paſch. 10 Jac. B. R. in Caſe of Rutland (Earl) v. Shrewsbury (Earl).

23. Though a Fine be a Feoffment of Record, yet it is but ſo *Fictione Juris*. If another were in by Fort it will not amount to an Entry as a Feoffment ſhall; Per Bridgman Ch J. Cart. 176. Hill. 18 & 19 Car. 2. C. B.

24. Entry on the Land *by a Ceſtuy que Truſt* is no ſufficient Claim; It muſt be by *Subpœna*; Per Ld. Keeper. Chan. Caſes 268. Mich. 27 Car 2. Clifford v. Asbly.

25. Though a Declaration in Ejectment be delivered within 20 Years, and a Trial, whereby there is a *Leaſe Entry and Ouſter confeſſed*, yet that will not amount to an Entry to bring it out of the Statute of Limitations, though an Entry be actually confeſſed, for it muſt be an actual Entry though an Ejectment be a cuſtomary way of Proceeding, and this has been ſo adjudged; Per Holt Ch. J. 12 Mod. 573. Mich. 13 W. 3. in Caſe of Hayward v. Kinſey.

A Caſual Entry by Hunting is not good. Lat. 25, 26 cites Pl. C. 93.

26. In proving an Entry and Claim it is neceſſary to prove that it be *Animo clamandi*. 6 Mod. 44. Mich. 2 Ann. B. R. Ford v. Ld. Grey.

27. A *bare Entry* on another without an Expulſion makes ſuch a *Seiſin* only that the Law will adjudge him in Poſſeſſion that has the Right, and ſo are the Words *Intravit & fuit inde Seiſitus prout Lex poſtulat* to be underſtood in Special Verdict, but it will not work Diſſeiſin or Abatement without *actual Expulſion*. Per Holt Ch. J. 1 Salk. 246 pl. 2. Trin. 3 Ann. B. R. Anon.

(F) In

(F) In what Caſes the Entry *of one* ſhall be *for another.*

1. IF a Rent deſcends to an Aunt and Niece as Coparceners, and the Aunt hath the Niece in Ward, (ſcilicet, as Guardian in Socage as it ſeems) and takes the Rent to her own Uſe, and never claims to the Uſe of the Niece, yet this Seiſin of the Aunt ſhall be an actual Seiſin for the Niece, for in Law the general Seiſin of one is of both, and here is not any expreſs Act that her Entry was to her own Uſe. 36 Aſſ. 1. Br. Brief, pl. 307. cites S. C.

2. If Lands deſcend to two Coparceners, and a Stranger abates, and after one enters generally into the Land, this ſhall be an Entry for both, and ſettle the Poſſeſſion in both. 26 Aſſ. 1. admitted. Br. Aſſiſe, pl. 258. cites 26 Aſſ. 2 and Roll is miſprinted.

—— Br. Entre congeable, pl. 59. cites S. C. and in Aſſiſe brought by her alone againſt the Abator ſhe recover'd by Award; For ſhe had Right againſt all that had no Right. ——— See Tit. Parceners (B) and (B. 2)

3. If Lands come to two in Common, and one enters into it generally, this ſhall be an Entry for both. M. 40, 41 El. B. R. between * *Hempſley and Brice*, per Curiam. Hobert's Reports 166. between † *Smales and Dales*, adjudged. * Cro. E. 639. pl. 41. S. C. reſolved. —— Mo. 546. pl. 729. Hemley v. Briſe. S C. and S. P. ruled accordingly.

† Hob. 120. pl 152. S. C. adjudged accordingly; For Entry Generally ſhall always be taken according to Right, as being under the Conſtruction of Law, and therefore ever conſtrued lawful. —— Mo. 868. pl. 1201. Small v. Dale S. C adjudg'd.

4. If a Man deviſes of Lands held in Capite by Knight's Service to (*) his younger Son, by which the Deviſe is void for a third Part, and the Deviſee enters generally into the Whole, this ſhall be an Entry in Law for the eldeſt Son alſo. M. 40, 41 El. B. R. between † *Hempſley and Brice*, per Curiam. Hobert's Reports 166. between ‖ *Smales and Dales*, adjudged. * Fol. 740. † Cro. E. 639. pl. 41. S. C & S. P. reſolv'd. —— Mo. 546. pl. 729. S. C & S. P. rul'd accordingly.

‖ Hob. 120. pl. 152. S. C. adjudg'd ——— Mo. 868. pl. 1201. S. C. adjudg'd.

[4.] So if the Deviſee after his Entry makes a Leaſe for Years of the Whole, yet this ſhall not be any Explanation of his Entry, but that his Entry ſhall be ſaid an Entry for both. M. 40, 41 Eliz. B. R. between *Hempſley and Brice.* Cro. E. 639. 641. reſolv'd by all the Court; Præter Fenner. ——— Mo. 546. pl. 729. S. C. & S. P. ruled accordingly.

5. So if the Deviſee levies a Fine of the Whole. M. 40, 41 El. B. R. between *Hempſley and Brice.*

6. If a Man ſeiſed of Lands held by Knight's Service in Fee, deviſes the whole to B. in Fee, and B after his Death enters into the Whole, claiming the Whole to himſelf, yet this is an Entry for the Heir, who is Tenant in Common with him for a third Part, the Deviſe being void for a third Part, for one Tenant in Common cannot diſſeiſe his Companion without an actual Ouſter. Hobert's Reports 167. Mr. Danvers in his Remarks on this Plea ſays, Vide Hob. fol. 120. and Quære, Whether it muſt not be intended the Heir was in Poſſeſſion before, or that B made his Entry firſt, and afterwards being in

in Poſſeſſion claimed the Whole; For by Co Litt. 243. b. 373. b where one Parcener enters ſpecially, claiming the Whole, and takes the whole Profits, ſhe gains the Moiety of her Siſter by Abatement. But See Cart. 176. where Hob. is taken [by Bridgman Ch. J. Hill. 18 & 19 Car 2. C. B. in delivering the Opinion of the Court in the Caſe of Rundale v. Ely.] as here abridged.

Noy. 51. Intr. H. 41 Eliz. B. R. Rot. 1061. Aynſworth v. Batty. S P. exactly, only in that Caſe the Legacies were paid to two, but not to the other two, and ſeems to be S. C. reſolv'd that by the Entry of one of the two who was not paid, the Eſtate was veſted in all four; For they take Jointly, and the Eſtate of the Heir deveſts from him in toto. —— Cro. E. 919 pl. 14. Hainſworth v. Prety. S. C. & S. P. adjudg'd. —— Mo. 644. pl. 891. Hamſworth v. Pretty. S. C. all the Sons were paid but one, and adjudg'd accordingly.

7. **If a Man** deviſes **certain** Annuities to his four Sons out of certain Lands, and **deviſes further**, That if his Heir does not pay **the ſaid Annuites**, then his ſaid Sons ſhall have the Lands to them, and the Survivor of them, **and after the ſaid Annuities are not paid, upon which** one of the Sons enters generally, **this ſhall be an Entry for all the four Sons, inaſmuch as they are Jointenants. P. 42 El. B. R. between** *Purſlowe and Parker*, **adjudged.**

8. **If a Man** deviſes to J S. Lands held by Knight's Service, **and dies**, his Heir within Age, **and a** Stranger enters upon the Deviſee, and diſſeiſes him, **and after** the Lord **in Chivalry** enters upon the Diſſeiſor, and upon the Re-entry by the Diſſeiſor, brings Treſpaſs againſt him, **this is maintainable, for** the Entry of the Lord **into his third Part (the Deviſe being void for that)** is an Entry for the Deviſee for the other two Parts, **and ſo the Lord and Diſſeiſor are no Tenants in Common. P. 3 Car. between** *Rogers and Blynman*, **per Curiam, reſolved upon Evidence at the Bar.**

Br. Aſſiſe, pl. 167. cites S. C. and adds, that the Feme upon this Alienation may recover by Cui in Vita; For this ſhall not ſtay the Aſſiſe.

9. In Aſſiſe the *Son leaſed to his Father for Life, and went beyond Sea*, and the *Father alienes in Fee*, and the *Siſter of the Son entred in the Name of her Brother if he be alive, and if he be dead in her own Name*, and was ouſted, the *Son returned* and brought Aſſiſe, and recovered by Award upon this Entry and Seiſin, and yet the Son did not depute the Daughter to enter; quod nota, by Award. Br. Entre Cong. pl. 50. cites 11 Aſſ. 11.

10. In Aſſiſe the *Baron and Feme* were *Tenants in Tail*, and *had Iſſue two Daughters*, the *Baron diſcontinued and died*, and *Feme by Aſſent of the Feoffee entred and claim'd nothing but at his Will*, and after *died, one Daughter entred claiming to both*, and the Feoffee brought *Aſſiſe againſt her who entred only*, and all this Matter found by Verdict, and the Writ *ſhall not abate by the not naming of the other Coparcener*, but the Plaintiff ſhall recover; for the Entry of one for two ſhall not be the Entry of the other, where the Entry is not lawful. Br. Entre Cong. pl. 69. cites 31 Aſſ. 33. and 1 H. 6. 5. and 8 H. 6. 16. accordingly.

11. If a *Fine* is levied *to two*, and *one does not enter, nor ſay any Thing*, and *the other enters and is impleaded*, there per Hank. he may plead Jointenancy with the other, notwithſtanding that *he alone counts of the Poſſeſſion*, and that the other never entred. For the Poſſeſſion by the Fine and the Entry of the one, ſhall be adjudg'd in Law to be in both, *till the other diſagrees by Matter of Record*, and ſo ſee that Diſagreement to relinquiſh a Thing ſhall not be but by Matter of Record, but Agreement to take a Thing may be by Parol or Matter in Deed. Br. Jointenancie, pl. 57. cites 8 H. 4. 13.

12. If *Diſſeiſor, Intruder* or *Abator enfeoffs a Stranger and dies ſeiſed*, and *his Heir enters and enfeoffs the Offender*, the firſt Diſſeiſee may enter, but

but againſt *Strangers* the Deſcent ſhall hold Place. Per Keble, which was not denied. Br. Entre Cong. pl. 119. cites 5 H. 7. 6.

13. If a *Man diſcontinues the Land of his Wife upon Condition*, and *dies without Iſſue*, the *Entry is given to the Heir of the Baron*, and *if he enters* for the Condition broken *then may the Heir of the Feme enter*, for the Entry of the one revives the Entry of the other. Br. Entre Cong. pl. 91. cites 9 H. 7. 24.

14. *And if a Recovery by erroneous Judgment* be had *againſt the Father, of Land of the Right to his Wife*, and *he dies*, if the *Heir of the Part of the Father reverſes the Judgment* by Error, there the *Heir of the Part of the Mother may enter*. Br. Entre Cong. pl. 91. cites 9 H. 7. 24.

15. *And* where a Man *ſeiſed of Land has Iſſue two Sons*, and the *Eldeſt enters into Religion*, and the *Father dies*, and an *erroneous Recovery is had againſt the Youngeſt*, and the *Eldeſt is deraigned*, he hath no Remedy; Per all the Juſtices of C. B. Br. Entre Cong. pl. 91. cites 9 H. 7. 24.

16. *But* if the *Youngeſt reverſes this by Error*, the Eldeſt may enter, for in theſe Caſes the Land is put in ſuch plight as if no Recovery or Diſcontinuance had been, and ſo the Entry of one ſhall give Advantage to the other. Br. Entre Cong. pl. 91. cites 9 H. 7. 24.

17. Two *Tenants for Life are diſſeiſed by A. and B.* if one of the Tenants for Life releaſes to A. and the other Tenant for Life re-enters, he has the Moiety in Common with A and he has reveſted the *entire Reverſion* in him in whom the Reverſion was before; Per Manwood J. Le. 264. pl. 354. 19. Eliz. C. . Anon.

18. When an Entry *is given by a ſpecial Statute*, there the Entry ſhall not enure further than the Words of the Statute, as Land is given to the Husband and Wife, and to the Heirs of the Body of the Huſband; The Husband levies a Fine and dies; The Wife enters; This Entry ſhall not avail the Iſſue in Tail; For the Entry is given to the Wife by a ſpecial Law, and ſo where the Husband aliened the Lands of the Wife and after they were divorced the Husband dies, the Wife ſhall not enter by 32 H. 8. but is put to her Writ of *Cui in Vita ante Divortium*; Arg; Le. 7. pl. 10. Mich. 25 and 26 Eliz. B. R. cited in the Caſe of Stonely v. Bracebridge as Sir Richard Haddons Caſe.

19. Tenant in Poſſeſſion of Lands to which another has Right of Entry *levies a Fine with Proclamation*; he who has Right ought to enter in *Perſon*, or make *Warrant ſpecial*, or Commandment to one to enter for him, otherwiſe he does not preſerve his Right, and other Entry by a Stranger will not *avoid the Fine*. Mo. 150. pl. 613. Paſch. 38 Eliz. B. R. Lutterel's Caſe.

Mo. 457. Awdley's Caſe, S. P. —Gawdy J. ſaid, that the Agreement peradventure of him that had the Right, if made *within the five Years* after ſuch Entry made in his Name, would ſerve but an Agreement afterward would not ſerve; Quære. Cro. E. 561. pl. 10. Paſch. 39 Eliz. B. R. in Caſe of Pollard v. Audley.——Poph. 108. Pollard v. Lutterell. S. C. agreed by the Chief Juſtices.

20. Two *Copartners of a Houſe. One entred Generally and made a Leaſe by the Name of* "*All that his Houſe* &c." Popham and Fenner held, that the intire Houſe paſſed; For when he ſays All that my Houſe &c. that intended the whole Houſe, and by his Livery made he gained the Intire, and gave the Intire, altho' by his general Entry it is not intended that he enter'd into more than to what he had Right; but Gawdy e Contra; For as this Entry prima Facie does not gain more, than he had Right to demand, no more ſhall this Leaſe. And Foſter at the Bar cited, that it was adjudged in this Court in Reignold's Caſe according to the Opinion of Popham. Cro. E. 615. pl. 4. Trin. 40 Eliz. B. R. Gerry v. Holford.

21. The

21. The Rule of the Law is, that in all Caſes when *Copartners or Jointenants* may join in Action, and have one and the ſame Remedy, there if one be ſummoned and ſevered, and the other ſues forth and recovers the Moiety, the other may enter with her; but when they are driven to ſeveral Actions, or where their Remedies are not equal, there if one recovers or continues the one Moiety, the other cannot enter with her, and yet when both have recovered, they ſhall be Coparceners again. 2 Inſt. 308.

(G) *Special* Entry.

* This is miſprinted, and ſhould be (2)

1. IF Lands deſcend to two Coparceners, **and a** Stranger abates, **and after** one Coparcener enters into the whole to her own Uſe, **this ſhall not ſettle any Poſſeſſion in the other, but** all **the Eſtate** ſhall be in herſelf **by the ſpecial Entry.** 26 **Aſſ.** * 1. **adjudged.**

If one enters claiming the whole and takes the Profits of the whole, this will deveſt the Freehold in Law of the other Parcener Co. Litt. 373. b ——Ibid. 243 b. S. P ——Cro. E 640, 641. S. P. and ſo if a Title devolves or comes to two as Tenants in Common, if the one enters firſt and claims all before the other has entered, that will gain the Poſſeſſion of the intire Eſtate; But if they were once in Poſſeſſion, then the Claim of the one only, or the Occupation of the one only, ſhall not ouſt his Companion. And Ibid cites the principal Caſe of 26 Aſſ. 2.

F. N. B. 167. (C)

2. If there are *two Coparceners*, and *one and a Stranger ouſts the other*, a Nuper Obiit lies againſt the Coparcener ſole, and Brooke ſays hence it Follows, that the Stranger gains no Franktenement by his Entry. Br. Entre Cong. pl. 122. cites F. N. B. 197.

(G. 2) Entry. Not Neceſſary in what Caſes.

If a Man is *diſſeiſed of Lands whereunto a Common is Appendant*, the *Diſſeiſee cannot uſe the Common till he enters into the Land to which it is Appendant*, becauſe it might be a Prejudice to the Tenant of the Soil, for if the Diſſeiſee might do it, ſo might the Diſſeiſor, which would be a double Charge to the Tenant. Co. Litt. 122. b.

1. DIſſeiſee may *enter into every Parcel*, but *not into the Appendancies without the Manor or Land to which* &c. As Common &c. and tho' an Advowſon may be ſever'd and made in groſs, it ought to be *when the Owner is ſeiſed of the Land to which* &c. and *not by Preſentment when he is out of Poſſeſſion*; Per Danby Ch. J. quod nota, good Reaſon, and Needham J. cum illo. Br. Preſentation, pl. 30. cites 9. E. 4. 38.

But if a Man is diſſeiſed *of a Manor to which there is an Advowſon uppendant*, he may preſent to the Advowſon before he enters into the Manor. Co. Litt. 122. b.

2. *And* where *Tenant for Life aliens the Manor in Fee* he in Reverſion cannot preſent to the Advowſon before that he has enter'd into the Manor; Per Needham J. Ibid.

3. In Treſpaſs it was agreed, that where a Man *recovers by erroneous Proceſs or Judgment* certain Land *and makes Feoffment*, and the other brings *Writ of Error and reverſes it*, yet he cannot enter, but ſhall have Scire

Scire Facias againſt the Feoffee; For he *is in by Title, and is a Stranger to the Reverſal.* Br. Scire Facias, pl. 163. cites 4 H. 7. 10.

4. *But by reverſal by Act of Parliament* he may enter without Scire Facias; For every one is Party to an Act of Parliament; Per Townſend J. quod non negatur. Br. Scire Facias, pl. 163 cites 4 H. 7. 10.

5. Of a thing tranſitory a Man may be in Poſſeſſion *without Entry or Seiſin*; Per Brudnell. Br. Treſpaſs, pl. 169. cites 14 H. 8. 23.

6. *As* where *Tenant in Chivalry dies, his Heir within Age*, the Lord ſhall have *Raviſhment of Ward without Seiſin*, but *not Ejectment* of Ward of the Land. Ibid.

7. If Tenant in Fee of a *Common Lord* is attainted of Felony, his Lands remain in him during his Life *until the Entry of the Lord*, and where *the King is Lord* until Office found; But in the Caſe of a Common Lord, after the *Death of the Perſon attainted*, they are in the Lord before Entry, and in the Caſe of the King before Office for the Miſchief of Abeyances; Arg. 2 Le. 126. in pl. 169. Mich. 28 & 29 Eliz. B. R. in Caſe of Venables v. Harris.

8. A Feoffment is made to the *Uſe of B.* Per Anderſon and Walmſley J. contra Granvil J. B. has ſuch a Seiſin before his Entry of which he may be *diſſeiſed*, and this by Force of the Statute. Ow. 87. Mich. 41 & 42 Eliz. C. B. Green v. Wiſeman.

Noy 73. S. C. the Court ſeemed that Plaintiff could not bring Ejectment; for actual Poſſeſſion is not in Ceſtuy que Uſe by the Stat. 27 H. 8. for he may diſagree to it. But by Walmſley and Glanvil, He may have an Aſſiſe, but not Treſpaſs without actual Poſſeſſion.

9. A Man after an Ejectment and *Liberate* returned cannot *aſſign Lands* before Entry. Show. 290. Mich. 3 W. & M. Hannam v. Stephens.

(G. 3) Neceſſary in what Caſes.

To veſt or deveſt an Eſtate.

1. IF a *Feme inheritable takes Baron*, and has Iſſue, and the Feme dies, the *Law adjudges the Franktenement in the Baron as Tenant by the Curteſy immediately without Entry*, and Præcipe quod reddat lies *againſt him.* Br. Præcipe, pl. 38. cites 21 E. 3. 49. and Doct. and Stud. lib. 2.

2. *Leaſe for Life on Condition*, that if Leſſor pay to Leſſee ſuch a Day 20 l. that his Eſtate ſhall ceaſe; now by the Performance of the Condition the Eſtate is determined without any Entry. 4 Le. 119. cites 21 H. 7. 12.

3. Where Eſtate *ends by Limitation* there needs no Entry, becauſe not waivable as a Condition is. Mo. 612. in pl. 842. 19 Eliz. cites Bracebridge's Caſe.

4. Though a *Leaſe* become *void on Nonpayment* according to Covenant, yet it ſeems there muſt be a Re-entry to re-ſettle the Poſſeſſion of the Land. 2 Le. 143. pl. 178. 33 Eliz. in the Exchequer.

5. Inheritance or *Freehold* in Uſe ſhall not *ceaſe* without Claim or Entry ſince the 27 H. 8. unleſs he that has Power to ceaſe it be *Tenant of the Franktenement*; Arg. Mo. 663. in pl. 906. Mich. 44 & 45 Eliz. in Canc. cites 1 Rep. Diggs's Caſe.

1 Rep. 173. S. C. — Mo 603. S. C.

6. A Man *cannot be ſaid ſeiſed* upon a *Fine ſur Render* without an Entry alleged; But upon a Fine * *Sur Coniuſance &c. come ceo &c.* it is otherwiſe for that is executed. Cro. E. 903. pl. 6. Mich. 44 & 45 Eliz. B. R. in Caſe of Buſtard v. Coulter.

* So upon a Fine ſur Conuſance de droit tantum, for theſe are Feoffments upon Record, and the Conuſee has a Freehold in him before Entry. Co. Litt. 266. b

7. Upon a *Surrender of a Leaſe for Years*, the Leaſe is determined, and the Poſſeſſion and Intereſt is in the Leſſor without Entry. Cro. C. 102. pl. 1. Hill. 3 Car. C. B. Peto v. Pemberton.

Hetl. 50. 71. S. C. but no Judgment. — Hutt. 94. S. C. and agreed, that where the Leſſee for Years ſurrenders, to which the Leſſor agrees and accepts it, the Poſſeſſion and the Intereſt is in him without Entry.

8. *Tenant for Life levies a Fine*, he having a Freehold his Fine diſplaces the Remainder, therefore an Entry is requiſite within five Years after the Death of Tenant for Life; Per Hale. Hardr. 402. Paſch. 17 Car. 2. in Scacc.

So if Tenant for Life at the Common Law make a Feoffment or a Leaſe for Life, in ſuch Caſe the firſt Leſſor ought to avoid this Forfeiture by Entry, and it is not void by the Death of the ſecond Leſſor, viz the Tenant for Life; Arg. Godb 318. cites 4 H. 7 18. —— But if ſuch Leaſe be made by Ceſtuy que Uſe it determines by his Death, and the Leſſee becomes Tenant at Sufferance; Arg. Godb. 319. cites D 57.

9. Upon executing the Deed of Mortgage the Mortgagor, by the *Covenant to enjoy* till Default of Payment, is *Tenant at Will*, and the Aſſignment of the Mortgagee to the Aſſignee, and the Aſſignee's aſſigning it over again *without the Mortgagor's joining*, can only make the Mortgagor *Tenant at Sufferance*, but his continuing in Poſſeſſion can never make a *Diſſeiſin*, nor deveſting of the Term mortgaged; Otherwiſe if the *Mortgagor* had *died and his Heir had entered*, for the Heir was never Tenant at Will, but his firſt Entry was tortious; Or if the *Mortgagee* had *entered on the Mortgagor, and the Mortgagor* had *re-entered*; For the Mortgagee's Entry had been a Determination of the Will, and the Re-entry of the Mortgagor had been merely tortious; Per Holt Ch. J. 1 Salk. 246. pl. 1. Paſch. 6 W. & M. in B. R. Smartle v. Williams.

(G. 4) Neceſſary.

To bring Treſpaſs.

1. IF Land deſcend to the Heir he may *make Leaſes* before Entry, but he cannot have an Action of Treſpaſs before Entry; Arg. Pl. C. 142. b. cites Paſch. 37 H. 6. 18. B. Surrender 21.

2. It was agreed, that *Diſſeiſee* may have Treſpaſs *of the firſt Entry* without Regreſs, but not of the Continuance of the Treſpaſs after the Entry; for he ſhall not puniſh Diſſeiſor in charging him with Damages which are the Acceſſory, before he has re-entered into the Franktenement which is the Principal. Br. Treſpaſs, pl. 227. cites 38 H. 6. 27.

3. *Tenant at Will* may have Treſpaſs without Re-entry *after Diſſeiſin till the Will of the Leſſor be determined by Releaſe &c.* and becauſe he by his Entry cannot re-continue the Franktenement to the Leſſor, therefore

ſore he ſhall have Treſpaſs without Regreſs, but he who may by his Entry re-continue the Franktenement and will not enter, ſhall not have Treſpaſs without a Regreſs; Note a Diverſity, per Forteſcue and Yelverton. Br. Treſpaſs, pl. 227. cites 38 H. 6. 27.

4. In Treſpaſs the *Defendant ſaid that the Plaintiff himſelf was ſeiſed in Fee, and leaſed to the Defendant for ſix Years, and* after *the Term ended*, the *Defendant held himſelf in and did the Treſpaſs, of which he has brought this Action before any Entry*; Judgment &c. and by all the Juſtices Treſpaſs Vi & Armis does not lie before the Plaintiff has made Regreſs, as here; quod nota. Br. Treſpaſs, pl. 365. cites 22 E. 4. 13.

5. *And* per Fairfax, the *Ouſter of the Leſſee* for Years ſhall give *Aſſiſe to the Heir, where* his Father made the Leaſe, and *the Son never entered.* Br. ibid.

6. *But where the Father dies ſeiſed, and did not make the Leaſe, and a Stranger enters*, there Treſpaſs does not lie without Entry firſt by the Heir, nor Aſſiſe, but Mortdanceſtor. Br. ibid.

7. If A. makes a *Leaſe to commence at Michaelmas*, the Leſſee may *grant* the Leaſe before Michaelmas, but he cannot have *Treſpaſs* before Entry; Arg. Pl. C. 142. b. cites 22 E. 4. 37. Br. Grants 100. The Intereſt veſts before Entry. Arg. Show. 299.

8. A. *deviſed Land to B. and his Heirs*, and dies, it is in B. immediately, but till Entry he cannot bring a poſſeſſory Action, as *Treſpaſs* &c. 2 Mod. 7. cites Pl. C. 412. 413. [Mich. 13 & 14 Eliz. It paſſes to B. before Notice or Conſent; Per Ventris J. Arg. 2 Vent 202.

9. A. made a *Leaſe to B. to hold to B. and his Heirs at the Will of A.* afterwards *B. dies.* If the Heir of B. enters, Treſpaſs Vi & Armis lies for A. before any Entry. Litt. S. 82. and Co. Litt. 62. b. Cited per Bridgman Ch. J who ſaid that in this Caſe the Heir was a Stranger. Carth. 66, 67. Paſch. 18 Car. 2.

10. When the *Leaſe at Will ceaſes*, he in Reverſion may bring an Action of Treſpaſs; Per Tirrel J. Carth. 62. cites Co. Litt. 62. b.

11. By the *Death of Tenant at Will* the Tenancy is determined, and the Eſtate reveſted in his Leſſor to maintain Treſpaſs before Re-entry by Reaſon of the Poſſeſſion which the Law caſts upon him; Agreed. Lev. 202. Hill. 18 & 19 Car. 2. B. R. in the Caſe of Geary v. Bearcroft.

12. If *Leſſee holds over his Term* there muſt be actual Entry to bring Action of Treſpaſs. 5 Mod, 384. Hill. 9 W. 3. B. R. Trevillian v. Andrews.

(G. 4) At what Time it may be made.

1. IF *Diſſeiſor infeoffs four*, upon whom the *Diſſeiſee re-enters*, and *one of the Feoffees enters again*, and the *Diſſeiſee brings Aſſiſe*, he cannot plead Jointenancy with the other three, for by the Entry of the Diſſeiſee their Intereſt is defeated, and therefore *Regreſs of the one does not remit the others*, for the *Right is determined.* Br. Remitter, pl. 16. cites 1 H. 6. 5. per Halſ. J.

2. *But where four Coparceners*, or others, *are lawfully ſeiſed, and are diſſeiſed*, the *Entry of the one remits all the others*, for the Entry is lawful and the Right remains; and in the other Caſes e contra; for the Right, Intereſt and Poſſeſſion is defeated by the lawful Entry. Ibid.

3. If

3. If a *Feme Sole of full Age be diſſeiſed* and *takes Baron*, and the *Diſſeiſor dies ſeiſed*, and the *Baron dies*, the Feme cannot enter, for ſhe might have re-entered before that ſhe took Baron, and did not, therefore it was her Folly; Per all the Juſtices. Br. Entre Cong. pl. 91. cites 9 H. 7. 24.

4. *Contrary* if the Diſſeiſin had been *during the Coverture*, *or* if ſhe had been *within Age* at the Time of the Diſſeiſin, and when ſhe took Baron, there ſhe might have entered after the Death of her Baron. Br. Entre Cong. pl. 91. cites 9 H. 7. 24.

5. *And e contra* if ſhe be *diſſeiſed within Age, and takes Baron at full Age, and* the *Diſſeiſor dies ſeiſed*, and the *Baron dies*, the Feme cannot enter; which all agreed. Br. Entre Cong. pl. 91. cites 9 H. 7. 24.

Br. Seiſin, pl. 37. cites S. C.

6. In Præcipe quod reddat the *Tenant ſaid, that before the Writ purchaſed H. was ſeiſed till by him diſſeiſed, which H. entered pending the Writ*; Judgment of the Writ; and adjudged a good Plea, as it ſeems, but the Reporter did not hear it. Br. Brief, pl. 356. cites 5 E. 4. 5.

Ow. 81. S.C. & S P. held accordingly. — 3 Le. 169. pl. 220.

7. Leſſor may enter inter into the **Land for a Forfeiture** *pending the Suit before Judgment*, as well as after, if the Plea be entered of Record. Goldsb. 41. pl. 18. Mich. 29 Eliz. Dixey v. Spencer.

S. C. but S P. does not appear.——Mo. 311. S. C. but S. P. does not appear.——Godb. 15. pl. 124. S. C. but S. P. does not appear.

8. A. inffeoffs B. on Condition to go to Rome within two Years; B. ſtays in England till within two Days of the End of the two Years, ſo that now it is *impoſſible to perform the Condition within the Time*, yet the Feoffor ſhall not enter **till the two Years** ended; Arg. Mo. 328. Trin. 32 Eliz

9. If there be Tenant for Life, and *Tenant for Life commits a Forfeiture*, he in Remainder for Life may enter, and the Caſe 29 Aſſ. 64. is not Law; For the particular Eſtate in Poſſeſſion is determined by the Forfeiture; and if he in Remainder could not enter, then it ſhould be at the Will of the Leſſor, whether he ſhould ever enter; The ſame Law is if the Remainder be for Years. Godb. 175. pl. 241. Paſch. 8 Jac. C. B. in Caſe of Meers v. Ridout.

(G. 6) Excuſed by Act or Fear of the Party.

1. IF a Man hath Title to enter into any Lands or Tenements, if he *dare not enter* into the ſame Lands and Tenements, nor *into any Parcel* thereof *for doubt of Beating*, *or for doubt of Maiming*, *or* for doubt of *Death*, if he *goeth* and approach *as near to the Tenements as he dare* for ſuch doubt, *and by Word claim* the Land to his, preſently by ſuch Claim he hath a Poſſeſſion and Seiſin in the Lands, as well as if he had entred indeed, although he never had Poſſeſſion or Seiſin of the ſame Lands or Tenements before the ſaid Claim. Litt. S 419.

2. If a Man *fear the burning of his Houſes*, *or the taking away or ſpoiling of his Goods*, this is not ſufficient, becauſe he may recover the ſame, or Damages to the Value, without any corporal Hurt. Co. Litt. 253. b.

3. Such doubt of *fear muſt concern the ſafety of the Perſon* of a Man, and not his Houſes or Goods, becauſe he may recover the ſame or Damages to the Value without any Corporal Hurt. Co. Litt. 253. b.

4. If

4. If the Fear concerns the Perſon, yet it muſt not be a vain Fear, but *the Fear muſt be ſuch as may befall a conſtant Man*, as if the adverſe *Party lies in wait in the Way with Weapons*, or by Words *Menace to beat, mayhem or kill him, that would enter*, and ſo in Pleading muſt he ſhew ſome juſt Cauſe of Fear; For Fear of itſelf is internal and ſecret; But in a ſpecial Verdict, if the Jurors find, that the Diſſeiſee did not enter for Fear of corporal Hurt this is ſufficient, and ſhall be intended that they had Evidence to prove the ſame. Co. Litt. 253. b.

5. *Fear of Impriſoment* is alſo ſufficient; For the Law has a ſpecial Regard to the Safety and Liberty of a Man. Litt. S. 420.

(G. 7) Writ abated by Entry; In what Caſes.

1. WRIT of *Entry in* le Quibus, the Tenant had not Entry unleſs after the Leaſe which one made who had not any thing therein unleſs as Guardian &c. was abated becauſe he might have Aſſiſe or Writ of Entry ſur Diſſeiſin, as his Caſe required. Thel. Dig. 117. Lib. 10. cap. 27. S. 1. cites Mich. 4 E. 2, Brief 790. But ſays that in the Time of Bracton the other Writ was in Uſe as appears fol. 324.

2. *In Admeaſurement of Paſture* the *Tenant ſaid, that the Demandant himſelf had ejected the Tenant out of the Common of Paſture, pending the Writ* &c. And adjudged no Plea; For the Tenant was ſeiſed of the Land by the Reaſon of which he ſurcharged the Paſture. Thel. Dig. 187. Lib. 12. cap. 21. S. 4. cites 8 E. 2. It. Kanc. Brief 846. Admeaſurement 14.

3. If the *Demandment diſſeiſes the Tenant, or enters pending the Writ*, it ſhall Abate notwithſtanding that the *Demandant* has *Aliened the Land after to another* Thel. Dig. 187. Lib. 12. cap. 21. cites Trin. 4 E. 3. 148.

4 In *Ceſſavit after Verdict* found *for the Demandant* againſt the Tenant en Pais the Tenant was not received at the Day in Bank to *plead that the Demandant had diſſeiſed him* &c. in Arreſt of Judgment. Thel. Dig 187. Lib. 12. cap. 21. S. 5. cites Trin. 5 E. 3. 201.

5. And where it appears by the Writ that the *Writ was upon the Seiſin of another Anceſtor* than him upon whoſe Seiſin it is brought, it ſhall abate. Thel. Dig. 117. Lib. 10. cap. 27. S. 2. cites Hill. 7 E. 3. 301.

6. *At the Grand Cape return'd* the Tenant was received to *ſay that that the Demandant had diſſeiſed him after the Default made, and that the Demandant is Tenant by his Diſſeiſin* &c. without ſaving the Default. Thel. Dig. 187. Lib. 12. cap. 21. S. 7. cites Paſch. 8 E. 388. And that ſo agrees Paſch. 9 E. 3. 455. at the Petit Cape return'd but he ought to ſay that the Demandant is this Day ſeiſed, cites 10 E. 3. 541.

7. If the *Demandant enters into Parcel*, pending the Writ, *and thereof infeoffs another*, the Writ ſhall abate for all. Thel. Dig. 187. lib. 12. cap. 21. S. 8. cites Mich. 10 E. 3. 531.

8 In *Writ of Right of Ward of the Body*, if the *Demandant ſeiſes the Body* of the Infant the Writ ſhall abate. Thel. Dig. 187. lib. 12. cap. 21. S. 9. cites Mich. 13 E. 3. Brief 673. and Mich. 12 H. 4. 7. where there was an Enterpleader.

In *Formedon*, the Tenant *pleaded Non-tenure, and thereupon to Iſſue* &c. And *after the Tenant pleaded that the Demandant entered after the laſt Continuance* &c. and held good notwithſtanding the Non-tennre pleaded before. Thel. Dig. 187. lib. 12. cap. 21. S. 14. cites Mich. 7 H. 6. 15.

9. To ſay that the *Demandant after the laſt Continuance diſſeiſed the Tenant, and ſo is Tenant* &c. is a good Plea to the Writ. Thel. Dig. 187. lib. 12. cap. 21. S. 11. cites Mich. 18 E. 3. 57.

In *Aſſiſe*, it is affirmed by Priſot, that the *Entry of the Plaintiff, pending the Writ, into Parcel pleaded by Diſſeiſor goes in Bar for this Parcel.* Thel. Dig. 187. lib. 12. cap. 21. S. 17. cites Mich. 35. H. 6. 13.

10. Entry *into Parcel ſhall abate all the Writ*; Per Shard. Thel. Dig. 187. lib. 12. cap. 21. S. 10. cites Mich. 17 E. 3. 57. and 4 E. 4. 34. Contra it is ſaid Trin. 27 E. 3. 82.

And *ſo* it is held *in Præcipe quod reddat pleaded* by the Tenant. Thel. Dig. 188. lib. 12. cap. 21. S. 17. cites 39 H. 6 45. and 21 H. 6. 53. And by Tenant by Receipt 37 H. 6. 2.

11. In Aſſiſe, the *Tenant ſaid that* the Aſſiſe ought not to be, for *the Plaintiff himſelf by this Deed indented, which he ſhews, granted to him after the laſt Continuance, that he ſhould hold the Land till Michaelmas laſt paſt*, and ſo has abated his Writ; Judgment; Caund. ſaid, the Grant proves that it was granted to the Uſe of the Plaintiff; and per Cur. the Writ is abated, by which the Plaintiff was nonſuited. Brook ſays the Reaſon ſeems to be, becauſe *this Leaſe is an Entry in Law*, as *Exchange*, or *Partition*, or *Aſſignment of Dower* of the Land in Plaint, as it is ſaid elſewhere, that thoſe are Entries in Law which ſhall abate a Writ. Br. Brief, pl. 308. cites 42 Aſſ. 21.

12. And if the Demandant *receives Parcel of the Tenements of the Tenant* pending the Writ *by Accord between them, and after leaſes this Parcel to the Tenant for Years*, the Writ ſhall abate for all, notwithſtanding that this Accord was upon Condition, which did not give Re-entry by the Non-performance thereof. Thel. Dig. 187. lib. 12. cap. 21. S. 8. cites Mich. 10 E. 3. 532 and ſays ſee 42 Aſſ. 21.

13. Writ of Entry ſur Diſſeiſin, the *Tenant ſaid that the Demandant with other Strangers, by his Procurement, have ouſted the Tenant pending the Writ*; Judgment of the Writ; & non allocatur, but the Writ awarded good; But if the *Demandant himſelf had entered, or another to his Uſe, to which he agreed*, this ſhall abate the Writ; Note the Diverſity; Quære of *Commandment*. Br. Brief, pl. 87. cites 50 E. 3. 2.

14. One *leaſed for Life rendering Rent*, and *reſerving a Re-entry for Default* of Payment, and afterwards *brought Writ of Waſte, pending which* Writ *he entered, becauſe the Rent was arrear* &c. Quære if the Writ ſhall abate. Thel. Dig. 187. lib. 12. cap. 21. S. 12. cites Paſch. 45 E. 3. 9. and ſays ſee 12 H. 4. 6 and 4 E. 4. 34.

15. The Tenant ſaid, that the *Demandant with others, by his Procurement, had ouſted the Tenant of the Land pending the Writ*, and no Plea, without ſaying *that the Demandant is, or was Tenant of the Land by this Ouſter.* Thel. Dig. 187. lib. 12. cap. 21. S. 13. cites Hill. 50 E. 3.

So in Aſſiſe it was agreed that if the *Plaintiff comes upon the Land, pending the Writ, and does not claim any Thing by his Entry*, that ſuch Entry ſhall not abate the Writ, for he comes there to ſhew the Jury the Land to have the View of it, and to give them Evidence. Br. Brief, pl 328. cites 5 E. 4 59.

16. If the *Demandant in Formedon enters* into the Land in Demand *to ſhew it to the Sheriff to make the View*, ſuch Entry ſhall not abate the Writ clearly; Quod Nota per Cur. Contra elſewhere if he claims to himſelf. Br. Brief, pl. 408. cites 10 H. 6. 8.

And therefore *the ſame* ſeems to be, that if he *enters to ſee if Waſte be done pending the Writ*, as in Formedon between Norton and ..... in the County of Stafford. Br. Brief, pl. 328. cites 5 E. 4. 59.

So

So where *a Common Way is over the Land*, and the Plaintiff uſes the Way, without claiming any other Thing. Br. Brief, pl. 328. cites 5 E. 4. 59

17. In Formedon, if a Man *enters upon the Tenant*, and the *Demandant proſecutes his Suit and recovers*, this ſhall bind the Tenant and him who entered; But if he who entered had *elder Title before the Writ of Formedon*, the Recovery is not good; and ſee elſewhere, that Writ ſhall be brought againſt the Mortgagor and Mortgagee, and the Lord and Villein; For an Entry by the Feoffor, or Lord of the Villein, ſhall abate the Writ, and ſo ſee that *the Entry of a Stranger* ſhall abate the Writ in ſeveral Caſes. Br. Brief, pl. 182. cites 21 H. 6. 17.

18. Where a *Manor is demanded* the *Entry of* the Demandant *into an Acre, Parcel* of the Manor, ſhall abate all the Writ. *But where* 20 *Acres are in Demand*, and the Demandant *enters into one Acre*, if he does not claim to enter into any more than into this Acre, the Writ ſhall abate only for this Acre; Per Priſot. Thel. Dig. 187. lib. 12 cap. 21. S. 16. cites 34 H. 6. 2. 2 H. 6. 17. 39 H. 6. 45. and 1 E. 4. 4.

19. In Cui in Vita *of three Acres* it was agreed, that if the *Demandant by another Action recovers one of the three Acres and enters*, it ſhall abate all the Writ, becauſe it is the Act of the Demandant to recover it, and to enter, and therefore ſhe ſhall abate her Cui in Vita; Quod Nota, that Recovery in Aſſiſe of Parcel of the Land ſhall abate the Cui in Vita for all the three Acres. Br. Brief, pl. 338. cites 1 E. 4. 3. 4. and 2 E. 4. 10.

In *Cui in Vita*, after Iſſue and *after the laſt Continuance, the Tenant pleaded that the Demandant had recovered Parcel* of the Tenements againſt him by Aſſiſe, *and that the Demandant had entered into this Parcel by force of this Recovery* &c. And it was held that this was a good Plea to all the Writ, yet Judgment was given for the Demandant to recover Seiſin of all. Thel. Dig. 188. lib. 12. cap. 21. S. 19. cites 1 E. 4. 4 Quære. 2 E. 4. 11.

20. If a Man brings *Præcipe quod reddat of a Manor*, Houſe, or the like, *which is intire*, and *enters into Part*, pending the Writ, all the Writ ſhall abate. Br. Brief, pl. 480. cites 2 E. 4. 10.

21. In Formedon, the *Tenant vouched A. who entered into the Warranty and vouched B. and* the *Demandant as to the third Part granted the Voucher, and to the reſt counterpleaded the Voucher*, by which Proceſs iſſued againſt the Inqueſt *upon the Voucher againſt B. and at the Day A. the firſt Vouchee ſaid that the Demandant, after the laſt Continuance, had entered into* 10 *Acres, and into the Moiety of the Rent Parcel of the Tenements in Demand*, and did not anſwer to the reſt, and well, per Cur. For Entry into Part ſhall abate the Writ in all, for he has *falſify'd his own Writ by his own Act*, and it lies well in the Mouth of the firſt Vouchee; for he remains Tenant of this Part which is counterpleaded, and he is alſo Tenant of the reſt till the ſecond Vouchee has entered into the Warranty; Quod Nota. Br. Brief, pl. 332. cites 5 E. 4. 116.

22. The *being of the Demandant upon the Land claiming nothing* is no ſuch Entry or Poſſeſſion of the Demandant as ſhall abate the Writ. Thel. Dig. 188. lib. 12. cap. 21. S. 18. cites Mich. 5 E. 4. 60. And that ſo agrees Plowden in the Aſſiſe of Parnel, fol. 92. For *the Intent* of him who entered *ſhall be conſider'd.*

23. In *Scire Facias againſt a Vicar upon Recovery of an Annuity*, it is no Plea that the *Plaintiff has entered into certain Land of the Vicarage*, nor of the Abbey, Mutatis Mutandis, *nor of the Heir where the Recovery is againſt the Anceſtor*; for the *Perſon is charged in Writ of Annuity and not the Land.* Br. Brief, pl. 370. cites 10 E. 4. 10.

24. So in *Aſſiſe of Freſh-force* the Plaintiff after the laſt Continuance *entered into the Cellar* of the Diſſeiſor *to view the Antiquity* thereof, *in order to give Evidence* upon a Subpœna delivered to him. It was adjudged that this was not ſuch an Entry as ſhould abate the Writ. Pl. C. 91. b. 93. a. b. Trin. 3 Mar. Panel v. Moore and Corporation of Mercers.

25. An

S.C. cited 2 Brownl. 231 in Caſe of E. of Rutland v. the E. of Shrewsbury's Caſe.

25. An Entry *to abate a Writ* ought to be an Entry into the Thing demanded, which every Entry will not do, as Entry was *into the Cellar* hanging the Aſſiſe, but it was *to view the Antiquity* of the Cellar, and ſo did not abate the Writ; Per Fleming Ch. J. 1 Bulſt. 9. Hill. 7 Jac. cites Pl. C. 92. The Parſon of Honey-Lane's Caſe.

2 Brownl. 238. S C. & P.

26. Several were upon the Land cutting down Wood, the Demandant came upon the Land and *admoniſhed* them *to do no more* than they could do by Law at their Perils; and this was adjudged no Entry to *abate his Writ*; Per Fleming Ch. J. 1 Bulſt. 9. Hill. 7 Jac. cites Pl. C. 93. in the E. of Shrewsbury's Caſe.

27. Every Entry which may abate a Writ *ought to be in the Thing demanded*, and therefore *if a Man brings an Aſſiſe of Rent or Common, and hanging this Aſſiſe, he enters into the Land*, this is not any Entry which will abate the Writ; Per Fleming Ch. J. 2 Brownl 237. Paſch. 8 Jac. B. R. in Caſe of Rutland (Earl) v. Shrewsbury (Earl)

Bulſt. 4. &c Shrewsbury (Earl) v Rutland (Earl) S. C the Entry here was not as an Officer but as a Wrong-doer, but *if he had entered ad Cuſtodiendum*, this would have abated his Writ, becauſe this would have been a Claim of Property.

28 An *Aſſiſe* was brought *for the Office of Keeper of a Park, and of the Vails and Fees*; and *Entry into the Park* will not abate the Writ brought for the keeping of it, and though it was ſaid that he *took* a Fee, viz. *A Shoulder of a Buck*, that does not make any Matter for two Reaſons, 1ſt, He has not ſhewed a Warrant he had to kill the Buck. 2dly, The taking of the Fee is no Entry into the Office, but the exerciſing of that; Per Fleming Ch. J. 2 Brownl. 237, 238. Paſch. 8 Jac. B. R. in Caſe of Rutland (Earl of) v. Shrewsbury (Earl of)

This was only an Entry to hunt, but an Entry to have abated the Writ ought to have been alleged that he entered to *keep*; for in every Entry the *Intent of the Entry* is to be regarded. 2 Brownl. 251. the E. of Rutland v. the E. of Shrewsbury. —— 235. 237 per tot. Cur. in S. C.

29. Error of a Judgment in Aſſiſe of the Office of Keeper of a Park granted to the Demandant in Reverſion, and afterwards the Park itſelf was granted to another, who entered and keeps out the Reverſioner after the Death of the Tenant for Life, for which he brought an Aſſiſe, and after the Verdict and before Judgment entered into the *Park, and hunted and killed a Deer*; this Entry did not *abate the Writ* or make the Judgment erroneous. 1 Bulſt. 5. Hill. 7 Jac. in the E. of Shrewsbury's Caſe.

30. In Ejectione Firmæ the Entry of the Plaintiff *after Verdict* upon the Niſi Prius, and before the *Judgment*, does not abate the Writ, and is not aſſignable for Error. Jenk. 341. pl. 100.

31. The *Leſſor pending the Action* brought by himſelf *for the Rent, entered into the Land*, and the *Leſſee re-entered* upon him; the Queſtion was, Whether the Writ once abated by the Plaintiff's Entry was revived by the Re-entry of the Defendant, and held it was not. Sty. 260. Paſch. 1651. Webb v. Wilmer.

32. In Ejectment the Quære was, If Entry *after the Day of Niſi Prius, and before the Day in Bank*, may be pleaded in Abatement; and if ſuch Entry *after the Darrein Contin'* be a Plea in Abatement in Ejectione Firmæ, See 18 E. 4. 19. 34 H. 6 9. cites 2 Cro. 303. Kerſey v. Lovet. Note, this was Error out of C. B. and at another Day it was held per Cur. that this is not Error, becauſe it is only in Abatement, and a Diverſity is between this and Death, and cites 1 Rep. 5. and it is uſual where Entry is before Niſi Prius to plead ſuch Plea at the Aſſiſes, and ſhall be tried at the Aſſiſes, and if it be omitted, the Advantage of it is loſt, bnt not in Caſe of Death. Sid. 231. pl. 8. Hill. 16 & 17 Car. 2. B. R. Boys v. Norcliff.

(G. 8) Writ abated by Entry of a Stranger.

1. IN *Writ againſt Tenant for Life*, if *he aliens in Fee*, and he in *Reverſion enters* &c. Quære if the Writ ſhall abate; for it is ſaid in this Caſe that he in Reverſion after ſuch Entry may be received by Default of the Tenant. Thel. Dig. 190. lib. 12. cap. 29. S. 1. cites Mich. 18 E. 3. 48.

2. If the *Mortgagor pays the Money* to the Mortgagee *at the Day limited* pending the Writ againſt the Mortgagee, *and enters*, the Writ ſhall abate. Thel. Dig. 190. lib. 12. cap. 29. S. 2. cites Mich. 39 E. 3. 36. and 18 E. 4. 27.

3. *Writ* brought *againſt a Villein* ſhall *abate by the Entry of the Lord*, pending the Writ. Thel. Dig. 190. lib. 12. cap. 29. S. 4. cites 3 H. 6. 34. and 4 H. 6. 14.

4. It is held that where the *Diſſeiſor makes Feoffment over*, and the *Feoffee is impleaded by a Stranger*, if the *Diſſeiſee enters upon the Feoffee, pending the Writ againſt him*, the Writ ſhall abate. Thel. Dig. 190. lib. 12. cap. 29. S. 3. cites Mich. 7 H. 6. 17. and ſays it ſeems that the Opinion of Hill. 3 H. 6. 34. agrees ſo *where the Diſſeiſor himſelf is Tenant, and the Diſſeiſee enters upon him.* Trin. 5 E. 4. 6. and 15 E. 4. 4. and 22 H. 6. 26.

5. But it ſaid that where one is *infeoffed upon Condition to be performed of the part of the Feoffee*, if he be impleaded by Writ, and the *Feoffor enters for the Condition broken pending the Writ* it ſhall not Abate. Thel. Dig. 190. Lib. 12. cap. 29. S. 5. cites Mich. E. 4. 5. Quære.

(G. 9) Pleadings in Writs of Entry.

1. IN Writ of Entry, the Demandant *pleaded Jointenancy by Fine*, and the Demandant was not received to maintain his Writ, but it was Abated. Thel. Dig. 226. Lib. 16. cap. 7. S. 5. cites Mich. 17 E. 2. Maintenance de Brief, 1. and 55. Paſch. 15 E. 3.

2. Feme received pleaded Entry of the Demandant pending the Writ, without ſaying after the laſt Continuance, and held good. Thel. Dig. 188. Lib. 12. cap. 21. S. 20. cites Trin. 21 H. 6. 54.

3. *If the Tenant enters pending Præcipe quod reddat before Iſſue*, the *Pleading ſhall be that he entered pending the Writ, but if he enters after Iſſue*, the Entry *ſhall be that he entered after the laſt Continuance.* Br. Brief, pl. 2. cites 26 H. 8. 3. Thel. Dig. 188. Lib 12. Cap 21. S 23 cites S. C.

4. Upon *pleading a Conveyance by Bargain and Sale* actual Entry ought to be pleaded, and Poſſeſſion by 27 H. 8. of Uſes is not ſufficient. Noy 6. Per the Juſtices. Anon.

5. A. *tortious Entry* is not to be pleaded in Bar of an *Action veſted*; Arg. Skin. 210. pl. 4. Mich. 36 Car. 2. in Caſe of Pool v. Archer.

6. *As* in *Debt for Rent* upon a Leaſe for Years *due at Lady-Day*, an *Entry after* our Lady-Day ſhall not be pleaded in Bar; Arg. Skin. 210. in S. C.

(G. 10) Bar of Action ; In what Cases.

1. WHERE a Man *recovers an Advowſon, or brings Præcipe quod reddat of Land*, and *before Judgment or Execution enters and makes a Leaſe* of it, *or takes a Leaſe* of it *for Years, Execution by Elegit*, or the like, *or accepts Dower in Part, pending Cui in Vita*, or *takes Part in Exchange or in Partition*, it is a Bar for the Time. Br. Barre, pl. 33. cites 24 E. 3. 3.

2. If *Diſſeiſee re-enters* he *ſhall not have Treſpaſs of the firſt Damage*, for it was tolly that he had not taken the Aſſiſe; Per Thirn. Br. Treſpaſs, pl. 72. cites 2. H. 4. 11.

3. In Writ of Entry the *Tenant pleaded Entry by the Demandant pending the Writ*, the *Demandant ſaid that the Tenant was Tenant of the Franktenement the Day of the Writ purchaſed, and yet is*, & non allocatur; For if the Demandant entered, and the Tenant re-entered, it ſhall not make the Writ good which was once abated; Per Fitzherbert and the beſt Opinion. Br. Brief, pl. 1. cites 26 H. 8. 1.

(G. 11) Entry in Nature of Aſſiſe. Writ and Pleadings.

1. IN Writ of Entry in Nature of Aſſiſe *againſt A. and B. by ſeveral Præcipes de Quibus A. and B. diſſeiſiverunt the Demandant*, and adjudged good *without ſuppoſing the ſeveral Diſſeiſins*. Thel. Dig 113. Lib. 10. cap. 23. S. 16. cites Hill 8 R. 2. Br. 929. And ſays it is ſo in Formedon, Wrſts of Entry, and Writs founded upon Diſſeiſin; Per Belknap.

2. It was ſaid, that in Writ of Entry in Nature of Aſſiſe *by Tenant in Tail, or for Life*, the Writ *ought to comprehend their Title*, and the Eſtate which they claim. Thel. Dig. 105. Lib. 10. cap. 14. S. 9. Hill 21 H. 6. 28.

(G. 12) Sur Diſſeiſin ; Writ and Pleadings.

1. IF a Man *gives in Tail, or* aliens *in Fee upon Condition*, if *the Condition be broken* the Donor, Feoffor, or his Heir may have Ad terminum qui præteriit, Per Mombray, quod Chelr. and Finch omnino negaverunt. Per Grene, if J. *leaſes for Term of Years, and the Term expires*, and a Stranger enters, the Leſſor ſhall have Ad terminum qui præteriit; Contra upon Eſtate upon Condition if the Condition be broken there is no other Remedy but Entry, quod Skipw. & omnes conceſſerunt by their Judgment. Br. Enter en le Per, pl. 27. cites 33 Aſſ. 11.

2. If *Diſſeiſee releaſes to the Diſſeiſor all his Right*, the Diſſeiſor in Writ of Entry after this Releaſe ſhall be ſuppoſed in the Per by the Diſſeiſin; Per Hody. Br. Releaſes, pl. 22. cites 19 H. 6. 17. 23.

3. The

3. The *reaſon for which Writ of Entry Ad terminum pui præteriit lies againſt Termor who holds over* his Term is becauſe *this holding in by Tort is in the Law a Fee-ſimple.* Br. Enter en le Per, pl. 32. cites 22 E. 4. 14. 38. Br. Eſtates, pl. 46. cites 22 E. 4. 38. S. C.

4 *Tenant in Tail brought a Writ of Entry ſur Diſſeiſin*, and the *Writ was General*, and the 21 H. 6. 26 was vouched to be held, that the Writ ought to be Special, viz. to make mention of the Tail; but the Court held that the General Writ is good enough. And then the Count ought to be Special. Le. 231. pl. 314. Paſch. 33 Eliz. C. B. Brownſall v. Tyler.

(G. 13) Upon what Plea by Defendant the Demandant may enter without praying Seiſin.

1. FOrmedon *againſt two*, the *one diſclaimed*, and the *other pleaded Non-tenure*, and therefore the *Demandant prayed Seiſin* of the Land, for nothing can be veſted in him who pleaded Non-tenure, becauſe he did not take the Tenancy; but the Opinion of all the Court was that the *Demandant may enter*; quod nota. Br. Diſclaimer, pl. 17. cites 36 H. 6. 28

2. Per Danby, *in Action in which a Man may recover Damages*, and the *Tenant diſclaimed*, the *Demandant may aver him Tenant.* But *Contra where he cannot recover Damages*; For he is at no Miſchief; For he may enter. Br. Diſclaimer, pl. 17. cites 36 H. 6. 28.

3. And note, That upon the Diſclaimer the Judgment is, *that the Writ ſhall abate*, and no Judgment is given for the Demandant, and yet he may *enter by Reaſon of the Eſtoppel which is between the Demandant and the Tenant*, but it is no Eſtoppel to another. Br. Diſclaimer, pl. 17. cites 36 H. 6. 28.

4. *In Quid juris clamat*, the *Tenant claimed Fee* which is *found againſt him*, the Plaintiff *ſhall not have Judgment to recover the Land nor to have Attornment*; For no Land was in Demand, and yet the Demandant may enter. Br. Diſclaimer, pl. 17. cites 36 H. 6. 28. per Priſot.

5. In *Formedon* the *Tenant diſclaimed*, the *Demandant maintained his Writ, that the Tenant was Pernor of the Profits the Day of the Writ, and Tenant of the Franktenement the Day of the Action accrued*; and per Littleton he ſhall not ſo *maintain his Action*; For he *is not to recover Damages* in this Action, and therefore he may enter. But Needham J. contra, and that he may ſo maintain his Writ; For he cannot enter; For the Judgment upon Declaimer is no more, but that the Demandant ſhall take nothing by his Writ, which is in Effect that the Writ ſhall abate, and then cannot the Demandant enter; For if he enters the Tenant may have Aſſiſe. Quod quære inde; For it ſeems the Law is contra, for the Diſclaimer eſtops the Tenant to have Aſſiſe. Br. Diſclaimer, pl. 24. cites 4 E. 4. 38.

6. In *Formedon* the *Tenant diſclaimed*, the Demandant cannot enter into the Land upon the Tenant or any who is in by him pending the Writ or after, as where the Tenant aliens pending the Writ or after. But he cannot enter upon him who is not in by him; As in Præcipe quod reddat againſt Diſſeiſor who diſclaims where the Diſſeiſee has enter'd pending the Writ, he cannot enter upon the Diſſeiſee. But Danby

Danby contra, if the Title of the Demandant be elder than the Title of the Diſſeiſin. Br. Diſclaimer, pl. 25. cites 5 E. 4. 1.

Of the ſeveral Writs of Entry of Ad Communem Legem. Ad Terminum qui præteriit. In Conſimili Caſu. In Caſu Proviſo. En le Per. En le Per, Cui & Poſt. En le Quibus. See F. N. B. and ſee Thel. Dig. 170. &c. Lib. 11. Cap. 54. per totum.

For more of Entry in General, See **Conditions. Deſcent. Ejectment. Eſtate. Fines. Forfeiture. Remitter. Treſpaſs.** And other proper Titles.

Error.

(A) In what Caſes an Erroneous Judgment may be *avoided by Plea* without Writ of Error.

Fol. 742.

1. IF the Tenant in a Cui in Vita dies ſeiſed pending the Writ, and after Judgment is given againſt him, **which is erroneous, and after the** Recoveror ſues Execution againſt the Heir, **and he** brings an Aſſiſe; **he ſhall not avoid this Judgment againſt his Father, by ſaying, that his Father died pending the Writ; but he is put to his Writ of Error;** for the Judgment is **not void, but** only voidable. * 28 Aſſ. 17 adjudged. 32 E. 3. Aſſ. 99. Curia.

* Br. Error, pl. 123. cites S. C. but Brooke ſays, that it ſeems if the Father who died had not been Tenant at any Time pending the Writ, but a Stranger had been, there the Judgment is void as to the Stranger, becauſe he may always falſify the Recovery.

By Stat. 17 Car. 2. cap. 8. S. 1. and made perpetual by 1 Jac. 2. cap. 7. It is enacted that in all Actions Real, Perſonal or Mixt the Death of either Party between the Verdict and Judgment ſhall not be alleged for Error, ſo as ſuch Judgment be enter'd within two Terms after the Verdict.

2. **If a Man** recovers in an Ejectione Firmæ, **and after his** Executor ſues in Execution **by Scire Facias againſt the Recoveree, the Recoveree cannot avoid the Judgment, nor ſtay Execution, by ſaying the** Teſtator died between Verdict and Judgment, **or ſuch like; but he is put to his Writ of Error, for the Judgment is only voidable. Mich. 5 Jac. B. R. between** *Hide and Markham*, **which concerned the Earl and Counteſs of Shrewsbury. Adjudged per Curiam; and by the Clerks, ſuch Pleas have been ſeveral Times diſallowed.**

3. So **if a Man recovers Lands** in any real Action, **and after ſues Execution againſt the Heir of the Recoveree by Scire Facias; it is not any Plea for the Heir to ſay, that his** Father died pending the Writ, **but he is put to his Writ of Error.** 28 Aſſ. 17. **by Mowbray, admitted.**

4. If

4. If a Man recover, againſt the Principal and ſues a Scire Facias againſt the Bail, they cannot ſay the Principal died before the Judgment, and ſo avoid the Judgment by Plea; for it is againſt the Record. Mich. 32, 33 El. B. R. between *Warter* Plaintiff, and *Perry and Spring* Defendants. Per Curiam. Cro. E. 199. pl. 20. S. C. the Court at firſt held it no Plea, becauſe it goes in Avoidance of the Judgment, and proves it Erroneous which cannot be avoided but by Writ of Error, but they might plead the Death of B. before the Scire Facias, and after Judgment, becauſe then they could not bring in the Body. But notwithſtanding the Plea was afterwards receiv'd becauſe they cannot have a Writ of Error to reverſe the Judgment. ——— 2 Le. 101. pl. 125. Walter v. Perry. S. C. and all the Juſtices except Wray held the Plea not good; For it is a Surmiſe againſt the Judgment, which cannot be given againſt a dead Man; but it was agreed that he may plead that Defendant is dead after the Judgment, but it was ruled that Defendants ſhould be ſworn that the Plea was true. ——— S. C. cited 2 Mod. 308. and ſaid that ſuch Plea was good by way of excuſing themſelves to bring in the Body, but not to avoid the Judgment becauſe it is againſt the Record which muſt be avoided by Writ of Error.

5. In an Action upon the Caſe, if the Plaintiff be nonſuit, and after it is entered, that he reliquit Actionem ſuam & fatetur ſe nolle ulterius proſequi, upon which Coſts are aſſeſſed, though it be admitted that this Judgment is Erroneous, becauſe this is not any Nonſuit as is entered; yet in an Action of Debt for the Coſts, the Defendant ſhall not avoid it by Plea without a Writ of Error; for it is a Judgment de facto not void, but only Voidable by Writ of Error. Mich. 11 Jac. B. R. between *Coles and Low*, adjudged.

6. If Land in one County be *recover'd by Præcipe in another County*. Or *if* the *Tenant dies pending the Writ*, thoſe ſhall be revers'd by Error as may be avoided by Anſwer; For thoſe *are* Ipſo Jure void. Br. Error, pl. 104. cites 36 H. 6. 33.

8. If a *Judgment* is given *in a Court which has no Juriſdiction* it may be avoided by Plea; For it is Coram non Judice; As in the Court of Marſhalſie unleſs both the Parties are de Hoſtel de Roy; Per Croke J. Bulſt. 208. cites 22 E. 4. 31. 19 E. 4. 8. b. and 20 E. 4. 16. Br. Judgment, 123. cites 20 E. 4. 15. S. P.

9. If any of the *Proclamations* upon a Fine be *entered to be made upon a Sunday, out of Term*, or *upon the 31ſt of June* (there never having been any ſuch Day) they may be avoided by Plea or Writ of Error. Dyer 181. a. 182. b. pl. 52. &c. Paſch. 2 Eliz. Fiſh v. Brokett. Pl. C. 265. a. &c. S. C. adjudged in Error in B. R. accordingly.

10. If a *Fine be impoſed in a Leet* be *unreaſonable or againſt Law, as Joint where it ſhould be Several*, it may be avoided by Plea and Judgment of the Court in which the Suit is depending, for there is no other Remedy; Reſolved. 11 Rep. 44. b. Godfrey's Caſe. Roll Rep. 75. Bullen v. Godfry, S. C. & S. P. agreed per Cur.

11. The *Bail* cannot maintain a Writ of Error *upon a Judgment given againſt the Principal*, becauſe he was not privy to the Judgment, and therefore it ſhall be allowed him by Way of Plea in a Scire Facias. Arg. Godb. 377. in pl. 465. Paſch. 3 Car. B. R.

12. In *Debt upon a Bond againſt an Adminiſtrator* he *pleads a Judgment recovered againſt the Inteſtate, and that he has not Aſſets ultra* &c. the Plaintiff *replies that an Action was brought againſt the Inteſtate, and that he died before the ſaid Judgment, and that after his Death Judgment was given and kept on Foot per Fraudem.* The *Defendant traverſed the Fraud, but did not anſwer the Death of the Inteſtate.* It was urged for the Plaintiff that the Judgment was ill, and that he being a Stranger to it could neither bring Error nor Deceit, and had no other Way to

avoid it but by Plea. The Court held that the Plaintiff mighr avoid the Judgment without a Writ of Error, eſpecially in this Caſe, where it is not only erroneous but void. 2 Mod. 308. Trin. 30 Car. 2. C. B. Randal's Caſe.

In what Caſes a *Fine* may be reverſed by Plea without Writ of Error; See Tit. Fine. (G. b. 3)

(A. 2) Lies; In what Caſes in General.

1. IN ſome Caſe of erroneous Judgment no Writ of Error lies, as where *Judgment is* given *againſt a Baſtard*, and he *dies without Iſſue*. Br. Error, pl. 112. cites 15 Aſſ. 8.

S. P. Br. Conuſance, pl. 13. cites 44 E. 3. 37.

2. Of a *Fine levied in a Franchiſe without Authority* Writ of Error lies. Br. Error, pl. 24. cites 44 E. 3. 37.

3. If *Matter of Error which is not apparent is not objected to*, but paſſes without Challenge, as a Venire Facias returned by a Bailiff of a Franchiſe where Part of the Lands are guildable, Error will not lie. See Br. Error, pl. 34. cites 3 H. 4. 6.

4. Error may be *in ſuing Execution*. Br. Error, pl. 7. cites 9 H. 6. 38.

5. Writ of Error lies *of a void Judgment* in any Caſe. Br. Judgment, pl. 123. cites 20 E. 4. 15.

6. This Writ lies when a Man is grieved by any Error *in the Foundation, Proceeding, Judgment or Execution*, and thereupon it is called Breve de Errore corrigendo. But *without a Judgment, or an Award in Nature of a Judgment, no Writ of Error does lie*; for the Words of the Writ be, Si Judicium redditum ſit; and that *Judgment muſt regularly be given by Judges of Record, and in a Court of Record*, and not by any other inferior Judges in baſe Courts; for thereupon a Writ of falſe Judgment does lie. Co. Litt. 288. b.

7. Error will not lie *on a Conviction for keeping a Gun* on the 33 H. 8. 6. Vent. 33. Trin. 21 Car. 2. B. R. Anon.

8. *Not* on a Conviction *of forcible Entry upon View* of the Juſtices of Peace, but it may be examined on a *Certiorari*. Vent. 171. Mich. 23 Car. 2. Anon.

9. Suppoſing there was a *general Pardon*, and the *Party did not plead it, nor the Judges did not take Notice of it*, the Party might not have Remedy by Writ of Error. Ellis ſaid, They could *allege nothing* for Error *but what did appear in the Record*; to which Vaughan aſſented. Freem. Rep. 84. pl. 103. Paſch. 1673. in Caſe of Phillips v. Crawly.

10. It is merely a Matter of Favour that *Judgment in inferior Courts, in Cauſes not ariſing within their Juriſdiction*, are not avoided without Writ of Error, and the bringing ſuch Writ does not affirm their Juriſdiction. 2 Jo. 209. Paſch. 34 Car. 2. B. R. Copping v. Fulford.

11. Upon the *Denial* of B. R. *to grant a Prohibition* the Houſe of Lords was moved for a Writ of Error, but there held that Error did not lie. 1 Salk. 136. Paſch. 11 W. 3. in Caſe of Biſhop of St. David's v. Lucy.

12. Error will not lie *on a new created Juriſdiction* unknown to Common Law; For they *need not proceed purſuant to the Methods of Law*, nor need they Indictment or Jury, nor in their Judgments ſay ideo conſideratum eſt, but *may ſay they judge him guilty, and that*

he ought to pay ſo much Money &c. and it is like the Caſe of Convictions by Juſtices of Peace, and in both Caſes the Party has a good Remedy by Certiorari, and that is a Conſequence neceſſary on all ſuch particular Juriſdictions, that the Record of their Proceedings may be brought up to B. R. that this Court may examine whether they have kept themſelves within their Juriſdiction; Per Holt Ch. J. in delivering the Judgment of the Court. 12 Mod. 390. Paſch. 12 W. 3. Dr. Greenvill v. The College of Phyſicians.

13. Since the Statute 9 Annæ, cap. 20 which allows ſpecial Pleadings to a *Mandamus*, it was admitted that Error lies of a Judgment thereon, becauſe it *is now in Nature of an Action, and Coſts are given* by the Statute for that Side which prevails; *But* then it was ſaid further, that this is no Argument that Error lies of a Mandamus *where there is no Plea to it, and only a Rule awarded for the Mandamus*, which is not in Nature of a Judgment; And Ld. Ch. J. Parker (who with others aſſiſted Ld. C. Cowper at the Motion) ſaid, that Chancery might ſuperſede ſuch Writ of Error, Quia improvide emanavit, if it were ſo; And that a Mandamus now is in Nature of an Action, and where Judgment was given on ſpecial Pleadings upon the late Statute, it was admitted lately in B. R. in a Caſe there, that Error lay. Wms's Rep. 350. Paſch. 1717. in Caſe of Dean and Chapter of Dublin v. Dowgatt.

14. Where a *Reference* is *to the Judges on a Caſe ſtated*, no Writ of Error will lie *on their Judgment*, but if they certify their Reaſons for their Opinions, this Court may conſider of it. 9 Mod. 5. Trin. 8 Geo. Gore v. Gore.

15. No Writ of Error lies in Caſes of *Mandamus* or *Procedendos*; For the Mandamus gives the Party that tries it no better Right than he had before, which ſtill remains examinable and triable in a proper Action, and there being no Coſts, the Party that ſues the Writ of Error can have no Benefit by it. MS. Tab. March 18. 1725. The King v. Herle.

(B) In what Caſes an erroneous Judgment may be avoided *by Entry* without a Writ of Error.

1. IF an Infant ſuffers a Common Recovery, in which he comes in as Vouchee in his proper Perſon, and not by Attorney or Guardian, though this ſhall not bind him but that he may in a Writ of Error avoid it, becauſe it is Error in Law, yet at his full Age he cannot enter into the Land and avoid it by his Entry, before he has reverſed it in a Writ of Error, becauſe he himſelf is privy to the Judgment, and may reverſe it by ſuch Means, and he is not a Stranger to the Judgment, for Judgments ought not to be ſubverted by Matter of Fact without Matter of Record; as a (*) Recognizance or Fine by an Infant, nor any Judgment in other Actions given againſt an Infant, where he appears by Attorney and not by Guardian. Hill. 1650. between *Ayliff and Walker* adjudged per Curiam, upon a ſpecial Verdict for Land in Eſſex. Intratur Trin. 1649. Rot. 200.

Sty. 246. Ailet v. Watleſs, S C adjudged Niſi. — See tit. Enfant (G) pl. 2. S. C. — See tit. Recovery Common (D) pl. 6. S. C.

* Fol. 743.

2. If

2. If *an Infant makes an Attorney which is recorded, and pleads* a Plea *to Iſſue*, which is *found againſt him*, this is no Matter in Arreſt of Judgment, but is put to his Writ of Error. Br. Error, pl. 79. cites 22 H. 6. 31. per Newton.

3. *So* per Portington, if the Infant be permitted to *levy a Fine*, if this be *recorded* it cannot be defeated but by Writ of Error; Quod nemo negavit. Ibid.

(C) In what Caſes Judgments ſhall be reverſed *without a Writ* of Error.

In what Court.

* Fitzh. Error, pl. 26. cites S. C. in B. R. and that the Ch. Juſtices and Clerks held that it could not be reverſed in that Court without Writ of Error, but ſays that otherwiſe it is in C. B. if he comes the ſame Term. ——— Br. Error, pl. 199. cites S. C. that he who comes in by Exigent may the ſame Term reverſe Utlawry for Matter apparent by Plea, As for Omiſſion of Proceſs in C. B. without Writ of Error; but otherwiſe upon Matter in Fact; But that the Uſage in B. R. is, that in both Caſes he is put to his Writ of Error. ——— Br. Error, pl. 81 cites 15 E 4. 7. 8. ſame Diverſities. ——— Outlawry in Perſonal Actions cannot be reverſed in B. R. without Writ of Error, by the Courſe of the Court; But otherwiſe it is in C. B. Per Broome, Secondary of B R. 2 Roll Rep. 25. Paſch. 16 Jac. B. R. Anon. cites 4 E. 4. 16 b. 11. a. and 42 b. 43. a.

1. IN Banco Regis in no Caſe, **neither in the ſame Term, nor in another Term, ſhall an Outlawry be reverſed without Writ of Error** on the Crown-Side. **Mich. 14 Jac. The Clerks ſaid, that ſo at all times had been their Courſe, and the Court agreed thereto, and adjudged accordingly.** * **19 H. 6. 2. adjudged; and by the Clerks it is the Courſe.**

In what Caſes Utlawry ſhall be reverſed by Writ of Error, or by Plea, See tit. Utlawry (G. b).

2. One *convicted of Felony prayed his Clergy*, and had it. The *Indictment was removed into the Crown-Office*; A Writ of Error does not lie to avoid it, becauſe he is a Clerk convicted only, and not attainted; For *when he prayed his Clergy, which was allowed him, there never was any Judgment afterwards given*, and of that Opinion was the whole Court; But upon Exceptions taken to the Indictment, the ſame was diſcharged and Reſtitution awarded. Cro. E. 489, 490. pl. 6. Mich. 38 & 39 Eliz. B. R. Long's Caſe.

(D) [Reverſed.] For what Cauſe

Br. Utlagary, pl. 11. cites S. C. —— Fitzh. Utlagary, pl. 40. cites S. C.

1. AT the Exigent returned in Banco, **if the** Defendant ſays the Plaintiff appears by the Attorney, and the Attorney has no Warrant, **this is not Cauſe to reverſe the Judgment without Writ of Error,** for perhaps he has a Warrant in Chancery. 11 H. 4. 34.

2. But

2. But **a Judgment may be reverſed in a Writ of Error** for an Outlawry after a Superſedeas and Mainpriſe. * 11 H. 4. 34. || 8 H. 6. 37. 9 H. 6. 8. **Contra Mich. 37 El. B. per Curiam.**

* Br. Utlagary, pl. 11 cites S. C.

|| Where one is outlawed contrary to a Superſedeas, the Court in the ſame Term may reverſe the Outlawry without a Writ of Error. Br. Utlagary, pl. 19. cites 8 H. 6. 37.

3. So **if the** Exigent bears Date before the fourth Day of the Pluries Capias iſſued **to the Sheriff.** 11 H. 4. 34.

Br. Utlagary, pl. 11. cites S. C.

—— Br. Error, pl. 48. cites S. C.

4. **A Man** outlawed of Felony **ſhall not avoid the Outlawry, becauſe he** was in Priſon at the Time, **without a Writ of Error.** 1 H. 7. 13. b. **Contra** * 7 H. 6. 25.

* Br. Utlagary, pl. 18. cites S. C. per Hals. Quod Nota.

5. [So] **if a Man be outlawed,** where it appears by the Record **that there** were * not two Capias's awarded **this may be annulled without a Writ of Error.** (8 H. 6. 37. 11 H. 6. † 11.) **though the Statute ſays it ſhall be void. Contra M. 37 El.** 6.

* In the large Edition of Brook, the Word is (tamen) but in the other Editions is (tantum) viz that there were two Capias's only; But the Year-Book is as in Roll, viz that there were not two Capias's awarded. See Brook Utlagary, pl. 19. cites 8 H. 6. 37.

† This is miſprinted in Roll, and it ſeems ſhould be (15. b pl. 6.) and there the Objection was, that there were but two Capias's iſſued where there ſhould have been a third.

6. So **if a Man be outlawed, and** no Mention **is made** of what County he was, **this may be reverſed without a Writ of Error.** 8 H. 6. 37. **Curia.**

S. P. where the Defendant came the ſame Term in Perſon and praved a Reverſal, becauſe it is in the ſame Term; Per Cott For the Statute ſays, that ſuch Proceſs ſhall be held for null, to which the Court, except Babb. Ch. J. agreed. Br. Utlagary, pl. 19 cites 8 H. 7. 37. —— Fitzh. Error, pl. 19. cites S. C.

7. [But] **if a Man be outlawed** without Addition **given to him** in ſuch Action, **in which Action** there ought to be **an Addition by the Statute, he ſhall not avoid it by Plea without Writ of Error, though the Statute ſays that ſuch Outlawry ſhall be void.** 11 H. 6. 15.

8. [But] **if a Man** comes in Ward upon the Capias Utlagatum, **he may reverſe the Outlawry, becauſe he is** named J. S. de A. whereas he was abiding at the Writ purchaſed at B. **and not at A. and this without Writ of Error, becauſe if he ſhould bring a Writ of Error, it ought to agree in the Name with the Record, which would be againſt himſelf.** 19 H. 6. 80.

9. **But** otherwiſe **it would be** if he had rendered himſelf Gratis. 19 H. 6. 80.

10. [But] **if a Man** comes in Ward upon the Capias Utlagatum, **he may avoid the Outlawry without Writ** of **Error, becauſe he is** called J S. de D. **where there is** no ſuch Vill in the County, **becauſe if he ſhould bring a Writ of Error it ought to agree with the Record, and ſo he ſhould admit that there is ſuch a Vill.** 22 E. 4. 38.

And a Sci. Fa. was granted againſt the Plaintiff to ſay if he would maintain the Writ, per Newton and Paſton J. For the Sheriff did wrong to arreſt him; becauſe if he be of B he is not the ſame Perſon, Nota; and ſhall not be forced to a Writ of Error; For per Paſton the ſuing a Writ of Error will affirm the Name becauſe it muſt be according to the Record; And ſo he was ſuffered to make Attorney, and was diſmiſſed. Br Utlagary, pl. 22. cites 19 H. 6. 80.

S. C. cited, 2 Jo. 167. Mich. 33 Car. 2 B. R. in Case of * Fol. 744. The King v. Briggs, which was

11. If a Man be convicted upon the Statute of Jac. cap. 11. by two Justices of the Peace for killing of Patridges with Nets upon Proof or Confession of the Party without Indictment, this Judgment may be reversed in B. R. this being removed there by Certiorari without any Writ of Error. Hil. 12 Car. * B. R. *Berry's Case*, Per Croke and Berkley, and they seemed in some Manner that such Conviction upon the Statute for Shooting, or such like, might be so reversed without Writ of Error.

on a Conviction for Hunting in a Park contrary to the Statute, and Judgment for the Penalty of 20l. given by the Statute; But Pemberton Ch. J. held, that the Party ought to be put to his Writ of Error, and he was not then permitted to reverse or quash it by Motion upon the Certiorari, but afterwards Pemberton assenting Exception was taken to the said Judgments by Motion on the Certiorari.

12. A Man shall have Writ of Error *upon an erroneous Execution*; As upon an Outlawry, as well as upon the principal Judgment; Per Paston. Br. Error, pl. 70. cites 7 H. 6. 44.

13. If an *erroneous Judgment* be given *upon an Indictment of Barretry* at the Sessions of Peace, and the Party fined thereupon, and committed till he pays it, and he removes the Indictment and Proceedings by Certiorari, and himself by Habeas Corpus, yet he cannot be discharged, because Judgment being given thereupon he cannot discharge it unless he brings a Writ of Error; Adjudged. Cro. J. 404. pl. 2. Trin. 14 Jac. Rice's Case.

14. But a *Record of Force* made *by Justites of Peace upon the View*, if the same is insufficient, may be quashed upon Motion without Writ of Error; Agreed per Cur. 1 Lev. 113. Mich. 15 Car. 2. the King v. Chaloner.

(E) At what *Time* a Judgment may be so reversed without Writ.

[Outlawry.]

Fitzh. Error, pl. 26. cites S C — Br. Error, pl. 199. cites S. C.

1. An Outlawry in Banco Regis in another Term cannot be reversed without a Writ of Error. 19 H. 6. 2. By Reports 14 Jac. *Hamon*.

——Br. Utlagary, pl. 20 cites 19 H. 6. 1. 2.

* Br. Utlawlawry, pl. 20. cites S. C. Contra. and he was put to his Writ of Error.

2. [But] an Outlawry in Banco Regis may be reversed in the same Term without Writ of Error, for all the Term the Judgment does not remain in Pectore of the Judges, this being an Outlawry and Judgment before the Coroner. * 19 H. 6. 2. Cr. 14. Jac. B. R.

——Fitzh. Error, 20. cites S. C. accordingly. ——And Br. Error, pl. 158. cites 4 E. 41, 42. that in B. R. the Defendant shall be put to his Writ of Error, and says that the same Term the Outlawry was reversed in B. R. upon an Exigent issuing there, a Writ of Error was brought out of Chancery, directed to the Justices of B. R. Brooke says, Quod nota, that they reversed their own Error at the same Term.

* Fitzh. Error, pl. 19. cites S C. —† Fitzh. Error, pl. 26. cites S C

3. So in the same Term an Outlawry returnable in Banco may be reversed in Writ of Error. * 8 H. 6. 37 † 19 H. 2.

4. But not there in another Term without a Writ of Error. 19 H. 6. 2.

——Br. Error, pl. 199. cites S. C.——See (C) pl. 1 and the Notes there.

5. An

5. An Outlawry after a Superſedeas cannot be reverſed in Banco the ſame Term of the Return without a Writ of Error. M. 37 El. B. per Curiam, becauſe this is not their Judgment, but the Judgment of the Coroner.

6. *In the ſame Term* and Outlawry may be reverſed in C. B. for Error. Het. 93. Paſch. 4 Car. C. B. Anon. Litt. Rep. 150. S. C.

7. Or *in any Term if* it be *void upon any Statute*; As for want of Proclamations &c. Het. 93. Ibid. Litt. Rep. 150. S. C.

(F) *Upon what Judgment.*

1. IF the Plaintiff be nonſuit at the Niſi Prius, upon which Coſts are taxed by the ſame Jury, by the Statutes of H. 8. and Ja. and Judgment given for them againſt the Plaintiff, the Plaintiff may have a Writ of Error upon this Judgment. Tr. 3 Jac. B. R. admitted per Curiam.

2. If a Man brings a Writ of falſe Judgment in Banco upon a Judgment given in Ancient Demeſne, and reverſes the Judgment there, a Writ of Error lies upon this Judgment, for this is a Matter of Record. M. 40 & 41 El. B. R. by two Juſtices.

3. If a Manor Court holds Plea of a Thing out of their Juriſdiction, and gives Judgment thereof, though this is void, being Coram non Judice, yet a Writ of Error lies, and Error may be aſſigned in this. M. 3 Ja. B. R. between *Quarrels and Searle*, for by the Writ of Error he ſhall be reſtored to all that he hath loſt, where, by the Action of Treſpaſs, he ſhall recover all in Damages. Cro. J. 95. 96. pl. 24. Quarles v. Searle, S. C. held accordingly by three Juſtices, contra Williams; And though a Writ of Error be brought that does not affirm the Juriſdiction of the inferior Court, nor is any affirmative, but that it may be ſaid to be a void Judgment, and yet the Writ of Error well lies of a void Judgment.

4. If a *Verdict* paſſes *againſt the Vouchee*, yet he ſhall have a Writ of Error notwithſtanding the Stat. 32 H. 8. cap. 30. Per the Juſtices of C. B. Bendl. 37. pl. 67. Mich. 1 & 2 P. & M. in a Nota. But in a Præcipe quod reddat T. S. was vouched, who entered into Warranty, and pleaded to *Iſſue*, which was *miſjoined or ſome other the like Default*, and it was found againſt him; now if Judgment is given againſt him, in ſuch Caſe he cannot have a Writ of Error, by all the Juſtices in Bank, notwithſtanding the Statute 32 H. 8. cap. 32. [30.] for this is out of the Statute, which only gives the Writ where a Verdict is found for or againſt the Demandant or Tenant, and a Vouchee is neither of them. And 26, 27. pl. 60. Hill. 7 E. 6. Anon.

5. And alſo note, That if any *Default is in any Original Writ*, *or* in the *Return thereof*, *or* in the *Verdict*, *or* in the *Judgment*, *or* in the Count, *ſo that it plainly appears by the* Count *that the Plaintiff has no Cauſe of Action*; And if a Verdict and Judgment is given upon ſuch Originals for the Plaintiff, yet the Defendant ſhall have Writ of Error, notwithſtanding the ſaid Statute, and theſe Defaults are not remedied by the ſame Statute. Bendl. 37. pl. 67. Mich. 1 & 2 P. & M. Bendl. in Keilw. 207. b. S. C. in totidem Verbis. —— Inſufficient Trials are not remedied by any Statute, for the Stat. 38 H 8. cap. 30 doe not extend to Verdict given between the Demandant and Vouchee, nor to any Default in the original Writ, or in the Return thereof, or the Want of an Original, or in the Count, or to any Inſufficiency in the Trial, Verdict, or Judgment &c. And the Stat. 18 Eliz. ſalves many ſuch Defects, but does not remedy any inſufficient Trial, but this remains as at Common Law 5 Rep. 36. b. Trin. 30 Eliz. in the Exchequer, in Baynham's Caſe, als', Baynham v. Brook.

6. It

6. It doth not lie of a Judgment upon an *Aſſiſe of Freſh-force*, but a Writ of falſe Judgment, as it ſeems. F. N. B. 19. (I)

7. If one be *outlawed upon an Indictment of Treaſon, Felony or Treſpaſs*, but the *Proceſs* and Order *preſcribed by the Statute of* 6 *H.* 8. *cap.* 1. *and* 8 *H.* 6. *cap.* 13. are not obſerved, the Outlawry may be reverſed by Writ of Error, which Writ ex merito Juſtitiæ ought to be granted. 3 Inſt. 31. cites it as adjudged, Mich. 26 & 27 Eliz. in Writ of Error Coram Rege in Ninian Menvil's Caſe.

If the Judgment be given by him that has Authority, and it be erroneous, it was at Common Law reverſible by Writ of Error, only the Stat.

8. A Writ of Error lies to reverſe an *Attainder of High Treaſon*, tho' ſome have held the contrary by reaſon of 33 H. 8. cap. 28. [20.] That every Attainder of Treaſon by the Common Law ſhould be as effectual as if by Authority of Parliament, for the Statute *is to be intended of lawful Attainders by due Courſe of Law, and not of erroneous or void Attainders*; and ſo it was held in a Parliament held the 28 Eliz. when it was enacted, That no Attainder of High Treaſon, where the Party was executed for the ſame, ſhould be avoided by Plea or Error, but this Act extended only to Attainders before that Time where the Party had been executed, not to Attainders after. 3 Inſt. 215.

25 Eliz. cap. 2. ſecures all former Attainders, where the Party is executed, from Reverſal by Writ of Error, but meddles not with other Attainders, neither doth the Stat. 33 H. 8. cap. 20. take away Writs of Error upon Attainder of Treaſon, as hath been reſolved againſt the Opinion of Stamf. P. C. lib. 3. cap 19. Ca. P. C. p. 31. But it is true that the Statutes 26 H. 8. cap. 13. and 5 & 6 E. 6. cap. 11. take away from a Perſon outlawed in Treaſon the Advantage of Reverſal of an Outlawry, becauſe the Party outlawed was out of the Realm, but extends not to other Offences. Hales's Hiſt. of Pl. Cr. 353, 354. cap. 26.

Ibid. ſays that ſo are 22 E. 3. 3. and 32 E. 3.

9. If a Man be *attainted by a Judgment upon an Indictment* he ſhall not have Writ of Error without making a *Petition to the King* for the having it; becauſe it ſo highly concerns him; Per Coke and Doderidge. Roll Rep. 175. pl. 12. Paſch. 13 Jac. B. R. Gargrave's Caſe.

Jo. 407. pl. 5. The King v Ld. St. John, S. C and reports that the Writ of Error was brought by *the King*; and held that it would lie for him. For he *is not concluded by the Statute* 3 Jac.

10. Error was brought to reverſe a *Judgment upon an Indictment for Recuſancy*; It was doubted whether any Exception be good upon ſuch Conviction; For the Statute 3 Jac. is preciſely that it ſhall not be void or diſcharged for Default of Form, or other Matter, until after conforming himſelf by coming to the Church. But afterwards, becauſe the *Judgment was not Ideo capiatur*, and the Omiſſion thereof is apparent to the King's Prejudice, and for that upon every Conviction in Indictment, the Judgment is Quod capiatur, for this Cauſe the Judgment was reverſed. Cro. C. 504, 505. pl. 6. Winchelſter (Marquis's) Caſe.

Ibid. Roll Ch. J. ſaid that 3 Jac. in Cam. Scacc. the very Caſe was ſo adjudged. —

11. Error was brought to reverſe a *Judgment* entered *in an inferior Court, that the Plaintiff recuperare debeat*, whereas it ought to be recuperare debet. Roll Ch J. ſaid, that this is no Judgment, and ſo no Writ of Error lies thereupon, for the Writ ſuppoſes a Judgment, becauſe the Words of the Writ are Si Judicium redditum ſit. Sty. 265. Paſch. 1651. Shedlock v. Lapere.

See (M) pl. 15. where it is held that *recuperare debeat is only an Award.*

12. It was ſaid by the Attorney-General that no Writ of Error lies upon a Judgment given *upon the Statute of Winton*. Freem. Rep. 435. pl. 588. (bis) Mich. 1676. Anon.

Becauſe it is no Judgment but

13. A Writ of Error lies not upon an *Indictment of Recuſancy and Conviction by Proclamation*. Vent. 355. Trin. 33 Car. 2. B. R.

the Statute 3 Jac. cap. 4 gives Proceſs upon it for the Forfeiture, and the Party's Remedy is in the Exchequer to quaſh it there. Raym. 433. Paſch. 33 Car. 2. B. R. Phorbes's Caſe.

14. The

14. The Defendant was *convicted at the Seſſions for a Scold*, and adjudged to be ducked; She brought a Writ of Error (by Leave of the Attorney-General) and the Ch. J. ſaid, The Court was well enough poſſeſſed of the Cauſe by Writ of Error, but the *beſt Way was by Certiorari to remove it into the Crown-Office, and then bring a Writ of Error coram nobis reſident*', and upon that the Courſe is to give a Rule to aſſign Error, and then to move for a peremptory Rule, and in Default thereof to have a Non Prof. and then an Award of Execution. 1 Salk. 266. pl. 12. Trin. 3 Ann. B. R. The Queen v. Foxby. 6 Mod. 178. S. C. held accordingly.

15. A Writ of Error does not lie on a *Mandamus*. 8 Mod. 29. Hill. 7 Geo. D. and Chapter of Dublin's Caſe.

As to Reverſing of *Attainders*, See Tit. **Attainder** (D)

(G) *Of what* Judgments. [In reſpect of the Court where given.]

1. IN Judgment in Pleas upon Patents, **Pleas of** Debt, Attachment of Treſpaſs, **and ſuch like**, given in Chancery, **among them of Chancery, and upon** Scire Facias upon Recognizances, **a Writ of Error lies.** * 37 H. 6. 14. b. D. 14 El. 315. 100. 11 E. 4 9. Br. Error, pl 95. cites 37 H. 6. S. C. & S. P.

2. But **no Writ of Error lies** upon a Judgment upon a Subpœna in in Chancery, **for as to this it is not a Court of Record.** 37 H. 6. 14. Br. Error, pl. 95 cites 37 H. 6. S. C. & S. P.

3. **A Writ of Error lies upon a Judgment** given in a Franchiſe **by Virtue of Conuſance of Pleas.** 2 H. 4. 4. b. Br. Error, pl. 32. cites S. C.

4. **No Writ of Error lies upon a Judgment** given by the Juſtices of the Peace. 4 H. 6. 24. See (D) pl. 11.

5. **A Writ of Error lies upon a Judgment** in Bank. 4 H. 6. 24.

6. If the *Sheriff refuſes the Challenges the Party ſhall have Error*. Br. Waſte, pl. 58. cites M. 2 H. 4. 2.

7. Of *Error in the Court of Pie-powders* lies Writ of Error, and not Writ of falſe Judgment, which proves that it is a Court of Record, and this per Littleton, quod non negatur. Br. Error, pl. 162. cites 6 E. 4. 3. and 7 E. 4. 23.

8. Where falſe Judgment is given upon a *Writ of Juſticies* directed to the Sheriff, uo Writ of Error lies, though the Judgment be of Debt or Treſpaſs above 20s. F. N. B. 18. (H)

9. Upon a Judgment in a Re-diſſeiſin *before* the Sheriff a Writ of Error lies. 6 Rep. 12. a.

10. A Writ of Error lies upon a Judgment given in a Court of *Pie-powders*. Jenk. 211. pl. 48.

11. A Writ of Error lies *out of the Petty Bag* into B. R. upon an Error in Fact. Vent. 103. Mich. 22 Car. 2. B. R. Foxwith v. Tremain.

12. If there be a *Conviction of Forcible Entry upon View of the Juſtices of the Peace* no Writ of Error lies upon it, but it may be examined in a *Certiorari* Vent. 171. Mich. 23 Car. 2 B. R.

13. Upon a Judgment given *by the Cenſors of the College of Phyſicians againſt one for Male-Practices* no Writ of Error will lie, becauſe it is a *Court inſtituted de novo*, and by the Inſtitution they are not bound up to the Formalities of other Courts, viz. as to draw up their Judgments

with *Ideo Conſideratum &c.* But it is ſufficient for them to ſhew the Conviction in other Words. But the *Conviction may be remov'd into B. R. by Certiorari, and there quaſh'd for Inſufficiency.* Per Holt Ch. J. Carth. 494. Paſch. 11 W. 3. B. R. Dr. Groenvelt v. Dr. Burnell.

(H) In what *Court* [it lies.]

1. D. 14 El. 315. 100. A Judgment given in Chancery upon a Scire * Facias upon a Recognizance, was reverſed in Banco Regis, yet both Courts were before the King himſelf. 29 Aſſ. 47 adjudged. My Reports, 11 Jac. B. R. per Coke.

* Fol. 745.

S. P. by Coke Ch. J. Roll Rep. 287. pl. 5. Hill. 13 Jac. B. R. in Caſe of the Bp. of Briſtol v. Proctor. —— 4 Inſt. 80. Cap. 8. S. P.

2. It lies in Parliament. 37 H. 6. 13. b. 11. E. 4. 9.

3. No Writ of Error lies in Banco or Banco Regis upon a Judgment given within the Cinque Ports. D. 23 El. 376. 23. adjudged.

As to Errors in Judgments in Cinque Ports, See tit. Courts of Cinque Ports. [E 7]

4. But by the Cuſtom of the Cinque Ports a falſe Judgment given there may be reverſed per Cuſtodem ſive Guardianum Portuum apud Curiam Shepeway D. 23 El. 376. 23.

Br. Error, pl. 175. cites 18 E 4 12. S P. [and Roll ſeems miſprinted (El.) for (E)]

5. A Writ of Error lies of Banco Regis of a Judgment given in Lancaſter. 18 El. 4. 12.

As to Writs of Errors to the Couties Palatine, See tit. Court of County Palatine (S. 6)

6. So of any County Palatine, for this is excepted out their Charters. Davis 1. County Palatine. 62. D. 15. El. 320. 19.

* Br. Error, pl. 74. S. C. —That Error in County Palatine ſhall be redreſſed here in England; [but ſays not in what Court whether in C. B. or B. R.]—— Br. Cinque Ports, pl. 8. cites S. C.

7. A Writ of Error his in Banco upon Judgment in a County Palatine becauſe theſe Counties were derived out of the Crown * 19 H. 6. 12. 6. H. 4. 4.

Doderidge ſaid, that it had been adjudged by all the Juſtices in own Trewman's Caſe, that no Writ of Error lies of a Judgment given in the Stanneries in Cornwall. Win. 8. Paſch. 19 Jac. in the Caſe of Ewrr v. Vaughan.

8. If the Judgment be given in the Court of Stannaries of the Dutchy of Cornwal, no Writ of Error lies upon this in Banco, or Banco Regis, becauſe it hath not been uſed; but of this there may be an Appeal to the Guardian of the Stannaries, and from him to the Prince, and when there is no Prince to the King's Counſel. M. 13 Jac. B. R.

* Br. Error, pl. 127. cites S. C.—— Per Cur. Le. 55. in pl. 69. cites 15 E. 3. Error 72.——And 3 Le. 159. pl. 207. cites S. C.——Upon a falſe Judgment, in C. B. in Ireland Error muſt be ſued in B. R. there, but on Judgment given in B. R. there, Error muſt be ſued in B. R. in England. F. N. B. 22. (E)—Vaugh. 290. Vaughan Ch. J. cites it as ſaid by Sir

9. A Writ of Error lies in B. R. upon a Judgment given in Banco Regis in Hibernia. D. 1. County Palatine. 62. * 34 Aſſ. 7. adjudged. 37. Aſſ. 5.

Sir Edward Coke in Calvin's Caſe, fol. 18. a. that Albeit no Reſervation were in King John's Charter, yet by Judgment of Law a Writ of Error did lie in B. R. of England of an erroneous Judgment in B. R. in Ireland. Whereupon Lord Hobert obſerves, that a Writ of Error lies not therefore to reverſe a Judgment in Ireland by ſpecial Act of Parliament, for it lies at Common Law to reverſe Judgments in any Inferior Dominions; and if it did not, Inferior and Provincial Governments, as Ireland is, might make what Laws they pleaſed; for Judgments are Laws when not to be reverſed.

10. **A Writ of Error lies** in Parliament upon a Judgment in Banco Regis, given either in a Writ of Error or upon an Action originally commenced there. **D.** 23 **El.** 375. 19. * 1 **H.** 7. 19.

* Br. Error, pl. 137. cites S. C.

11. **If a Judgment be in any Court** in Wales, **a Writ of Error** lies **thereof** before the Juſtices errant. 19 **H.** 6. 12.

Br. Error, pl. 74 cites S. C.——Br. Cinque Ports, pl. 8. cites S. C.

12. But no Writ **of Error** lies **thereof** in any Court at Common Law at Weſtminſter, **becauſe it lies before the Juſtices errant.** 19 **H.** 6. 12. **b.**

Br. Error, pl. 74. cites S. C. but by Newton if there are no inde; For by ſuch Juſtices there it ſhall be redreſſed here in Curia Regis; but Brooke ſays, Quære Forteſcue and others it ſhall be redreſſed in Parliament.——Br. Cinque Ports, pl. 8. cites S. C accordingly.

13. And if **a Judgment be** given before the Juſtices Errant in Wales no Writ **of Error** lies **thereof** in any Court at Weſtminſter, **becauſe the Court of Juſtices Errant is as high as any of the King's Courts, except the Parliament.** 19 **H.** 6. 12.

Wales was a Kingdom by itſelf and never derived from the Crown, as Lancaſter, Cheſter and Durham were; Per Forteſcue. Br. Cinque Ports, pl. 8.——S. P. and therefore regularly no Writ of Error did lie of a Judgment in Wales, but otherwiſe of the Counties Palatine. 2 Inſt 223. Cap 42—But Keilw 202. b. in pl. 19. Mich. 11 H. 8. it was ſaid by Brudenell, Ex aſſenſu Brook, Fitzherbert, and all the King's Counſel, that Wales is Parcel of the Realm of England, and that Writ of Error lies in England for an erroneous Judgment given in Wales, tho' not of ſuch Judgment given in the Iſle of Man which was no Parcel of the Realm, and ſo of Gaſcoigne and Calice.

14. But **a Writ of Error** lies in Parliament **upon a Judgment given before the Juſtices Errant in Wales, becauſe the Parliament is more high.** 19 **H.** 6. 12.

But as to more relating to Error of Judgments in Wales, See tit. Wales (C) and the Notes there, on Stat 34 & 35 H. 8. cap. 26.

15. **A Writ of Error lies** in Banco upon a Judgment **given** before the Judges of Aſſiſe. 11 **H.** 3. **Rot.** 7. **admitted that it was well brought.**

Le 55. pl. 69. Paſch. 29 Eliz. C. B. The A. Bp. of York v. Morton S. P. adjuded that it did not lie in the ſaid Court.——3 Le 159. pl. 207. S. C. in totidem Verbis.

16. **A Writ of Error does** not **lie** in Chancery upon a Judgment **given** in Banco.

17. But **vide** 17 **E.** 3. 5. 19. 21. **where a** Writ of Error upon a Judgment in Banco **was** returnable in Chancery, **and there the** Record **was** returned accordingly, **and the** Chancellor delivered it over to the Chief Juſtice de Banco Regis. 17 **E.** 3. 46. 30 **E.** 3. 14.

18. **A Judgment** in Aſſiſe cannot be reverſed by the Chancellor before the Council, **for this is not any Place for it.** 34 **E.** 3. 14. **by the Juſtices.**

There is no ſuch Year in the Year Book.

19. **Upon a Judgment** given in the Huſtings **of London a Writ** of Error lies at St. Martins before certain Juſtices. 18 **E.** 3. 8.

20. Where

20. Where Writ of Error is ſued in London of Error before the Mayor, this ſhall be ſued at *St. Martins*, and then the Mayor and Aldermen ſhall have *Day by* 40 *Days to be advis'd* of their Records, and then the *Recorder ſhall record it Ore tenus*, and there were diverſe Opinions if the Party after this might allege *Diminution* or not. Br. Error, pl. 18. cites 34 H. 6. 42.

The Chancellor and Treaſurer are Judges, and the other are only Aſſiſtants Br. Judgment, pl. 125. cites 8 H. 7. 13

21. 31 *E.* 3. *Stat.* 1. *cap.* 12. Enacts, That *where a Man complains of Error in the Exchequer, the Chancellor and Treaſurer ſhall cauſe to come before them in any Chamber of Council nigh the Exchequer, the Record of the Proceſs taking to them the Juſtices and other ſage Perſons; and ſhall caus'd to be called before them the Barons of the Exchequer, to hear the Cauſes of their Judgments; and if Error be found, they ſhall correct and amend the Rolls, and ſend them into the Exchequer to make Execution.*

16 *Car.* 2. *cap.* 2. *S.* 2. *The not coming of the Ld. Chancellor and Ld Treaſurer at the Day of the Return of any Writ of Error on the Statute of* 31 *E.* 3. *cap.* 12. *ſhall not cauſe any Abatement or Diſcontinuance; but if either of the Chief Juſtices, or the Ld. Chancellor or Ld. Treaſurer ſhall come to the Exchequer-Chamber at the Day of the Return the Suit ſhall proceed.*

S. 3. *Provided that no Judgment be given, unleſs both the Ld. Chancellor and Ld. Treaſurer be preſent.*

Br. Contempt, pl. 7. cites S C.—

22. Writ of Error lies in England of a Judgment in *Calais*. Br. Proceſs, pl. 181. cites 21 H. 7. 31.

4 Inſt. 282. cap 68. S. P. —— S. C. & S. P. cited Raym. 174. Arg. —— Vaugh. 291. cites 2 R. 3. 12. S. P.

23. If *falſe Judgment* be given *in London, or other* Place which is a *Court of Record*, the Party grieved ſhall have a Writ of Error, and this Writ may be returned into C. B. or B. R. at the Pleaſure of him who ſues the ſame. F. N. B. 20 (D)

24. Judgment in a *Quare Impedit before Judges of Aſſiſe*, and a *Writ awarded to the Archbiſhop*, and for Damages *a Scire Facias to the Sheriff*; the Defendants bring Error, and remove the Record into Banco Regis, and the Writ was directed to the Chief Juſtice de Banco. Dyer 76, 77 Mich. 6 E. 6. Henſlow v. Keble.

And. 12. pl. 26. S. C. awarded accordingly, after Argument and Conſideration. D. 250. pl. 85. &c

25. Error was brought in C. B. by A. and B. againſt J. S. of a *Judgment in an Aſſiſe of Novel Diſſeiſin given by the Juſtices of Aſſiſe at Monmouth*; The Defendant demurred, and adjudged that a Writ of Error did not lie here. Mo. 78. pl. 208. Trin. 8 Eliz. Price v. Jones.

—— Bendl. 153. pl 213. Ap-Richard v. Jones. S. C. awarded accordingly.— S. C. held accordingly.

26. It was held by all the Juſtices that a Writ of Error does *not lie in C. B. upon* an Erroneous *Judgment given in any inferior Court of Record*. And this was, as was ſaid, upon great Advice. Cro. E. 26. pl. 6. Paſch. 26 Eliz. C. B. Roe v. Hartly.

Adminiſtrators are within the Benefit of this Act. 6 Rep. 80. cites it as adjudged in the Exchequer Chamber 36 Eliz. in Ld Mordant's Caſe.

27. 27 *Eliz. cap.* 8. *S.* 2. *Reciting that Erroneous Judgment in B. R. were only to be reformed in Parliament*, enacts, that *where any Judgment ſhall begin in B. R. in any Action of Debt, Detinue, Covenant, Account, Action upon the Caſe, Ejectione Firmæ or Treſpaſs, firſt commenced there, other than ſuch only where the Queen ſhall be Party; the Plaintiff or Defendant againſt whom Judgment ſhall be given, may ſue forth out of Chancery a ſpecial Writ of Error directed to the Ch. J. of B. R. commanding him to cauſe the ſaid Record, and all Things concerning the ſaid Judgment, to be brought before the ſaid Juſtices of C. B. and Barons of the Exchequer into the Exchequer-Chamber, to be examined by the ſaid Juſtices of C. B. and Barons; which Juſtices of C. B. and ſuch Barons of the Exchequer as are of the Degree of the Coi, or Six of them, ſhall thereupon*

A *Scire*

upon have Power to examine all ſuch Errors as ſhall be aſſigned or found in ſuch Judgment, and thereupon to reverſe or affirm the Judgment other than for Errors concerning the Juriſdiction of the Court of B. R. or for want of Form in any Writ, Return, Plaint, Bill, Declaration or other Pleading, Proceſs, Verdict or Proceeding; and after that the Judgment ſhall be affirmed or reverſed, the Record and all Things concerning the ſame ſhall be brought back into B. R. for Execution &c.

S. 3. *Such Reverſal or Affirmation ſhall not be ſo final, but that the Party grieved may ſue* in Parliament *for the further Examination of the Judgment.*

Fácias was awarded againſt the Defendants upon a Recognizance, which they entered into as Bail for a Plaintiff in a Writ of Error that he ſhould proſecute it with Effect, or pay the Money, if the Judgment was affirm'd; They plead, That he did proſecute it with Effect, and that the Judgment was not yet affirmed; The Plaintiff replied *Proteſtando*, That they did not proſecute with Effect, *Pro Placito*, That the Judgment was affirmed by the Juſtices of the Common Bench, and Barons *De Gradu de la Coif, et hoc paratus eſt verificare per Recordum*; To which the Defendants demurred generally, Becauſe it was *not alleged, That there were ſix Juſtices and Barons preſent when the Judgment was affirmed*; For 27 Eliz. cap. 8. which gives them Authority, requires that there ſhould be ſix at the leaſt. Sed non allocatur; For the Defendant ſhould then have pleaded *Nul tiel Record*; For if there were not ſix, their Proceedings were *Coram non Judice*. Vent. 75. Paſch. 22 Car. 2. Barret v. Milward.

28. A *Statute Merchant* was *by Mittimus removed out of the Chancery into C. B.* and *Execution awarded there ſuper tenorem Recordi.* Reſolved that Error lies in B. R. although the Original be in the Chancery, and the Judgment of Execution given in C. B. Mo. 570. pl. 778. Trin. 41 Eliz. B. R. Worſley v. Charnock.

Cro. E. 448 pl. 18. and 472. (bis) pl. 36. S. C. but S. P. does not appear. —

Ow. 106. S. C. but S. P. does not appear.

29. In *Durham*, if an erroneous *Judgment* be *given either in Canc.* there according to the Common Law, *or before the Juſtices of the Biſhop*, a Writ of Error is to be brought before the *Biſhop* himſelf; and if he *gives an erroneous Judgment*, a Writ of Error ſhall be ſued returnable in the King's Bench. 4 Inſt. 218. cap 38.

30. When *Judgment* is given *in B. R. upon Writ of Error, no Writ of Error* thereupon *lies in the Exchequer-Chamber*; Per Coke Ch. J. Roll Rep. 65. pl. 10. Mich. 12 Jac. B. R.

S P. by Coke Ch J. 2 Bulſt. 162. Whether the Judgment ſo given in B R. be in Affirmance or Diſaffirmance of the Judgment before given. But in Treſpaſs, Detinue, Ejectione Firmæ, where the Judgment is originally here upon a Suit here begun, a Writ of Error lies in the Exchequer Chamber, but not otherwiſe.

31. *Bail upon a Judgment in Scire Facias* cannot have Error in the Exchequer Chamber; For it is out of the Statute of 27 Eliz. Held per Cur. Cro. J. 384. pl. 14. Mich. 13 Jac. in Cam. Scacc. in Caſe of Sandelow v. Deverton.

32. Error cannot be brought *in one Inferior Court on a Judgment in another*; Per Cur. Keb. 318. pl. 42. Trin. 14 Car. 2. B. R. Marchant v. Short.

33. Error lies *in B. R. of a Judgment in Attainder before the Ld. High Steward*; but the Plaintiff in Error ought to aſſign the Errors in Perſon; Per Twiſden and Windham, and not denied. Lev. 149. Mich. 16 Car. 2. B. R. in Cornhill's Caſe.

S P. by Twiſden. Sid. 208. pl. 2. in S. C.

34. Writ of Error *on a Judgment in Indictment of Perjury in B. R. was brought in Parliament*, Arg. cites the Caſe of **Read v. Dawſon**, as about two Years before, and Per Cur. this proves that it may be brought in Parliament but not that it muſt; and they affirmed their Juriſdiction that *Error may be brought in B. R. in Criminal Caſes upon Judgments given in this ſame Court*; but *not in Civil Caſes, unleſs* it be *of Errors in Fact* triable by Jury; but in Caſes Criminal, as well of Errors in Law as in Fact. Lev. 149. Mich. 16 Car. 2. B. R.

If the *Indictment* had been *of Treaſon* &c. and the Defendant had been erroneouſly outlaw'd, and ſo return'd a Writ of

Error may be brought in B. R for the Reverſal thereof. 3 Inſt. 214. cap. 101.

35. A Writ of Error *out of an Inferior Court lies as properly in C. B. as in B. R. but* generally Writs of Errors for many Years have not been brought in C. B. the Reaſon is Matter of Conveniency, becauſe *if you bring a Writ of Error in C. B. and the Judgment is affirmed, yet it may be brought into B. R. and be there reverſed*; though indeed if a Writ be brought in C. B. we muſt proceed upon it; But no Man will adviſe his Client to bring it in C. B. but rather into B. R. where it is final; Per Vaughan Ch. J. Cart. 222. Paſch. 23 Car. 2. C. B. Anon.

2 Keb. 91. Mich. 18 Car. 2. B. R. the Court conceived that no Writ of Error lay in Parliament on a Judgment in B. R. affirmed in Cam. Scacc. And per Windham, the Stat. 27 Eliz. cap. 8. was made to prevent Delays in Parliament.

36. Upon a *Judgment in the King's Bench Error may be* brought either *in the Exchequer Chamber or Parliament* at the Election of the Party, *but* upon a Judgment *in the Exchequer Chamber*, the Writ of *Error muſt firſt be brought before the Lord Chancellor, and cannot come per Saltum into Parliament.* Parl. Caſes 56, 57. in Caſe of Phillips v. Bury.

37. In the Court of Exchequer Chamber for reverſing a Judgment given in the Court of Exchequer, according to the Statute 31 Ed. 3. cap. 12. the Lord Keeper Somers did then declare, That the Queſtion had been put to all the Judges in England, *Whether the Judgment of that Court ought to purſue the Opinion of the Majority of Judges?* And he ſaid the Judges had delivered to him their Opinions in Writing. Holt Ch. J. Powell and Eyre Juſtices, were of Opinion, *that the Majority of the Judges ſhould govern this Judgment.* But the Ch. J. Treby, Ch B. Ward, Nevell, Rokeby, Turton, Letchmere and Powis, were of a contrary Opinion; and therefore the Ld. K. pronounced a Reverſal of the Judgment in the Court of Exchequer merely upon his own Opinion, and of Treby Ch. J. and Baron Letchmere, againſt the Opinion of all the reſt of the Judges. Carth. 388. Mich. 8 W. 3. B. R. The King v. Hornely and Williams.

38. *Mayor and Commonalty of London ſued in the Sheriff's Court for a Fine for refuſing the Office of Sheriff*, according to a By-Law; *Error brought into the Huſtings, which is a Court held before the Mayor, or ſix Aldermen in his Abſence*; It was objected that the Writ of Error did not lie, becauſe the Mayor was both Judge and Party; but not allowed, becauſe the Court might be held without the Mayor; Adjudged in B. R. Holt diſſentiente, and Judgment affirmed. MS. Tab. March 18, 1707. Mayor of London v. Markwith.

(I) Lies where.

In the *ſame Court* where the Judgment was.

But in the ſame Term they may reverſe their own Error without ſuing to the Parliament.

1. A **Writ of Error does** not **lie in Banco Regis** for an Error in a Judgment **given in the ſame Court.** 7 H. 8. 6. 29. **agreed.** Br. Error, pl. 68. cites S. C. — Fitzh. Error, pl. 16. cites S. C.

2. But

2. But if the Error be not in the Judgment but in the Proceſs, there the Writ of Error lies in the ſame Court de Banco Regis where the Judgment was, and they may reverſe it. 7 H. 6. 30. Br. Error, pl. 68. S. P. cites 7 H. 6. 28. S C. —— Fitzh Error, pl 16. cites S. C.

3. As they may reverſe their own Judgment for falſe Latin, becauſe this is not the Default of the Court but the Clerks. 7 H. 6. 30. Br. Error, pl. 68. S. P. cites 7 H. 6. 28. S. C. ——Fitzh. Error, pl 16. cites S. C.

4. So upon a Judgment in a Real Action, if they award an Habere Facias Seiſinam of two Meſſuages and Lands in one Town, where the Demand is in two Towns, this erroneous Execution may be there reverſed upon a Writ of Error brought in another Term than that in which the Execution is awarded. Hil. 38 El. B. R. between *Hanmer and Thomas* adjudged.

5. If a Man comes in B. R. the ſame Term the Exigent is returned, and notwithſtanding this the Court gives Judgment againſt him, this may be reverſed by Writ of Error in the ſame Court, becauſe this is not the Act of the Court, but of the Sheriff or Coroner. 7 H. 6. 28. Br. Error, pl. 68. cites S. C.

6. If the Court de B. R. awards Exigent where they ought to award a Pluries Capias, and thereupon the Party is outlawed in the Country, this may be reverſed in the ſame Court, becauſe it is the Judgment of the Coroner. 7 H. 6. 28. Br. Error, pl 68. cites S. C.

7. If a Diſtringas and Octo Tales be returnable in B. R. where the Award is made de Octo Tal', and after Judgment is given, this may be reverſed by Writ of Error in the ſame Court, becauſe the Error is in the Proceſs, and made by the Sheriff. 7 H. 6 28. Br. Error, pl. 68 cites S. C. and that it was in the ſame Court in the ſame Term, and that the Error aſſigned was, that he had a Diſtringas Juratores after Iſſue joined, and the Sheriff returned the Diſtringas & octo Tales where no Tales was awarded by the Roll. But Cheyney Ch. J. ſaid, that the ſame Term that Judgment is given, the Record is in the Breaſt of the Juſtices, and not in the Roll; For the Roll the ſame Term is not the Record, but the Remembrance of the Juſtices, and by this Amendment we ſhall not force the Party from any Action, for though the Roll be vicious, the Record is in us Juſtices, therefore we will amend the Roll, and not the Record, for the Record is in our Breaſts all this Term, and I myſelf well remember that Octo Tales was awarded, and I think that where good Judgment is given in C. B which is entered in the Roll erroneouſly, and Writ of Error comes the ſame Term, the Juſtices ought to amend the Roll according to their Remembrance and the Truth, and then to ſign the Record; But contra in another Term; For then the Record is in the Roll, by which he commanded the Clerk to amend the Roll; Quod Nota. —— Br. Amendment, pl. 32. cites 7 H. 6. 29. S C —— Br. Record, pl 20. cites 7 H. 6. 30. S C. —— Fitzh. Error, pl 16. cites S. C. —— If a Judgment is pronounced in B. R. and is not entered, the Judges may alter it the next Term; Per Jones J. which was not denied Poph. 181.

8. If a Partition be made in Chancery, this may be reverſed by Writ of Error in the ſame Court without going to Parliament. 42 Aſſ. 22. adjudged. Br. Error, pl. 131. cites S. C.

9. If after a Judgment a Capias ad Satisfaciendum be awarded in B. R. where no Capias lies in the Original, and thereupon the Party is outlawed, he may have a Writ of Error in another Term and reverſe it in the ſame Court for the Error in Proceis in Promulgatione Utlagariæ, becauſe this was the Judgment of the Coroners, and not of the Court. Dyer 3 El. 195. 37. adjudged.

10. If in an Action upon the Caſe in B. R. an Award is made upon Non ſum Informatus quod querens damna recuperare debeat, ſed quia neſcitur quæ damna &c. a Writ of Inquiry of Damages is awarded, but it is never returned, nor any final Judgment given, and yet

yet afterwards a Writ of Capias ad Satisfaciendum is awarded for the 81. Damages, and upon this an Exigent, and the Party is outlawed, no Writ of Error lies in Banco Regis in another Term for this Error in the Judgment, because they cannot correct their own Error, but the Party has his Remedy in Parliament only. Dyer, 3 El. 195. 37. adjudged.

Br. Error, pl 121 cites S. C.

11. If a Man brings a Writ of Error in B. R. upon a Recovery in an Assise of Darrein Presentment in Banco, and is nonsuit therein, upon which a Writ to the Bishop is awarded for the Recoveror, yet afterwards the Recoveree may have a new Writ of Error in the same Court, though they ought to reverse by Consequence their own Award of the Writ to the Bishop if they reverse the first Judgment. 23 Ass. 8. adjudged.

* Fol 747 Roll Rep. 64, 65. pl. 10. S. C. per tot. Cur.

12. If Judgment be given in an Action in Banco Regis, and there also Execution is awarded, a Writ of Error quod coram vobis residet does not lie in B. R. in Adjudicatione Executionis, because they cannot reverse their (*) own Error. M. 12 Jac. B. R. between *Chefton* Plaintiff, *against Bunn and Serle*, adjudged.

* Cro. E. 106 in pl. cites Gourney's Case. S. C. adjudged accordingly.

† S. C. cited Sty. 218. per Roll Ch. J. as adjudged.

‡ Sty. 216 S. C. argued, but adjurnatur.——Ibid. 218 212. S. C. accordingly.

13. If the Defendant in an Action, being an Infant, appears in B. R. by Attorney, and Judgment is there given against him, a Writ of Error to reverse this Judgment lies in the same Court for this Error. M. 25. 26 El. Rot. 98 B. R. adjudged between * *Saer and Gurney.* Mich. 5 Ja. B. R. between † *Watkin and Griffin* adjudged Rot. 386. Tr. 1650. between ‡ *Dawkes and Peyton* adjudged, and the Judgment reversed accordingly between *Dawkes and Peyton*, where the Case was, that *Peyton* being a Clerk of the Petit Bag of Chancery, declared there by Force of his Privilege, but not by Attorney or Guardian, and yet was within Age, and after he came of full Age, and after they pleaded to Issue, and after it was transmitted in B. R. and there was a Verdict and Judgment given for the Plaintiff, the Action being a Trespass of Battery, and so the Case was more strong than the other Cases, because the Error in this Case was committed in Chancery before the Record came in B. R.

In an Assumpsit against two mean between the Verdict and the Judgment, one of them dies, and notwithstanding Judgment was given, and upon this it was demurred, if Error lies here; For it was said, that this Court cannot reverse their own Judgment, except it be for Error in Process, and not for Error en fait; But it was adjudged that the Writ of Error was well brought here; For the Death &c. was by the Act of God, and a Thing that did not lie in their Cognizance; And it was clearly agreed, that the Death of one of the Parties did abate the Writ, and the Judgment was reversed. Cro. E. 105, 106. pl. 19. Trin. 30 Eliz B. R. Meggot v. Broughton.——2 Le. 54. pl. 77. S. C. but no Resolution.——4 Le. 60. pl. 151. Megot v. Davis. S. C. in totidem Verbis, & adjornatur.

14. If two bring a Writ of Error in B. R. upon a Judgment in an Assise, and pending the Writ one of the Plaintiffs dies and after the Court not knowing of the Death of one of them reverses the Judgment, and after he against whom the Judgment was reversed brings a Writ of Error in the same Court de B. R. and assigns the Death of one of the Plaintiffs in the first Writ of Error, which was the Act of God, not the Error of the Court, it seems the Writ well lies. Vide 2 R. 3. 1. a. b. and 20. where this is reported uncertainly, but Davisor in the End said, that he would shew them Precedents.

Jones upon F. N. B 21. (I) took this *Difference*, true it is that B. R. cannot re-

15. *Error in B. R. in the Process where it is the Default of the Clerks* shall be reversed in the same Court *by a Writ of Error* sued by the Party before the same Justices, but not without suing of a Writ of Error, altho' it be the same Term. F. N. B. 21. (I).

16. *But in C. B.* after Judgment given in the same Term the Justices may reverse their own Judgment upon Error in the Process, or for Default

Default of the Clerks, *without any Writ of Error* ſued forth; but in another Term the Party ought to ſue forth a Writ of Error thereupon returnable into B. R. F. N. B. 21. (I).

17. But of an *Error in Law* which is the Default of the Juſtices, the ſame Court cannot reverſe the Judgment by a Writ of Error, nor with a Writ of Error, but this Error ought to be redreſſed in another Court before other Juſtices by a Writ of Error. F. N. B. 21. (I).

verſe a Judgment altho' it be in the ſame Term without a Writ of Error, but this is *where Error lies in the ſame Cauſe in the ſame Court* as upon Outlawry, *but if no Error lies in this Court for the ſame Cauſe, but in Parliament*, then B. R. may reverſe the Judgment without Writ of Error being the ſame Term. Poph. 181. Trin. 2 Car. B. R.

18. The Court of *B. R. cannot reverſe Errors in Law* before themſelves, tho' it be in the ſame Term; *But* Error *in Fact or in Proceſs* they may; Per Cur. Mo. 186. pl. 332. Mich. 26 Eliz. B. R. Anon.

Yelv. 157. Trin. 7 Jac. B. R. Williams J. ſeemed that B. R. cannot reform Error in Proceſs unleſs in the ſame Term.

19. If A. B. be *indicted of Treaſon or Felony in B. R. or* if he be indicted *before Commiſſioners of Oyer and Terminer, or any other*, and *the Indictment* of Treaſon or Felony *is removed into B. R.* and *by Proceſs out of B. R. he is erroneouſly outlawed*, and ſo returned, a Writ of Error may be brought in B. R. for Reverſal thereof. 3 Inſt. 214.

20. A Writ of Error was brought of a Judgment *in B. R. upon an Indictment in B. R.* and held good, and that there are more Precedents of Writs of Error in ſuch Caſes brought there than in Parliament, and cannot be elſewhere than here, being Matter in Fact, and Non Conſtat till Error aſſigned if it be for Error in Fact or not. Sid. 208. pl. 2. Trin. 16 Car. 2. B. R. The King v. Cornwall and Ux.

(I. 2) In Exchequer Chamber.

1. A Writ of Error is *not maintainable* in the Exchequer Chamber by the Statute of 27 Eliz. upon a Judgment in B. R. *upon a Reſcous*, becauſe it is not within the Words of the Statute, altho' it be a Treſpaſs; but *it is more than a Treſpaſs*, and the Party that brings Reſcous could not have had Treſpaſs becauſe the Cattle reſcued were the Defendant's own Cattle; Per all the Juſtices clearly. Mo. 694. pl. 963. Trin. 37 Eliz. Ody v. Yate.

Cro J. 171. in pl. 12. Mann the Secondary ſhewed to the Court a Precedent of ſuch Writ of Error brought but reſolved not allowable, it not being an Action mentioned in the ſaid Statute.

2. By the Statute 27 Eliz. the Exchequer Chamber hath Power to examine Errors of Judgments in B. R. and after ſuch Judgments are affirmed or reverſed, then to ſend back *the Record* into B. R. ſo that by the Words of this Statute, it is *not to be ſent back unleſs the Judgment be affirmed or reverſed*; but yet, by the Equity of that Statute, if the *Plaintiff* in the Writ of Error is *nonſuit, or if the Suit is diſcontinued*, the Record ſhall be ſent back into B. R. and the Court of Exchequer ſhall give Coſts and Damages to the Plaintiff in the original Action for his Delay and Vexation upon the Statute 3 H. 7. cap. 10. but if the Plaintiff in Error was Plaintiff in the original Action, then no Coſts ſhall be given. 2 And. 122. pl. 68. 40 Eliz. Anon.

3. Error in the Exchequer Chamber, upon a Judgment in B. R. for that *one of the Parties died before Judgment*; it was objected, they had

no Authority to examine ſuch Errors; but it was held by all the Judges and Barons that they had Authority, tho' they had none to bail the Defendant, becauſe their Power was only to examine Errors. Cro. Eliz. 731. pl. 70. Mich. 41 & 42 Eliz. in Cam. Scacc. Price's Caſe.

It was afterwards moved in B. R. that they had proceeded in the Exchequer Chamber without Warrant of the Statute to try Error in Fait; For the Statute does impower them only to examine Errors in the Record; and of that Opinion were all the Juſtices; wherefore for this Cauſe they would not re-grant Reſtitution upon this Judgment to the Defendant, who was put out by the firſt Judgment. Ibid.——Cro. C. 514. at the End of pl. 11. cites S. C. that Error in the Exchequer Chamber in Fait was aſſigned and tried by Niſi Prius and found, and for that Cauſe reverſed.

4. Error in the Exchequer Chamber of a *Judgment in B. R. in an Ejectione Firmæ*, the *Error aſſigned was, that the Plaintiff was an Infant and ſued by Attorney, where he could not make Attorney*, but ought to have ſued by Guardian; It was reſolved by all, except Anderſon, that altho' this was an Error in Fact, yet it might be well aſſigned in that Court of Exchequer Chamber for Error, altho' it was urged, that their Authority given them by the Statute, was not to examine Matters in Fact, but only Errors in Law, which appeared in the Record, and to reverſe or affirm the Judgment; whereupon the Defendant ſaid, that the Plaintiff at the Time of his Action brought was of full Age; upon which, Iſſue being joined, the Court of Exchequer Chamber awarded Niſi Prius. Cro. J. 5. pl. 5. Paſch. 1 Jac. Rew v. Long.

5. Error was brought by the Bail in the Exchequer Chamber upon the Statute of 27 Eliz. *of a Judgment in a Sci. Fa. againſt him*; It was the Opinion of all the Juſtices, that it was not an Action mentioned in the Statute, whereof a Writ of Error did lie in that Court, nor is he Party that can have Error of the firſt Judgment. Cro. J. 171. pl. 12. Trin. 5 Jac. in Cam. Scacc. Vaughan v. Williams.

Per Cur no Writ of Error lies in the Exchequer Chamber, becauſe *Sci. Fac. is a Judicial Writ*, and Judgment is given therein, and it is *not expreſſey named in the Statute* 27 *Eliz.* which gives Error in the Exchequer Chamber. Yelv. 157. Trin. 7 Jac. B. R. Prowſe v. Turner.——In Sci. Fac. againſt Bail, or *on a Recognizance*, a Writ of Error was never allowed in the Exchequer Chamber; Agreed by all. 2 Keb. 833. pl. 58. Mich. 23 Car. 2. B. R.

6. In *Sci. Fac. againſt the Bail* who upon the ſecond Sci. Fac. was condemned for not having the Body of the Principal, and *Judgment was given that the Plaintiff recover ſuper Recuperationem prædictam*, where it ſhould be ſuper *Recognitionem prædictam*; Per Cur. no Writ of Error lies into the Exchequer Chamber; nor does it lie into B. R. as upon Error in Proceſs; For *this is no Error in the Proceſs*; For that is where the Proceſs is miſtaken, viz. one Proceſs for another, which it is not here; but *the Error is only in Point of Judgment*, viz. *Recuperationem inſtead of Recognitionem*, which is clearly another Matter, and *no Remedy*, as it ſeems, *but in Parliament*. Yelv. 157. Trin. 7 Jac. B. R. Prowſe v. Turner.

7. *Judgment* in Debt was given *in C. B.* which *was affirmed* upon a Writ of Error brought *in B. R.* Afterwards the Defendant died, and then a *Scire Facias was brought againſt the Son and the Ter-tenants, and Judgment againſt them*; and upon a Motion for a Writ of Error in the Exchequer Chamber, upon the Judgment in the Scire Facias, it was denied, becauſe the Record came into B. R. by Writ of Error, and not originally by Bill, as by the Statute 27 Eliz. cap. 8. is required. Roll Rep. 264. pl. 35. Mich. 13 Jac. B. R. Harvey v. Williams.

8. Writ of Error does not lie in the Exchequer Chamber on a *Judgment* given *in a Writ of Raviſhment of Ward*, by the Statute 27 Eliz. Sic dictum fuit, and not denied. 2 Roll Rep. 134. Mich. 17 Jac. B. R. in Caſe of Barnefield v. Hutchins.

9. It was agreed that Error upon a *Judgment* in B. R. *in Replevin* does *not lie* in the Exchequer Chamber, *but in Parliament* only, becauſe Replevin

Replevin is out of the Statute. 2 Roll Rep. 434. Trin. 21 Jac. B. R. Farnell's Caſe.

10. No Writ of Error lies in the Exchequer Chamber by Force of the Statute 27 Eliz. on a *Judgment in B. R. in an Action De Scandalis*, for it is not included within the Words of the Statute, for though the Statute ſays, ſuch Writ ſhall lie upon Judgments in Actions of the Caſe, yet it does not extend to that Action, altho' it be an Action on the Caſe, becauſe it is an Action of a far higher Degree, being founded ſpecially upon a Statute. 2 Ld. Raym. Rep. 954. Trin. 2 Ann. in Caſe of Aſhby v. White, by Holt Ch. J. cites Cro. C. 142. pl. 19. [Mich. 4 Car. B. R. Say (Ld. Viſcount) v. Stephens.]

Cro. C. 142. S. C. held accordingly by three Juſtices, but Crooke J. doubted. — Jo. 194. pl. 5. S. C. held accordingly. —— Lev 82. S. C. reſolved. —— Palm. 565. S. C. but S. P. does not appear. —— S. C. cited by Jones J. Jo. 423. —— S. C. cited and S. P. reſolved accordingly per tot. Curiam. Sid. 143. pl. 20. Paſch. 15 Car. 2. B. R. Stamford (Earl) v. Nedham. —— S. C. cited Sid. 240. in pl. 13. Hill. 16 & 17 Car. 2. B. R. —— S. P. cited as adjudged accordingly. 5 Mod. 230.

11. Error of a *Judgment in B. R.* lies in B. R. *in Criminal Caſes* upon Judgments in the ſame Court, as well of Errors of Law as Errors of Fact; *but not in Civil Caſes, unleſs of Errors in Fact triable by Jury.* Lev. 149. Mich. 16 Car. 2. B. R. Cornhill's Caſe.

Sid. 208. pl. 2. The King v. Cornwall, S. C & S. P. and it cannot be brought elſewhere than here for Matter in Fact, & non conſtat till Error aſſigned whether it be for Matter in Fact or not.

12. In *Debt upon the Statute of Uſury*, the Plaintiff had Judgment in B. R. and the Defendant brought a Writ of Error in the Exchequer Chamber. It was moved that it ſhould not be allowed, becauſe it is not within the Statute 27 Eliz. which gives a Writ of Error there; for no Action which *concerns the King* is within it, and therefore an Action upon the Statute of Scandalum Magnatum is not within the Statute, and cited Ld. Say's Caſe. But on the other Side it was ſaid that it hath been adjudged to lie *on a Judgment in an Action on the Statute for Tithes*; Ideo Quære. Sid. 240. pl. 13. Hill. 16 & 17 Car. 2. B. R. Whitton v. Preſton.

Keb. 828. pl. 5. S. C. per Cur the Writ of Error muſt be ſuperſeded, and the King being here to have a Part, he may be ſaid a Party; but Hyde and Twiſden abſentibus, adjornatur. —— 5 Mod. 230. Arg. cites S. C. that *the Writ of Error was diſallowed.*

13. *Mandamus to reſtore* Dr. Patrick *to the Maſterſhip of Queen's College in Cambridge*, to which there was a long Return of Charters and local Statutes; and upon the arguing it ſeveral Times the Court was divided, Whether it might be adjourned into the Exchequer Chamber, for Difficulty it being amongſt the Pleas of the Crown as well as civil Pleas might, was the Doubt, but *the Court ſeemed* that it might, and *that Pleas of the Crown, as well as other Pleas, might be adjourned thither*, and that 4 Inſt. 68, 69. ſeems to warrant it, and that it extends to all Pleas, except to thoſe of the Eccleſiaſtical Courts. Sid. 346. pl. 12. Mich. 19 Car. 2. B. R. The King v. Dr. Patrick.

Raym. 101. to 113. Hill. 16 & 17 Car. 2. Patrick's Caſe, S. C. argued, but Curia adviſare vult. But in the Marg. it is ſaid that this Caſe was ſolemnly argued by four Judges, and that Norton [Moreton] and Keeling were for the Plaintiff, and Twiſden and Windham contra. —— Lev. 65. Queen's College Caſe alias Dr. Patrick's Caſe, the Court being ſo divided it was conſidered if it being a Cauſe of the Crown Side, it might be adjourned into the Exchequer Chamber, and it ſeemed to ſome that it might, but it was not.

14. In *Treſpaſs upon the Statute* 8 *H.* 6. the Plaintiff had Judgment. It was moved whether a Writ of Error would lie of this in the Exchequer Chamber; for though a Treſpaſs is one of the ſeven Caſes mentioned in the Statute which gives this Writ of Error, yet it may be intended common Treſpaſſes only, and not thoſe which are founded on a Statute; Curia adviſare vult. Vent. 34. Trin. 21 Car. 2. B. R. Skirr v. Skies.

15. Writ

But where Judgment was given in B R. in Debt on the Stat. 1 Eliz. cap 3. and 23 Eliz. cap. 1. for *absenting from Church for eleven Months*, resolved that Error well lies in the Exchequer, because *the King is not properly a Party*, though he is to have Part of the Penalty. Raym. 275. Pasch. 31 Car. 2. in Scacc. Scot v. Knapton.

15. Writ of Error in the Exchequer Chamber doth not lie *to reverse a Judgment given in an Action Qui tam* &c. *because the King is Party.* Vent. 49. Mich. 21 Car. 2. B. R. Anon.

16. *Scire Facias issued against the Bail*, and *upon two Nichils returned, there was a Judgment against them.* Resolv'd, that no Writ of Error can be brought into the Exchequer Chamber upon that Judgment, but in Parliament only; and that after such a Return of two Nichils, it cannot be assigned for Error, that there was no Capias against the Principal; but in that Case *the Bail is relievable only by an Audita Querela.* Vent. 38. Trin. 21 Car. 2. B. R. Wingate v. Stanton.

S. P. in a Nota, Sid. 424. Mich. 21 Car. 2. B. R. at the End of the Case of Redman v. Edolph.

17. Where an *Action commences by original Writ out of Chancery* a Writ of *Error does not lie* in the Exchequer Chamber by the Stat. 27 Eliz. cap. 8. *but only in Parliament.* Saund. 346. Mich 21 Car. 2. at the End of the Case of Mellor v. Spateman.

2 Keb. 849, 850. pl. 99. S. C. held accordingly; For by the Judgment which recites the Affirmance in the Exchequer Chamber, and Execution here all the rest is determined, and the Supersedeas was set aside and Execution granted ——— Per Twisden J. clearly no Writ of Error lies in the Exchequer Chamber on Judgment in Sci. Fa. &c. 2 Keb. 842 pl. 79. Mich. 23 Car. 2. B. R. in Case of Jones v. Anderson.

18. *Judgment in B. R. in an Action on the Case, and a Scire Facias quare Executionem* &c. and there was a *Judgment upon that*; upon which a Writ of *Error was brought in the Exchequer Chamber*, and the *Judgment in the Sci. Fa. was affirmed*; then the *Defendant died*, and a *Sci. Fa. (reciting the Judgment and Affirmance of it in the Exchequer Chamber) was brought against an Administrator, and Judgment had upon that*, and the *Administrator brought a Writ of Error upon the Judgment in the last Sci. Fa.* The Court held that it did not lie in the Exchequer Chamber, because it was brought upon a Judgment affirmed in the Exchequer Chamber, which is therefore privileg'd from any other Writ of Error to be brought upon it there, so that *this Writ can be brought only upon the Judgment given in the Sci. Fa.* and therefore lies not into the Exchequer Chamber. Vent. 168, 169. Mich. 23 Car. 2. B. R. Skinner v. Webb.

19. Note, it was said by the Court, That if there be a *Conviction of forcible Entry upon the View of the Justices of the Peace*, no Wsit of Error lies upon it; but it may be examined upon a Certiorari. Vent. 171. Mich. 23 Car. 2. B. R. Anon.

2 Lev. 38. Hopkins and Prior v. Weigglesworth, S. C. the Error assigned was the Death of one of the Plaintiffs, and Judgment was affirmed; upon which the Plaintiff brought Writ of Error Coram vobis resident' in B R. and assigned the same Error and entered it on the same Roll; and now Hale Ch. J. said this Writ does not lie here; for this ought to be brought upon and recite all the Proceedings in the Exchequer Chamber.

20. Error was brought of a Judgment in this Court into the Exchequer Chamber, and *Error in Fact* was then assigned; and the Court being there of Opinion, That Error in Fact would not be assigned there, they affirmed the Judgment; upon which the Record with the Affirmation was remitted hither, and a Writ of Error was brought here Coram vobis resident' (as is usual for Error in Fact.) Vent. 207. Pasch. 24 Car. 2. B. R. Prior v. . . . . .

21. No Writ of Error lies in the Exchequer Chamber *on a Sci. Fa. against Bail.* 12 Mod. 112. Hill. 8 W. 3. Coniers v. Manucaptors of Rawlins.

22. *Judgment*

22. *Judgment in Caſe* upon a Bill of Exchange *was affirmed upon a* Writ of *Error in Cam. Scacc. and remitted into B. R.* and then a *Sci. Fa. iſſued, and Judgment thereupon was, that the Plaintiff ſhould have Execution.* Then the *Defendant brought Error in Cam. Scacc. tam in Reddi-tione Judicii quam in Adjudicatione Executionis*, and the Writ was allowed, *yet the Plaintiff was taken in Execution*, whereof Complaint was made to the Court, but without Relief; For per tot. Cur. no Writ of Error lies in Cam. Scacc. in ſuch Caſe, and therefore the Execution is well taken out. Comb. 393. Mich. 8 W. 3. B. R. Hartop v. Holt.

12 Mod. 105. S. C. ruled accordingly. —— 5 Mod. 229. S. C. adjudged that the Writ of Error does not lie and is no Superſedeas. —— 1 Salk. 263. pl. 4. S. C. adjudged accordingly. —— Ld. Raym. Rep. 97 S. C. adjudged accordingly, that the Intent of the Statute of 27 Eliz. was only to relieve the Party grieved upon the Merits of the Cauſe as it was at the Time of the firſt Judgment, and not upon any Matter ſubſequent which ariſes afterwards, when therefore the firſt Judgment was affirmed the Merits of the Cauſe were allowed, and the Exchequer Chamber, who ought only to affirm or reverſe the firſt Judgment, have executed their full Power. It is true that if a Sci. Fa. be brought to revive a Dormant Judgment in B. R. Error will lie in the Exchequer Chamber tam quam becauſe it is only in Execution of the firſt Judgment, and is Quaſi an Original Action; but if a Judgment in B. R. be once affirmed in the Exchequer Chamber, and then a Sci. Fa. is brought upon it, it is privileged from any other Writ of Error, otherwiſe the Law would be infinite and without End. And the Sci. Fa. is not in Nature of Debt at Common Law; for the one is brought to obtain another Judgment, and the other to obtain Execution.

(K) *What Perſons* ſhall have a Writ of Error.

[And in what Caſes *jointly*.]

1. THE Writ of Error ſhall be brought by him who ſhould have the Thing for which the Judgment is erroneouſly given, if the Judgment had not been given. Dyer 1 Ma. * 9. 5.

* This ſhould be D. 90. a. pl. 5. Mich. 1 Mar. in Caſe of Reynolds and Verney & al' v. Dignam & al'.

2. As the Iſſue Female ſhall have it if intailed to her. 3 H. 4. Dyer 1 Ma. * 9. 5.

* D. 90. a. pl. 5. cites 3 H. 4. S. P. and Hill. 10 E. 3. —— Br. Error, pl. 35. cites 3 H. 4. 16. S. P. and alſo 9 H. 7. 24. Contra and that the Heir at Common Law ſhall have the Action, and that after the Judgment reverſed, the Heir in Tail may enter. —— S. P. per Cur. Le. 261. pl. 346. 18 Eliz. B. R.

3. None ſhall have a Writ of Error unleſs he be Party or Privy to the Judgment. 22 E. 4. 31.

Godb. 377. Arg. cites S. C. and 9 E. 4. 13. 9 H. 46. b. —— Privies in Record may join in a Writ of Error; Per Roll Ch. J. Sty. 190. Hill. 1649. —— There is a difference if one be Party to the Writ, although not Party to the Judgment; A Quare Impedit was brought by the King againſt the Patron and the Incumbent, and Judgment was had againſt the Patron only, and the Incumbent Parſon brought a Writ of Error; but if he had not been Party to the Writ, he could not have maintained Error. Arg. Godb. 378. pl. 465 Paſch. 3 Car. B. R. in Brooker's Caſe cites Error 72. —— S. had Judgment againſt W. and afterwards acknowledg'd a Statute to B. then S. ſued Execution, and B. brought Error on the Judgment, but adjudg'd that it would not lie, 1ſt. becauſe he was a Stranger, and ſecondly, Becauſe he came in under and after the Title of Error. Arg Godb. 378. cites 43 Eliz. C. B. Sherrington v. Worſeley.

4. But all that were Parties to the Fine, though they ſhall have nothing if reverſed, yet ſhall join with him that ſhall have the Thing for Conformity. Dyer 1 Ma. 89. 2.

D. 89. b. pl. 2 Raynolds and Verney v. Dignam.

* Br. Error, pl. 187 cites S. C. — Br Error, pl. 39. cites S. C. ——

5. Writ of Error may be brought by him that is made Party by the Law, though he was not originally Party; as every of the Vouchees shall have a Writ of Error. * 22 E. 4. 31. 8 H. 4. 3. b.

Fitzh. Error, pl. 61. cites S. C.

Br. Error, pl. 39. cites S. C. ——

6. The Tenant shall have a Writ of Error also of an Error between him and the Demandant. 8 H. 4. 3.

Fitzh. Error, pl 61. cites S. C —— See (R) pl. 1. and the Notes there.

Fitzh. Error, pl 61 cites S. C. ——

7. But the Tenant shall not have a Writ of Error of an Error between the Demandant and the Vouchee. 22 E. 4. 32. Contra 8 H. 4. 5.

Jenk. 69 pl. 31. S. P. accordingly, cites 8 H. 4. 4 and 9 H. 4. 1. —— See (R) pl. 2.

Br. Error, pl. 187 cites 22 E. 4. 30, 31. S. P.

8. [But] The Tenant shall have a Writ of Error of an erroneous Judgment given againſt the Tenant by Reſceit. 22 E. 4. 32.

—— In a Quod ei deforceat in Wales, in Nature of a Writ of Right Judgment was given upon the Default of the Tenant by Reſceipt, and this was aſſign'd for Error, for that the Judgment ought always to be againſt the Tenant to the Action; and this was held a manifeſt Error, and Judgment was reverſed. Cro. C. 262, 263. pl. 9. Trin 8 Car. B. R. Kiffin v. Vaughan.

9. But upon Default of the Tenant, if the Demandant ſays, that the Reverſion is to J. and prays that he be reſceived, there the Tenant ſhall not have a Writ of Error. Quære. 22 E. 4. 32.

Br. Error, 187. cites S. C. but it is held by ſome the Garniſhee

10. If a Judgment be given againſt B. and the Money of C. is attached by Force of a foreign Attachment in London, C. ſhall not have a Writ of Error, becauſe he comes in by Garniſhment by the Cuſtom, and is not Party nor Privy. 22 E. 4. 31.

upon foreign Attachment &c. may have a Writ of Error, and that the *Plaintiff in Attachment of Debt* in another's Hands in London by the Cuſtom may; For the Judgment is not only againſt the Garniſhee but againſt the Defendant alſo, that the other ſhall be diſcharged againſt him which is Extinguiſhment of the Debt of the Defendant againſt the Garniſhee.

* Fol. 748.

11. If he in the Remainder be made privy to the Record by Aid-Praier * he ſhall have a Writ of Error during the Life of the Leſſee. Co. 3. Marqueſs of Wincheſter. 4.

* Fitzh. Error, pl. 61. cites S. C. ——

12. So if he be reſceiv'd he ſhall have a Writ of Error. Co. 3. Marqueſs of Wincheſter's Caſe. 4. * 8 H. 4. 5.

Br. Error pl. 39. cites S. C

13. So if he in the Reverſion or Remainder be made Privy by Voucher. Co. 3. 4

Same Caſes cited 3 Rep. 4. a.

14. So if a Recovery be againſt Leſſee for Life, he in the Reverſion ſhall have a Writ of Error after his Death. 18 E. 3. 25 b. 17 Aſſ. 24.

15. So if the Feme be reſceived by the Default of the Baron, and loſes the Land by Judgment, the Baron and Feme ſhall have a Writ of Error thereupon. 49 E. 3. 21. b.

* Cro. E. 129. pl 1. Charnock v. Worſley. S. C adjudg'd. —— Le. 114 pl. 157. S C. adjudged. —— F. N. B. (D) S. P. —— Br. Error, pl. 28 cites S. C. But *Ceſſet Executio during the Life of the Baron*; For he has Authority to give it during his Life. —— Fitzh. Error, pl. 67. cites Hill. 50 E. 3. 5. S C.

16. If the Baron and Feme levies a Fine, they may by Error reverſe the Fine for Nonage of the Feme during the Life of the Baron. Co. 2. Beckwith 57. b. * Worſly. 77. b. Contra 50 E. 3. 6.

17. If

17. If the Conuſor of a Statute aliens the Land, and Execution is ſued againſt the Alienee, he may have a Writ of Error upon the Execution. *18 E. 3. 25. adjudged. Quære, for he is not privy thereto; for the Execution goes of the Land of the Conuſor. Dyer. 4 H. 8 1. 5. †17 Aſſ. 24. the ſame Caſe, becauſe he is ouſted by the Execution.

* Fitzh. Error, pl. 71. cites S. C. —— S. C. cited D. 1. b. pl. 5. — † Fitzh. Error, pl. 71. cites S. C. —— Godb. 377. Arg. cites S. C. and 18 E. 3. 25. and ſays that the Feoffee is privy to that which charges him, the Land being extended in his Hands, and if the Feoffee in ſuch Caſe ſhould not have Error, the Law ſhould give him no manner of Remedy; For the Conuſor himſelf cannot have Error, becauſe the Lands are not extended in his Hands.

18. If an Action be brought againſt A. as a Feme ſole; where ſhe is a Feme Covert, and ſhe pleads to Iſſue as a Feme ſole, and after a Judgment is given againſt her, and ſhe is took in Execution, ſhe and her Husband may bring a Writ of Error; for otherwiſe the Husband ſhall be prejudiced in the Conſortſhip of his Wife, and of her Care concerning his Buſineſs and Family, and he has no other Means to help himſelf; But in the Caſe of a Fine the Husband may enter and avoid it. Tr. 1651. between * *Hayward and Williams* adjudged in a Writ of Error. Intratur Hill. 1649. Rot. 824. †18 E 4. 4. per Curiam. M. 15 Car. B. R. per Curiam, between *Edwards and Simpſon*, in a Writ of Error upon a Judgment in the Marſhalſea.

* Sty. 254. S. C. adjornatur. —— Ibid. 280. S. C. and after it was moved ſeveral Times, and the Court adviſed, they at laſt ſaid, that a Stranger to a Record may not bring a Writ of Error to reverſe it, but that is only where he may have another Remedy to avoid the Prejudice he may receive by it; But in this Caſe the Baron has no other Remedy; For his Wife is taken in Execution, and by this Means he ſhall loſe her Society; and therefore reverſetur, niſi ante &c.

† Br. Error, pl. 173. cites S. C. but that is of an Action brought againſt a Feme Covert who appeared, becauſe ſhe did not know whether her Baron (who was beyond Sea) was dead or not, and ſhe was condemned upon Plea, but the Baron came back, and they brought a Writ of Error, and all the Juſtices held that it well lay; And if ſhe is outlawed they ſhall join in Error, otherwiſe it cannot be reverſed. —— Br. Joinder en Action, pl 88. cites S. C. as to Outlawry; for Feme Covert cannot ſue without her Baron. —— S. C. cited 2 Roll Rep. 53. Mich. 16 Jac. B. R. in the Caſe of Haydon v Miller, but in that Caſe, becauſe it did not ſufficiently appear to the Court that ſhe was Covert at the Time of the original Proceſs ſued out, and which ought to be expreſsly averred in the Aſſignment of the Error the firſt Judgment was affirmed. —— Same Caſes cited 2 Ld. Raym. Rep. 1526. 1527. Trin. 2 Geo. 2. in Caſe of King v. Jones, but the Court took a Difference between the Defendant's being a Feme Covert at the Time of ſuing the Writ, and her being then and after a Feme ſole, and cited the Caſe of Haydon v. Miller, and Judgment in the principal Caſe affirmed accordingly.

19. So in the ſaid Caſe, if the Action be brought againſt A. and others, they all with the Husband may join in a Writ of Error in the ſaid Caſe of *Hayward and Williams*; Adjudged per Curiam, and the Judgment reverſed accordingly.

Sty 254. & 280 S. C. but S. P. does not appear.

20. If pending a Real Action the Tenant aliens in Fee, and after a Recovery is had againſt him, he himſelf may have a Writ of Error, though he hath nothing in the Land, becauſe he is privy to the Judgment after his Alienation and Tenant in Law.

S. P. for the Feoffee has no other Remedy in this Caſe, becauſe he cannot have Writ of Right, nor other Remedy; Quod Nota. Br. Error, pl 111. cites 12 Aſſ. 41. —— Ibid. pl 118. S. P. cites 20 Aſſ. 2. —— In ſuch Caſe the Feoffor ſhall have Error, and when he is reſtored the Feoffee ſhall enter upon him; Per Richardſon J. Palm. 247. Mich. 19 Jac. B. R. cites 6 H 8 Brooks's Caſe, and 12 Aſſ. 4. 20 Aſſ. 2. 21 E. 3. Error 41. —— The Feoffor in ſuch Caſe ſhall have Error, and yet there is no Right nor Privity in him. Ibid. 254. per Doderidge J. cites 12 Aſſ. 41. 17 Aſſ. 24. 20 Aſſ. 2. 21 E. 3 54. 38 E 3. 10. and 11. 1 Rep. 111. [Albany's Caſe.] —— See (A. c) pl. 8. S. P.

21. So if he had alienated in Fee pending the Writ, and re-purchaſed it for Life, and after Judgment had paſſed againſt him, he ſhould have had a Writ of Error.

See (A. a) pl. 6. S. P.

22. So

22. So his Heir after his Death ſhall have a Writ of Error, tho' he ſhall have nothing in the Land, for the Privacy which he has to the Judgment. Contra 50 Aſſ. 3.

Br. Error, pl. 112 cites 15 Aſſ. 8. S. P. obiter. ——— Ibid. pl. 132. cites 50 Aſſ. 3. and ſays that ſo it ſeems to him. ——— Jenk. 161. in pl. 6. S P.

23. But if the Tenant aliens, pending the Writ, and after Judgment paſſes againſt him, the Alienee cannot have a Writ of Error upon this Judgment for want of Privity.

Br Error, pl. 132. cites S. C.

24. So if the Tenant aliens, pending the Writ, and re-purchaſes it for Life, and after Judgment paſſes againſt him, and after he dies, it ſeems he in Reverſion ſhall have a Writ; For though he had nothing in the Land at the Time of the Writ purchaſed, yet he had a Reverſion at the Time of the Judgment, and ſo privy thereto. Dubitatur 50 Aſſ. 3.

‡ Jo. 396. pl. 4. S. C. the Bail cannot join in a Writ of Error to reverſe the Judgment * Fol 749. againſt the Principal, and another Judgment againſt the Bail; But the Bail ſhall have Error alone to reverſe the Judgment

25. In an Action againſt J. S. if certain Perſons become Bail for him, and after Judgment is given againſt J. S. the Bail cannot have a Writ of Error upon the firſt Judgment, if Judgment be not alſo given againſt the Bail in Scire Facias. H. 11 Ja. B. R. per Curiam. Hill. 11 Car. B. R. between *Hardy and Brown*, per Curiam, adjudged in a Writ of Error upon a Judgment in Ripon. Intratur Tr. 10 Car. Rot. 979. But the Judgment upon the Scire Facias (*) reverſed upon this Writ for Error in the Judgment upon the Scire Facias. But Mich. 13 Car. B. R. between ‡ *South and Griffith*, ſuch Writ brought by the Bail upon the firſt Judgment againſt the Principal, and upon a Judgment in a Scire Facias againſt the Bail was abated, and he put to a new Writ. Intratur, Hill. 12 Car. Rot. 559. Mich. 15 Car. B. R. between || *Williams and Worral*, ſuch Writ abated, being brought upon ſuch Judgments in the Marſhalſea. Intratur Tr. 15 Car. Rot. 1200. Mich. 24 Car. B. R. between *Jeffrys and Scot*, adjudged the Writ ſhall abate. Intratur, M. 23 Car. Rot. 218.

againſt them, and the Principal ſhall have another Writ to reverſe the firſt Judgment, and a Writ brought by the Bail to reverſe the firſt and ſecond Judgment was held ill. ——— Cro. C. 481. pl. 4 S. C. held accordingly by Berkley and Crooke, contra Jones (abſente Brampſton) that the Writ ſhould abate in toto, becauſe it was grounded on the firſt Judgment, and alſo upon the Judgment in the Scire Facias, and ſo coupling them together all is void; But if the Bail in their Writ of Error had recited the firſt Judgment, (as of Neceſſity they muſt mention it) and the ſecond Judgment in the Scire Facias, and alleged Error in that Judgment, and in the Execution thereof &c it had been well enough.

It has been a Queſtion heretofore, whether a Writ of Error brought upon the principal Judgment, and alſo upon the Judgment given againſt the Bail together be good in Part, and ill for other Part; But of later Times it has been ruled that it ought to abate for all; Therefore let the Party ſhew Cauſe why the Writ ſhall not be abated here. Sty. 174. Mich. 1649 Shaler v. Bigg. ——— S. P. by Glyn Ch. J. Sty. 471. Mich. 1655. in Caſe of Buſfield v. Norden, but the principal Judgment ought to be reverſed by the Principal, and not by the Bail, and therefore the Writ of Error is not well brought by the Bail, therefore let it abate.

The Bail cannot have a Writ of Error of the principal Judgment, which was agreed by the Court, but then the Queſtion was, the Record being removed, Whether he may have a Writ of Error, Quod coram vobis reſidet? And thereof the Court doubted and would adviſe. Cro. C. 561. pl. 5. Mich 15 Car. B. R. Anon.

26. In a Writ of Annuity againſt an Heir, upon an Annuity granted by his Anceſtor in Fee, upon Non eſt Factum pleaded, if a Verdict be found for the Plaintiff, and thereupon Judgment is given that the Plaintiff ſhall recover his Coſts, Damages and Arrears of the Lands deſcended from the ſame Anceſtor, and thereupon a Writ of Execution is awarded to levy it of the Lands deſcended, but no Return thereof appears upon the Record, and after the Heir dies inteſtate, his Adminiſtrator cannot have a Writ of Error upon this Judgment, maſmuch

much as he loſes nothing thereby, for if it be levied it is of the Lands deſcended, the which, nor the Profits thereof, he cannot have, nor be reſtored to it if he reverſed the Judgment. Hill. 11 Car. B. R. between *Franke and Stukely*, per Curiam, in a Writ of Error upon a Judgment in Banco. Intratur Hill. 10 Car. Rot. 99c.

27. If a Judgment be given againſt the Principal, and after a Judgment againſt the Bail in a Scire Facias againſt them, the Principal ſhall not have a Writ of Error upon the firſt Judgment and the Judgment againſt the Bail. Mich. 13 Car. B. R. between *Griffith and South.* Dubitatur, Hill. 15 Car. in Camera Scaccarii, in a Writ of Error between *Coke and* upon a Judgment in Banco Regis ſuch Writ of Error was abated per Curiam. Cro. C. 481. pl. 4. S. C. but S. P. does not appear. —— Jo. 396. pl 4. S. C. but S. P. does not appear.

—— If the Sureties be amerced where they ought not to be amerced by the Law, yet the Defendant ſhall not have a Writ of Error thereupon, for he is not the Party grieved by the Amercement; and upon that Reaſon it is, if in a Scire Facias againſt the Bail erroneous Judgment be given, the Defendant in the Action ſhall not have a Writ of Error; Arg. 2 Le 4. pl. 4. Mich. 31 & 32 Eliz B R. in Savacre's Caſe. —— Keb. 256. pl 30. Paſch. 14 Car. 2. B. R. Spencer v. Monke, S. P. held accordingly.

28. Where one *recovers in Aſſiſe againſt the Tenant*, and the *Diſſeiſors named* in the Aſſiſe *were acquitted* of the Diſſeiſin, yet the *Tenants who loſt, and thoſe Diſſeiſors, may join* in Writ of Error. Thel. Dig. 32. lib. 2. cap. 13. S. 1. cites Hill. 2 E. 3. 31. and that ſo it is agreed in Falſe Judgment Paſch. 3 E. 3. 80. and Trin. 19 E. 3. Joinder en Action 30. and 19 Aſſ. 7. if the Diſſeiſors are convicted of the Diſſeiſin; And ſays ſee ſuch like Matter Paſch. 3 H. 4. 16.

29. If the *Tenant in Præcipe quod reddat aliens pending the Writ*, and the *Demandant recovers* by Judgment, the *Tenant may well bring Writ of Error.* Br. Entre Cong pl. 51. cites 12 Aſſ. 41.

30. It was adjudged, where *two Brothers Parceners in Gavelkind* were *forejudged in Writ of Meſne*, that *the Survivor* of them, *and the Sons of the other*, ſhould be received to join in Writ of Error, inaſmuch as one of the Brothers was dead before the Judgment. Thel. Dig. 32. lib. 2. cap. 13. S. 3. cites 19 Aſſ. 8.

31. A *Stranger to a Recognizance of Statute Merchant* may ſue Writ of Error to reverſe Execution awarded of this Recognizance, *if he be Tenant of the Land at the Time of the Execution ſued.* Thel. Dig. 33. lib. 2. cap 42. S. 1. cites Trin. 18 E. 3. 25. 17 Aſſ. 24.

32. And it was held, where Writ of *Error is brought by two Tenants*, and the *one dies*, the *Survivor and the Heir of the other ſhall have* a Scire Facias in Common ad audiendum Errores. Thel. Dig. 32. lib. 2. cap. 13 S. 2. cites 19 E. 3. Joinder en Action 30. and 19 Aſſ. 7.

33. 9 *R.* 2. *cap.* 3. *S.* 1. *If Tenant for Life, in Dower, by the Curteſy, or in Tail after Poſſibility, be impleaded, and loſe by Verdict or otherwiſe, he* in Reverſion *ſhall have an Attaint or Writ of Error upon a falſe Verdict found, or an erroneous Judgment given againſt the* Particular Tenant. The King ſhall take Advantage of this Statute notwithſtanding that he is not named in it. Pl. C. 343. b. Trin 10 Eliz. Brett v. Rigden. —— It was reſolved, that tho' the Statute ſpeaks only of Reverſions, yet it ſhall be taken to *extend to Remainders.* 3 Rep. 4. a. Trin 25 Eliz. The Marq of Wincheſter's Caſe.

It extends *not to* a *Reverſion or Remainder* expectant *upon an Eſtate Tail*, for by enumerating the four particular Eſtates for Life, it appears to be the Intention of the Legiſlature to exclude Eſtates expectant upon an Eſtate Tail; and it would be unreaſonable to give a Writ of Error to ſuch Reverſioner or Remainder-man during the Life of the Tenant whoſe Eſtate is an Eſtate of Inheritance, and by Poſſibility may continue for ever. Reſolved. 3 Rep 4 a b. Marq. of Wincheſter's Caſe. —— 3 Rep. 61. a. Mich. 37 & 38 Eliz. C. B. Lincoln College Caſe. —— 10 Rep. 44. b. in Jennings's Caſe.

It may be collected from hence, that the Parliament adjudged such Recovery by Covin

34. *And if the Oath be found falſe, or the Judgment erroneous, and the Tenants ſtill in Life, he ſhall be reſtored to his Poſſeſſion and* Iſſues, *and the Reverſioner to the* Arrearages; *But if he be dead, or be found of* Covin *with the Demandant, the Reverſioner ſhall have all, yet the Tenant may traverſe the Covin by* Scire Facias *out of the Judgment or Writ of Attaint if he pleaſe.*

and Conſent to be a *Forfeiture*, otherwiſe it would be hard to reſtore him not only to the Poſſeſſion but likewiſe to the meſne Profits; Per Coke 3 Rep. 4 b. Trin. 25 Eliz. in the Marquis of Wincheſter's Caſe.

35. In *Aſſiſe againſt an Infant and two others*, there *each took the Tenancy ſeverally and pleaded in Bar*, and the *Plaintiff elected the Infant for Tenant and made Title, and were at Iſſue*, and *demurred upon the others*, and *it was found that the Infant was Tenant, and the Title for the Plaintiff, and that the two diſſeiſed the Plaintiff to the Uſe of the Infant, he being a Year and half old*, and the Plaintiff recovered, and the two brought Writ of Error, inaſmuch as they ought to adjudge the Plaintiff to be barr'd for miſ-electing of his Tenant. Hornby ſaid they ſevered in Pleas in Aſſiſe, therefore they cannot now join in this Action; but Tirwhit contra, and Markham doubted, therefore Quære his Intent of the Tenancy, inaſmuch as *an Infant of that Age cannot agree to the Entry*. Br. Joinder in Action, pl. 107. cites 3 H. 4. 16.

36. *Several Outlaws in Appeal* may join or ſever in Writ of Error at their Election, by the clear Opinion of Gaſcoign. Thel. Dig. 32. lib. 2. cap. 13. S. 4. cited Paſch. 7 H. 4. 39. and 40.

37. Where the *Tenant vouches in Præcipe quod reddat*, or Damages are to be recovered, and the *Vouchee enters into the Warranty and loſes*, the Damages ſhall be recovered againſt the Vouchee, therefore he ſhall have Writ of Error; Per Horton. Br. Damages, pl. 45. cites 8. H. 4. 5.

38. *Succeſſor of a Parſon* ſhall have Error or Attaint of a Recovery adjuged againſt his Predeceſſor. Br. Error, pl. 198. cites 8 H. 6. 25.

39. *Treſpaſs againſt two* who are condemned by erroneous Judgment, they may join or ſever in Writ of Error at their Election; Per Cur. Br. Joinder in Action, pl. 77. cites 14 H. 6. 9.

40. In *Recovery in Writ of Treſpaſs againſt the Anceſtor, the Heir* ſhall not have Writ of Error nor Attaint; for this does not deſcend to him there, but yet *if Franktenant come in Debate*, the Heir of it ſhall take Advantage *by way of Eſtopple*. Br. Diſcent, pl. 4. cites 33 H. 6 18, 19.

Br. Eſtoppel, pl 15. cites S C. Per Aſhton.

41. If *Treſpaſs* be brought againſt J. N. who dies, his *Heir* ſhall not have Error nor Attaint; For it was upon a Perſonal Action, which ſhall not deſcend to the Heir. Br. Error, pl. 14. cites 33 H. 6. 19. 51, 52.

42. Treſpaſs *againſt four* in B. R. by one, and *one died* meſne *between the Niſi Prius and the Day in Bank*, and therefore the Plaintiff prayed Judgment againſt the others; But Markham ſaid, that he might have *Judgment againſt all*; For none can have Error but the Executors of the Deceaſed, and not the other Defendants. Br. Brief, pl. 357. cites 5 E. 4. 6. 7.

43. Where a *Feme Covert was ſued as a Feme ſole*, and condemned *and put in Execution*, and afterwards *her Baron returned from beyond Sea*, it was held that *he and his Feme ſhould have* a Writ of *Error* to reverſe this Judgment. Thel. Dig. 32. lib. 2. cap. 13. S. 5. cites Paſch. 18. E. 4. 4.

44. In *Debt upon Eſcape after Recovery of Debt, or Damages, or other ſuch Action founded upon Record, againſt a Stranger to the Record*, the Defendant ſhall not Fallify by Error in the firſt Record. Br. Error, pl. 196. cites 21. E. 4. 27.

45. If Erroneous Judgment be given *againſt Tenant by the Curteſy* and after *he dies without Iſſue*, if *his Heir reverſes the Judgment by Error*, the Heir of the Part of the Feme may enter. Br. Error, pl. 154.. cites 9 H. 7. 24.

46. *And* by all the Juſtices if *a Man ſeiſed of Land has Iſſue two Sons, and the Eldeſt enters into Religion* and the *Father dies*, and the *Youngeſt* Son *loſes by Erroneous Judgment* and the *Eldeſt is deraigned*, he has no Remedy. Ibid.

47. *But if the Youngeſt reverſes the Judgment* by Error *the Eldeſt may enter*; Quod Nota; And this tho' the Youngeſt enters after the reverſal or not; And ſo in the other Caſe above, as appears there. Ibid.

48. *Tenant in Tail ſuffered a Recovery, and releaſed all Errors*; now, tho' this Releaſe ſhall bar him to bring a Writ of Error, yet it ſeemed to divers Juſtices that *it ſhall not hinder the Iſſue in Tail*, but then the Queſtion was, whether, if there are no ſuch, *he in Remainder in Tail ſhall have Error* by the Statute Rich. 2. or by the Common Law, he not being privy in Blood to him who loſt the Land erroneouſly? And it ſeemed by the Opinion in Paſch. 4 H. 8. fol. 1. that he may. D. 188. pl. 8. Mich. 2 & 3 Eliz. Sir Ralph Rowlet's Caſe.

49. Error and Attaint always deſcend to *ſuch Perſon to whom the Land would deſcend*, if ſuch Recovery or falſe Oath had not been. Le. 261. pl. 346. 18 Eliz. B. R. in Caſe of Heningham v. Windham.

Ow. 68 S.C. & S.P. —— *No Man* ſhall have Error or Attaint *but he who may be reſtored to Thing loſt* by the Verdict or Judgment. Mar. 210. pl. 247. Paſch. 18 Car. Per Mallet J. and ſaid that you ſhall never find it otherwiſe in all our Books.

50. *So* if a Man *has Lands of the Part of his Mother*, and loſes it by erroneous Judgment, and dies, the Heir of the Party of the Mother ſhall have the Writ of Error. Le. 261. pl. 346. 18 Eliz. B. R. in Caſe of Henningham v. Windham.

51. If *Tenant in Tail Male has Iſſue a Son and a Daughter by one Venter, and a Son by another, and dies*, and the *eldeſt Son makes a Feoffment*, and a *Common Recovery is had againſt the Feoffee, in which the eldeſt is vouched, and he vouches over the common Vouchee*, and after the *eldeſt dies*, the *youngeſt Son may have Writ of Error*; for though the eldeſt ſhould have rendered a Fee Simple to the Feoffee according to his Loſs, yet he ſhould have recovered but an Eſtate Tail, viz. ſuch an Eſtate as he had when the Warranty was made, which would have deſcended to the youngeſt, and conſequently the Writ of Error ſhall be brought by him. Le. 261. pl. 346. 18 Eliz. Henningham v. Windham.

52. He who is *ſpecial Heir* by the Cuſtom, *as of Borough-Engliſh* Land, ſhall have the Writ of Error, and not the Heir at the Common Law; Adjudged. 4 Le. 5. pl. 19. 18 Eliz. Henningham's Caſe.

53. *In a common Recovery four Husbands and their Wives were vouched*, and the *Plaintiff brought a Writ of Error as Heir to one of the Husbands*, Exception was taken becauſe he *did not make himſelf Heir to the Survivor of the four Husbands*. But a Difference was taken between a Real and a Perſonal Covenant, for if two are bound to Warranty, and one dies, the Survivor and the Heir of the other ſhall be charged, and ſaid, that each of the four and their Heirs are charged, and then the Heir of each being chargeable the Heir of any of them may have Writ of Error. And the Writ of Error was adjudged good. But upon Suggeſtion that the Writ of Error was not well brought, for the Voucher being of four Husbands and their Wives, it ſhall be intended in Right of their Wives according to 20 H. 7. 1. b.

46 E. 3. 28. 29 E. 3. 49. So the Plaintiff here ſhould intitle himſelf as Heir to the Wife; wherefore the Plaintiff relinquiſhed his Writ and *brought a new Writ and intitled himſelf as Heir to the Wife.* Le. 291. pl. 718. Mich. 26 & 27 Eliz. B. R. Gravenor v. Maſſey.

Cro. E. 67. pl. 17. S. C. Mich. 29 Eliz. but S. P. does not appear. —— Ibid. 294. pl. 10. Scroggs v. Ld Mordant. Hill. 35 Eliz. in Cam. Scacc.

54. The Plaintiff had a *Verdict in* an Action on the *Caſe for Words and* 1000 *l. Damages*, and afterwards he *took out Execution by Elegit on the Lands of the Defendant, who died*, and his *Adminiſtrator brought* a Writ of *Error* in the Exchequer Chamber; the Defendant in Error pleaded in Abatement this Execution, by which he intended, that the Adminiſtrator not having any Loſs but the Heir only, therefore a Writ of Error would not lie by the Adminiſtrator; but upon a Demurrer to this Plea, it was *adjudged for the Adminiſtrator; for upon Eviction of the Lands the Plaintiff might reſort to the Goods.* Mo. 686. pl. 949. Trin. 29 Eliz. Lord Mordant v. Bridges.

S. C. & S. P. reſolved that the Writ of Error did lie, and that the Adminiſtrator is privy to the Record, and may have Loſs by it in futuro.

55. *Leſſee for Life and Infant in Remainder join in a Fine*, the Infant alone may bring Error. D. 89. b. pl. 2. Marg. cites Hill. 30 Eliz. C. B. Pigot's Caſe.

3 Le. 176. pl. 228. The Queen v. the Biſhop of Glouceſter, S. C. Per Wray, the Biſhop *ſhall join for Conformity of Law and for Privity of Record*;

56. In a *Quare Impedit* againſt the Biſhop and S. brought by the Queen, in which the *Biſhop pleaded, that he claimed nothing but as Ordinary*; after Judgment for the Queen *Error was brought by the Biſhop and S.* It was objected that the Biſhop ought not to join in the Writ, becauſe he had no Loſs; But it was adjudged that the Writ was well brought, for Wray ſaid, the *Biſhop has Loſs*; for the Writ ſhall be to the Archbiſhop for Admiſſion and Inſtitution, and ſo he has Loſs. Cro. E. 65. pl. 11. Mich. 29 & 30 Eliz. B. R. The Biſhop of Glouceſter v. Savacre.

and the Plea of the Biſhop is not ſo ſtrong as a Diſclaimer; and afterwards the Writ was awarded good —— And. 200. pl. 236. S. C. but S. P. does not appear. —— 3 Mod. 134 S. P. obiter per Cur. ſays they muſt join in Error unleſs where the Biſhop claims only as Ordinary.

Cro. E. 115. pl. 15. Pigot v. Ruſſel, S. C. and the Writ held well brought it being for an Error in Fair, viz. his Non-age, and of that no other can take Advantage

57. *Husband and Wife Tenants for Life, Remainder to an Infant in Fee, all three levied a Fine*, and the *Infant alone brought Writ of Error to reverſe it for Non-age.* It was objected, that ſince all joined in the Fine they ſhould likewiſe join in the Writ of Error; and that the Husband and Wife ſhould be ſummoned and ſevered, and then the Infant might proceed alone to aſſign Errors; but adjudged that the Writ of Error is well brought by the Infant alone, becauſe the Error aſſigned is not in the Record, but without it, viz. in the Perſon of the Infant, and that is the Cauſe of the Action by him, and for no other. Leon. 317. pl. 445. Mich. 30 & 31 Eliz. B. R. Pigott v. Harrington.

And if two Infants bring Error they muſt aſſign the Errors ſeverally, and therefore if one be within Age he muſt bring the Writ alone.

58. A *Conuſor of a Fine cannot aſſign Error in the Grant and Render* by which he takes Eſtate, any more than the Conuſee ſhall do in the Conuſance; for this would be to defeat the Eſtate which by the Fine is given to himſelf; *ſo a Recoveror ſhall not bring* a Writ of *Error to defeat a Record by which he himſelf recovered*, for the Judgment in the Writ of Error is to reſtore the Party to all which he loſt by the Fine or Judgment, and not to avoid or loſe that which he had gained by the Fine or Judgment. 5 Rep. 39. b. Trin. 34 Eliz. B. R. in Tey's Caſe.

59. The

59. A Man was *outlawed of Felony* and died, his *Executor brought a Writ of Error* to reverſe the Outlawry, and the Queſtion was whether it lay; The ſame was argued, Sed adjornatur. Cro. E. 225. pl. 10. Paſch. 33 Eliz. B. R. and Ibid. 273. pl. 2. Paſch. 34 Eliz. B. R. Marſh's Caſe.

Ow. 147 S. C. argued. —— Le. 325. pl. 359. S. C. Wray Ch. J. held clearly that the Executor might have and purſue this Writ of Error, and afterwards the Outlawry was reverſed accordingly. —— S. C. cited as reſolved accordingly. 5 Rep. 111. a. —— Godb. 380. Jones J. cited 5 Rep. 111. but ſaid that Marſh's Caſe never was adjudged. —— Cro. E. 358. S. P. cited by Popham and Gawdy as ruled accordingly in B. R. in Nicholſon's Caſe.

60. The Plaintiff had a *Judgment in Debt*, and afterwards the *Defendant made a Feoffment to J. S. of his Lands*, then the Plaintiff ſued an *Elegit* upon the Judgment; before it was executed J. S. brought a Writ of Error, and aſſigned Error in the Judgment; Adjudged, that a Writ *of Error would not lie for J. S. unleſs* it be *for Error in ſuing out Execution*, which was not done in this Caſe, for before Execution he is not a Party grieved, which is the true Reaſon why *he in Reverſion* or Remainder *ſhall not have* a Writ of *Error in the Life-time of the Tenant for Life* upon a Judgment given againſt ſuch Tenant for Life, becauſe neither of them can be a *Party grieved* in his Time. Cro. E. 289. pl. 6. Mich. 34 & 35 Eliz. B. R. Charnock v. Sherrington.

61 If *Execution* upon a Judgment *is ſued by Elegit, and Lands only extended*, and no Goods taken in Execution, and after the *Defendant dies* his *Adminiſtrator may have a Writ of Error*, for he is privy to the Record, and may in futuro have Loſs by it. Cro. E. 294. pl. 10. in Cam. Scacc. Hill. 35 Eliz. Scrogs v. Ld. Mordant.

Mo. 687. pl. 949. Trin. 29 Eliz. B. R. the S. C. ruled that the Writ well lay for the Adminiſtrator, becauſe it might be that the Land might be evicted, and then the Plaintiff might reſort to the Goods. —— And at the End of the Caſe in Cro. E. is a Nota added to the ſame Purpoſe.

62. In many Caſes *he that has no Loſs nor can have Loſs* may maintain a Writ of Error; *as the Tenant which makes a Feoffment pending the Writ againſt him; So in Treſpaſs againſt two, and Execution of the Damages is had againſt one only*, and the Plaintiff is ſatisfied, and *he, againſt whom the Execution was, died*, yet the *Survivor may ſue a Writ of Error*; Per Cur. Cro. E. 294, 295. pl. 10. Hill. 35 Eliz. B. R. in Caſe of Scroggs v. Ld. Mordant; and as to the laſt Point cites 20 E. 3.

63. *Judgment in Quare Impedit* was given *againſt the Incumbent and Biſhop Defendants*. The *Biſhop pleaded that he claimed nothing but as Ordinary. Error was brought in the Name of the Incumbent and Biſhop*, but the *Incumbent only aſſigned the Errors* (without Summons and Severance.) *Afterwards the Incumbent and the Biſhop aſſigned the ſame Errors*, and the Defendant pleaded in Nullo eſt erratum. All the Court held the *Aſſignment by one only was ill*, and all the Plea diſcontinued, and not aided by the ſecond Aſſignment after. And afterwards a new Writ of Error was brought. Cro. J. 92. pl. 20. Mich. 3 Jac. B. R. Lancaſter v. Low.

But Mod. 134. Trin. 3 Jac. 2. B. R. in the Caſe of Hacket v. Herne it is ſaid obiter, that if a Quare Impedit be brought againſt a Biſhop and others, and Judgment be againſt them all, they muſt likewiſe all join in a Writ of Error, unleſs it be where the Biſhop claims only as Ordinary.

64. An *Aſſiſe* was brought *againſt five* for 100 Acres of Land, *three of the Defendants were found not Tenants, and acquitted* of the Diſſeiſin; *two other were found guilty*, quoad three Acres, and for the Reſidue not guilty, but the Verdict was entered for 100 Acres, and Judgment given accordingly. A Writ of Error was brought, in which all of them

Noy 116. Vaughan's Caſe. S. C. adjudged to be Error.

them joined; Adjudged, that it ought to have been brought *only by thoſe two who were found guilty*, and the three who were acquitted had not any Loſs, and therefore ought not to have joined. Cro. J. 138. pl. 15. Mich. 4 Jac. B. R. Vaughan v. Lorriman.

65. *Treſpaſs againſt ſeveral*, they *all appear by Attorney and plead ſeveral Pleas; three not guilty, two of which are found guilty*; the *others juſtify by Force of a Statute made* 12 *Car.* 2. *that three of them being Officers purſuant to the Direction of the Governor* &c. and *according to the Statute took the Goods, and that the other Defendants, as their Servants, and by their Command, aſſiſted them in it.* Upon a Writ of Error brought the *Error aſſigned* is, *That A. who was Servant, was an Infant*, and under Age. It was mov'd the Infant's Appearance by Attorney is erroneous for all; for it is a joint Judgment, and joint Damages are given, and cited the Caſe of Oate v. Aylett. The other Side agreed, that in all Caſes where an Infant ought not to appear by Attorney, if he doth, it is Error. But whether it is Error here, he only acting as a Servant, I muſt ſubmit. The Reaſon why an Infant cannot appear by Attorney is, becauſe he is thought not to be able to make known his Caſe; now he being a Servant muſt plead as the others, and ſtand or fall by that. Per Holt Ch. J. The Caſe is the ſame whether he is Maſter or Servant, for the Servant is equally liable to Damages with the Maſter. Powell J. It is a joint Judgment, and entire Damages which cannot be divided. Per Cur. the Judgment was reverſed. Holt's Rep. 360. pl. 5. Trin. 8 Ann. Greek v. Mew.

Hob. 70. pl. 81. Hill. 11 Jac. in Cam. Scacc. Parker v. Lawrence. — If in *Treſpaſs againſt three*, *Judgment was againſt the Plaintiff as to one, and as to the other two for the Plaintiff*, the two only without the third may have a Writ of Error, for he for whom the Judgment was given cannot ſay that the Judgment was to his Damage; Per Cur. præter Twiſden, who held that the Writ ought to be brought by all. 1 Lev. 210. Paſch. 19 Car. 2. B. R. Cannon v. Abbot.

66. In *Treſpaſs againſt three one pleads to Iſſue*; The *Plaintiff has a Verdict againſt him and Judgment*; The *other two demur*; A *Nolle Proſequi is entered as to them*; *The three Defendants cannot join* in a Writ of Error; For the two againſt whom the Nolle Proſequi is entered are not damnified. Jenk. 309. pl. 87.

67. The *Son and Heir was outlawed upon an Indictment for Felony in the Life-time of his Father, who was ſeiſed in Fee, and upon his Death the Son entered and deviſed it to C. in Fee*, who conveyed it to B. who brought a Writ of Error to reverſe the Outlawry; Doderidge and Jones J. ſeemed to incline that it did not lie for B. For that none can reſtore the Blood, but he who is privy in Blood; Sed adjornatur. Godb. 376. pl. 465. Paſch. 3 Car. B. R. Brooker's Caſe.

Jo. 360. pl. 1. Pollex v. Buſhell S. P. adjudged, and ſeems to be S. C.—S. P. adjudged Hob. 72. pl. 85. Foreſt v. Sandland.—Cro. J. 384. pl. 14. Mich. 13 Jac. B. R. Sandelow v. Deverton in Cam. Scacc. S. P. held accordingly.——Roll Rep. 294. pl. 9. Verten v. Sandelow. S. C. & S. P. accordingly.——Cro. C. 300. pl. 2. Lancaſter v. Keyleigh. Paſch. 9 Car. B. R. held accordingly.—S. C. & S. P. reſolved Jo. 325. pl. 3. —Godb. 440. pl. 507 S. C. held accordingly.—Cro. C. 574, 575. pl. 17. Hill. 15 Car. B. R. Smith v. James S. P. held accordingly.—Bulſt. 125. Paſch. 9 Jac. Hooker v. Robinſon. S P. agreed.—Lev. 157. Trin. 16 Car. 2 B. R. Atherton v. Hole S P. and the Writ was quaſhed.——Writ of Error by Principal and Bail was held ill, and that they cannot join, and cites Foreſt v. Sandland, Hob. 72. Show. 8. Paſch. 1 W. & M. Evans v. Pettifer.—Comb. 108. S. C. held accordingly.

68. The *Principal and Bail* ought not to *join* in a Writ of Error to avoid the Principal Judgment, nor the Judgment againſt the Bail. Cro. C. 408. pl. 1. Trin. 11 Car. B. R. Buſhell v. Yaller.

69. *Nor* can *thoſe returned in one Writ take Advantage* of any Error in the Proceedings on the other Writ, becauſe the Actions are ſeveral. Carth. 201. cites Cro. C. 517. [pl. 19. Mich. 14 Car. B. R.] Angel v. Cooper.

70. If

70. If *J. S. binds himſelf and his Heirs in a Bond*, and thereupon *Judgment is obtained againſt J. S.* and *J. S. makes his* Will, and his *Heir at Law Executor and dies, leaving Lands which deſcend* to his Heir, yet he *ſhall not have a Writ of Error as Heir*, for he is not privy to the Judgment, and when an Extent is made upon him it is as Tertenant, but after the Lands are taken in Execution he may have a Writ of Error; Per Roll J. Sed adjornatur. Sty. 38. 39. Trin. 23 Car. White v. Thomas.

71. By Roll Ch. J. if an *Action* be brought *againſt three, and one of them is an Infant*, and they *all appear by Attorney*, and an *intire Judgment is given againſt them all*, and they all join in Writ of Error to reverſe this Judgment, this Writ is well brought; for the Judgment was erroneous, becauſe it is an entire Judgment, for as to the Infant it cannot be good, and ſo it is naught to the reſt, and he cited one **Byre's Caſe** 9 Jac. in the Point. Sty. 406. Hill. 1654. Anon. S. P. by Roll Ch. J. Judgment reverſed. Sty. 400. Bocking v. Symons.

72. Judgment was had in *Debt upon a Bond againſt Father and Son*, and afterwards the *Father alone brought a Writ of Error*, and the *Error aſſigned was, that his Son was under Age*; but becauſe the *Son did not join in the Error*, the Court ordered the Writ to be abated. 3 Mod. 134 Trin. 3 Jac. 2. Hacket v. Herne.

73. There is a *Difference where* a Writ of *Error is brought by the Plaintiffs in the original Action, and when by the Defendants*, for *if two Plaintiffs are barred by an erroneous Judgment, and* afterwards *bring* a Writ of *Error*, the *Releaſe of one ſhall bar the other*, becauſe they are both Actors in a perſonal Thing to charge another, and it ſhall be preſumed a Folly in him to join with another, who might releaſe all; *But where the Defendants bring a* Writ of *Error it is otherwiſe*, for it being brought to diſcharge themſelves of a Judgment the Releaſe of one cannot bar the other, becauſe they have not a joint Intereſt, but a Joint Burthen, and by Law are compelled to join in Errors. 3 Mod. 135. Trin. 3 Jac. 2. B. R. in Caſe of Hacket v. Herne. Ibid Marg. cites 5 Rep. 55. a. Ruddock's Caſe [but it ſhould be 6 Rep. 25. a. b.] where the ſame Diverſity is taken per Curiam.

74. Where *ſeveral Writs of Sci. Fa. iſſue into ſeveral Counties*, againſt ſeveral Tertenants, upon one and the ſame Judgment, in ſuch Caſe they cannot all join in one Writ of Error, for the Actions are ſeveral. Carth. 200. Mich. 3 W. & M. in B. R. in Caſe of Blake v. Gell.

75. *But* where a Scire Facias iſſued againſt the Tertenants *in the ſame County*, and upon a Scire Feci returned againſt ſeveral, they pleaded that J. S. is another Tertenant and not ſummoned, and then a ſecond *Scire Facias iſſued againſt the ſaid J. S.* who was returned an Infant &c. and the *Parol demurred for Infancy*, and after his full Age a *Reſummons* iſſued againſt all the Tertenants; But one of the Tertenants who was returned ſummoned was dead before the Day of the Return, and this was aſſigned for Error, and the *ſurviving Tertenants and the Heir of him who was dead joined in the Writ* of Error, and held good, for the laſt Scire Facias is only *ſupplemental* to the firſt, and then both make but one Action. Carth. 200. Mich. 3 W. & M. in B. R. Blake v. Gell.

76. Judgment was had againſt the Principal, and afterwards upon a Scire Facias, *Execution was awarded againſt the Bail*, and one of the *Bail* for the Defendant in the original Action brought a Writ of Error *Tam in redditione Judicii quam in adjudicatione Executionis againſt the Bail* &c. But the Writ was *quaſhed quoad all that related to the Judgment in the original Action, and no more*, and was ruled to ſtand good quoad the Judgment againſt the Bail upon the Scire Facias and the Bail (Plaintiff in Error) proceeded therein accordingly. Carth. 447. Paſch. 10 W. 3. B. R. Burr v. Atwood. 1 Salk 89. pl. 11. Atwood v. Burr. S. C. but S. P. does not appear. —Ibid. 402. pl. 10. S. C. but not S. P. —3 Salk. 369. pl. 6. S. C. and adjudged naught, and that it ſhould have been in adjudicatione Executionis Recognitionis prædictæ, becauſe a Recognizance is not ſuch a Judgment as might or would be intended on the Face of the Writ

Writ of Error.——7 Mod. 3. S. C. and ſame Exception taken by Raymond at the End of the Caſe fol. 8. and the Court were of Opinion to quaſh the Writ of Error for this Exception.—— Ld. Raym. Rep. 553. S. C. and the Writ of Error was quaſhed for the ſame Reaſon.——Ibid. 328. S. C. ſtated as in Carth. and ruled accordingly.

77. Error upon a Judgment in C. B. in an *Action againſt two*, and *one of the Defendants was outlawed*; And exception was taken to *the Writ of Error*, becauſe it *mentioned the Writ to be brought againſt one only*; But it was held good, becauſe the Writ as to the other was determined by the Outlawry; Ex relatione M'ri Jacob. Ld. Raym. Rep. 691. Trin. 13 W. 3. Oliver v. Hunning.

78. If an *Appeal of Murder* be brought *againſt three* Perſons, they may all join in a Writ of Error, for *it is ad damnum ipſorum reſpective*, and yet the Attaint of one is not the Attaint of the other two; Per Holt Ch. J. Holt. 277. pl. 22. Hill. 4 Ann. in Caſe of Bradell v. Sawbridge.

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79. The Plaintiff obtained *Judgment againſt two Defendants in* an Action of *Debt*, and *one of them brought a Writ of Error*, when it ſhould be brought by both, *and then he who would not proſecute ought to be ſummoned and ſevered*, which not being done, this was held to be a Fault not amendable, and thereupon the Writ of Error was quaſhed. 8 Mod. 305. Mich. 11 Geo. Cowper v. Ginger.

(L) *Againſt whom* it lies.

Br. Error, pl. 9. cites S. C.—— Or his Heir, be he Ter-Tenant or not.

1. IT **does** not **lie againſt** any but **againſt him who is** Party or Privy to the firſt Judgment. 9 H. 6. 46. b. Curia.

2. **It does not lie againſt any who is not Party or Privy**, though **he be** Tenant of the Land. 9 H. 6. 46. b. Curia.

For Nontenure is no Plea in Writ of Error. Br. Error, pl. 131. cites 42 Aſſ. 22. Per Fulthorp. —— It is agreed that Writ of Error does not lie *but againſt Parties or Privies*, viz The Party or his Heir, be he Tertenant or not, and if another be Tertenant Scire Facias ſhall iſſue againſt him, for otherwiſe Aſſiſe lies for him if he be ouſted. Br Error, pl. 9. cites 9 H. 46.

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3. **The Writ lies againſt him who is Party or Privy to the Judgment, though he hath nothing in the Land.** 9 H. 6. 46. b. Curia.

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4. **If a Man** recovers and dies without Heir, **Quære againſt whom the Writ of Error ſhall be brought.** 9 H. 6. 49. b. Quære what Remedy in ſuch Caſe.

5. Writ of Error lies well *againſt him who was Tenant at the Time of the Judgment given*, notwithſtanding that he is not his Tenant at the Time of the Writ of Error acquired; Contra of Attaint; For this ſhall be againſt the Tenant of the Franktenement &c. Br. Error, pl. 109. cites 6 Aſſ. 6.

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6. *H. recover'd*, and had *Iſſue Iſabel and died*, and *ſhe took Baron and had Iſſue T. and dyed*, and Writ of Error was *brought againſt the Tenant by the Curteſy and the Heir*, and admitted, and yet per Candiſh, the Uſage has been to bring the Writ of Error againſt the Party to the Record or his Heir, and when the Judgment is revers'd to bring Scire Facias

Facias against the Tertenant, if he can ſay any Thing why the Plaintiff ſhould not have Execution, quod nota. Br. Error, pl. 27. cites 47 E. 3. 7.

7. Where *Error* is ſu'd *in Parliament of a Judgment given in B. R.* or if Error be ſu'd in B. R. upon a Fine levied in C. B. the Tranſcript ſhall go, and ſhall be certify'd, and not the Record itſelf. Br. Record, pl. 48. cites 2 H. 7. 19. Br. Error, pl. 137. cites 1 H. 7. 19, 20. S. C.

8 If an erroneous *Judgment is given for the Queen in a Writ of Intruſion*, the Party ſhall have a Writ of Error againſt the Queen without any Petition; Per Coke, Arg. 2 Le. 194. Hill. 29 Eliz. in Hurliſton's Caſe.

9. Many *Outlawries* have been *reverſed* for Error *without any Petition, and yet* in ſuch Caſe *the Queen has an immediate Intereſt*; Per Wray. 2 Le. 194 Hill. 29 Eliz.

10. Error does not lie againſt *the Queen* upon a Petition, *where ſhe is immediate Party to the Recovery*; but otherwiſe where ſhe is Party only as for Conformity, as in an Action upon the Statute, or in a Popular Action; Per Curiam. Noy. 56. Anon. 2 Le. 194. pl. 244. Hill 29 Eliz. B. R. Hurliſton's Caſe. Same Caſes cited, and ſeems to be S. C. of **Glazier v. Hudleſton**, and the Caſe was, That Judgment was given for the Queen in a Sci. Fa. to reverſe the Patent of the Conſtableſhip of the Caſtle of Cheſter. But Clench ſaid, That there needs no Petition, becauſe both Patentees claim from the Queen, and whether there be Error or not the Queen is not prejudiced.

11. Adjudged, That a Writ of Error lies *againſt the King without Petition*, though antiently the Courſe was by Petition, and was a Decency, but ſince the Year 1640 Writs of Error have been Ex Officio. 1 Salk. 264. pl. 7. Paſch. 11 W. 3. B. R. Anon.

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Writ of Niſi Prius was returnable Octab' Hillarii at which Day it was return'd, and at the firſt Day thereof the Plaintiff had Judgment to recover, the Defendant brought Writ of Error, *bearing Date the third Day of the ſaid Returr, and before the fourth* Day, viz. Meſne *between the firſt Day and the fourth Day*, and becauſe Judgment was given the firſt Day, and ſo it is after Judgment as it ought to be, therefore well; Per Cur. Br. Error, pl. 17. cites 34 H. 6. 27. —— Br. Jours. pl. 10. cites S. C.

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2. **In an Assise of** Darrein Presentment **if the** Parties demur upon the Title, **and it is** adjudged for the Plaintiff, and that he shall have

a Writ to the Biſhop, **a Writ of** Error lies **upon this Judgment** before the Damages inquired of, **becauſe there were no Damages at the Common Law, and then the Writ would be preſently, and the Addition of Damages given by the Statute to be inquired of to the Sheriff, ſhall not ſtay the Writ of Error, and if it be affirmed, it may be inquired of the Damages where it is affirmed.** 17 E. 3. 5. 19. 21. **adjudged** 33.

3. So **if a Man** recovers by Default in **a Writ of** Couſinage or Aiel, **a Writ of Error lies upon this before the Damages are inquired of, becauſe the Damages are but an Addition to the Common Law given by the Statute,** (*) **and ſo the Judgment for the Principal continues as it was at Common Law.** 17 E. 3. 21. 33.

* Fol. 750.

Br. Error, pl. 58. cites S. C. —— Per Stouf; and Brook adds, that in Account there are 2 Judgments, and Writ of Error is *Quod ſi Judicium redditum ſit tunc* &c For Writ of Error does not lie before Judgment. —— Cro. E. 636. in pl 32. cites S. C. & S. P. For the Plaintiff might be nonſuited before the ſecond Judgment, as 1 H. 7. 2. is; And that ſo it was adjudged in 11 Eliz. **Parding v. Cline.** And ſo 7 R. 2. in Formedon where the Tenant was ouſted of Aid, Error lies not till the Judgment of the Principal. —— Le. 194. in pl. 277. cites 21 E. 3. 9.

4. No Writ **of Error** lies upon a Judgment to account before the laſt Judgment, **becauſe the Plea is not ended till he hath accounted.** 21 E. 3. 9. **adjudged. Co.** 11. * **Metcalfe** 38. **adjudged. Vide Noy's Reports** 68. **two Executors have Judgment againſt B. quod computet the Writ ſhall not abate by the Death of one of the Executors.**

* Cro. J. 356. pl. 14. **Metcalf v. Wood.** S. C. reſolv'd. —— D. 291. b. Marg. pl. 68. cites 40 Eliz. B. R. Bill v. Matthews. S. P.

Award Quod computet is but barely as an Award, As Award that Aſſiſe ſhall be taken, Award in Waſte, Writ to inquire of Waſte, of Treſpaſs &c. Writ of Inquiry of Damages in Partitione Facienda, Award Quod Partitio Fiat, in Writ of Admeaſurement Award Quod Admenſuratio Fiat, Award that one ſhall be ouſted of Aid, and ſuch like, are only Awards of the Court, and are but Interlocutory, and not Definitive, whereof no Writ of Error lies till the laſt Judgment is given; Per Cur. 11 Rep. 40. a. Mich. 12 Jac. in Metcalf's Caſe.—In Accompt no Error lies before the ſecond Judgment. Palm. 2. cites 21 E. 3. 9. Award.

5. So **no Writ of Error lies** upon an Award before the Original be determined. 17 E. 3. 21.

6. As **it does not lie** upon an award of a Capias, Summons, or Reſummons **before the Original determined.** 17 E. 3. 21.

* Cro. E. 635 pl. 32. and 643. pl. 46. the Counteſs of Warwick v. Ld. Berkley, S. C. held per tot. Cur. that till the ſecond Judgment given, Quod Partitio Stabilis ſit the Record is not full, nor the Judgment perfect, and therefore the Record ſhould not be removed. —— Mo. 643. pl. 888 S. C. but no Judgment. —— Noy 71. S C. held accordingly; and this is not like other Real Actions, where Error lies before the Habere Facias Seiſinam be returned; For that is a final Judgment, and no other to be given; beſides, there needs no Return of an Habere Facias Seiſinam; For the Party that recovers may execute his Judgment by his Entry, and cites D. 67. a. —— Roll Rep. 85. Mich. 12 Jac. B. R. Coke Ch. J. ſaid, that in the Counteſs of Warwick's Caſe of Partition there was not any Reſolution, but that it ſeems in ſuch Caſe before the ſecond Judgment no Writ of Error lies, Quod fuit conceſſum per Doderidge, but Crooke and Haughton doubted of it. —— S. C. cited by Doderidge, as ruled to be brought too ſoon before the ſecond Judgment. 2 Bulſt. 104. —— S. C. cited 2 Roll Rep. 125. as held accordingly.

7. **In a Writ of Partition,** if **the** Judgment be given Quod Partitio Fiat, **and thereupon a Writ is directed to the Sheriff to make a Partition before it is executed and returned,** no Writ of Error lies **upon the firſt Judgment for that** before the laſt Judgment, **which ought to be Quod Partitio Præd' foret firma, and ſtabilis in perpetuum the Plaintiff may be nonſuit, or he may, upon the Return of the Sheriff, ſuggeſt to the Court that the Partition is not equal, and ſo have a new Partition, and alſo he may releaſe before the laſt Judgment. Mich.** 40, 41 **El. B. R.** between the * *Lord Barkly and the Counteſs of Warwick* **adjudged. M.** 10 **Ja. B.** 20. between † *Ballad and Rawlins,* **per Curiam, P.** 13 **Car. B. R.** between *Williams and Watkins* **adjudged, and ſuch Writ abated, being brought upon the firſt Judgment given in Cardigan.**

† Cro.

† Cro. J. 324. pl. 4. Rawlins v. Barret, S. C. & S. P. reſolved. —— 2 Bulſt. 104. S. C. & S. P. agreed. —— 2 Bulſt. 19. Arg. S. P.

8. A Writ of Error lies in Camera Scaccarii after an Award of the Court of King's-Bench for Judgment, and the Roll ſigned for Judgment by the Clerk before any Judgment entered; for otherwiſe the Plaintiff in the Writ of Error ſhould be at great Prejudice, for the uſe of the Court is not to enter the Judgment till the Vacation after, but to award Execution preſently after the Signing the Roll for Judgment, and before Entry thereof; And ſo if the Writ of Error ſhall not be allowed after Signing, and before the Entry, the Plaintiff in the Writ of Error ſhould not have any Benefit of the Superſedeas of the Execution, which is incident in the Writ of Error. Mich. 15 Jac. B. R. between *Smith and Bowles*, by all the Clerks, that this is the common Courſe, and per Curiam adjudged. See tit. Execution (M. a) pl. 1. S. C. —— See ſupra the Caſe of Jennings v. Bragg, in the Notes pl. 1.

9. If a Woman recovers in a Writ of Dower, a Writ of Error lies before the Writ of Inquiry of Damages awarded, and before the third Part aſſigned by Metes and Bounds; for the Judgment is perfect as to the Realty, and the Damages given by the Statute by way of Addition. P. 17 Car. B. between *Steward and Steward*, per Curiam adjudged, and the Inquiry of the Damages, after the Writ of Error brought, quaſhed. Mar. 83. pl 142. S. C. reſolved that the Error was well brought. — Brownl. 127. Hill. 13 Jac. Glefold v. Carr, Value be inquired of.

S. P. per tot. Cur. held that it would not lie; For the Judgment is not perfect till the

10. In an Ejectione Firmæ, if the Plaintiff recovers per nihil dicit, in which Judgment is given that the Plaintiff ſhall recover his Term, and a Writ awarded to inquire of the Damages, a Writ of Error lies upon this Judgment before the Return of the Writ of Damages, and Judgment thereupon, for the Judgment is perfect as to the Recovery of the Term before by the firſt Judgment, and the Plaintiff may preſently have Execution for the Poſſeſſion, and perhaps he will never have Judgment for the Damages, and ſo the Defendant ſhould be ouſted of the Poſſeſſion without Remedy. Tr. 3 Car. B. R. between *Newton and Terry*. Intratur Mich. 2 Car. Rot. 110. per Curiam, in a Writ of Error Judgment reverſed. Nota, Mr. Hoddesdon the Secondary de B. R. ſaid to me, that this is now agreed by both Courts, ſcilicet, the Common-Pleas and King's-Bench. Noy 95. Terry v. Newton, S. C. reſolved. —— Lat. 212. Terry v. Newton, S. C. accordingly.

11. So if a Man recovers in a Quare Impedit upon a Demurrer, the Defendant may have a Writ of Error before the Writ of Inquiry of Damages (*) returned, for ſuch Writ may be awarded out of the King's-Bench if the Judgment be affirmed there. Note, this was the *Lord Arundel's Caſe againſt Edmonds*, about 15 Car. admitted, and ſo is the conſtant Practice of the Court, for no Damages were given at the Common Law, but given by the Statute. Contra Noy's Reports 66. the *Biſhop of Glouceſter and Vele.* S. P. by Bankes Ch. * Fol. 751. J. Mar. 89. in pl. 142. Paſch. 17 Car.

12. If an Execution upon a Statute-Merchant be awarded where a Stranger is ſeiſed of the Land by Feoffment of the Conuſor, yet he ſhall not have a Writ of Error of the Execution before he is ouſted by the Execution. 18 E. 25. becauſe he is not privy to the Record before this, nor before the Return of Execution, and after the Ouſter of him by Force of the Writ by the Sheriff. Dubitatur 18 E. 3. 25. Fitzh Error, pl. 71. cites S. C. — D. 1. b. pl. 5. cites S. C. —— See (K) pl. 17. S. C.

13. If

13. If a Man recovers in a Præcipe quod reddat against me, I may have a Writ of Error before Execution is sued. 18 E. 3. 26. 17 Ass. 24

* Noy 35. Terry v. Newton, S. C resolved — Lat. 212. Terry v. Newson, S. C. accordingly. — Where an Assise or an Ejectment is brought where the Land is the Principal, if Judgment be given for it, although Damages are to be recovered, yet before a Writ of Inquiry for them Error lies; because the Damages are but Accessory; Arg. Cro. E. 636. in pl. 32. — For the Judgment is, Quod querens recuperet terminum, and upon this Judgment the Plaintiff may have an Habere Facias Possessionem, and if Error would not lie on this Judgment, the Plaintiff after he had got Possession upon an erroneous Judgment would never sue a Writ of Inquiry, and so the Defendant would be without Remedy. Lat. 212. Pasch. 3 Car. Smith v. Amys — S. P. by Roll Ch. J Sty 283. Trin. 1651, in Case of Giles v. Timberley. — S. P. adjudged, there being no Return of Damages, nor a Capiatur, the Commonwealth may by this Means be cozened of the Fine, and the Defendant barred from bringing a Writ of Error. Sty. 346. Mich. 1652. Acton v Ayres. — If Error be brought in Ejectment before the last Judgment on the Writ of Inquiry, and no Capiatur entered, it is Error; Per Twisden, and so he said it had been often ruled. Keb 327. pl. 59. Trin. 14 Car. 2. B. R. Oliver v. Hardwick.

14. If a Man recovers in an Ejectione Firmæ by Confession, Nihil dicit, Non tum Informatus, or Demurrer, a Writ of Error lies before the Damages taxed by Writ of Inquiry I had the Precedents of Master Hoddesdon, Secondary de B. R. Pasch. 13 El. B. R. Rot. 52 between *Taverner and Laxcet* Error brought upon a Judgment in Banco, and a Writ of Inquiry awarded in B. R. The like between *Bach and Errington*, P. 13 El. B. R. Rot. 51. Tr. 35 El. B. R. Rot. 696. *Wimark's Case*; And same Case Co. 5 *Wimark's Case*, 74. where Judgment upon Demurrer in B. R. and before the Return of the Writ of Inquiry Error was brought in Camera Scaccarii, and there affirmed and remanded, P. 44 El. Rot. 438. B. R. between *Howse and Layton.* Error brought in Camera Scaccarii before Damages assessed, and this affirmed Mich. 25, 26 El. B. R. Error brought after Judgment, and before Damages assessed, and this reversed for Error in Fact, Tr. 3 Car. between * *Newton and Terrye*, per Curiam, in a Writ of Error. New Entries 191. between *Dun and Lawe.* But vide, this is there but an Award. Hill. 1649. between *Broad and Barnet* adjudged in a Writ of Error upon a Judgment by Nihil dicit in Banco. Intratur Tr. 1649. Rot. 1535.

15. But in an Ejectione Firmæ, if Judgment be given, Ideo consideratum est quod querens Possessionem suam Termini adhuc venturi de Tenemento præd' recuperare debeat, no Writ of Error lies before Damages tared, because there is but an Award; but otherwise it had been if it had been recuperet. M. 5 Ja. B. R. Rot. 269. between *Lane and Alexander*, per Curiam, in a Writ of Error in Camera Scaccarii upon a Judgment in B. R. and the Record remanded in B. R. accordingly for the Cause aforesaid.

A Writ of Error was delivered to the same Court before a Writ to the Bishop was awarded to admit the Clerk; Per tot. Cur. the Writ of Error ought to be allowed. Godb. 439. pl. 505. Trin. 5 Car. B. R. The Earle of Pembroke v. Bostock

16. If a Man recovers in a Quare Impedit, and after brings a Writ of Quare non admisit against the Bishop, a Writ of Error may be after brought upon the Judgment in the Quare Impedit, and the Record shall be removed, though the other Writ of Quare non admisit be not yet discussed. Dubitatur 26 E. 3. 75.

17. If a Man recovers Damages, and after a Year sues a Scire Facias of the Damages, a Writ of Error lies after of the Judgment, and the Record shall be removed. 26 E. 3. 75.

Cro C 307. pl. 8. The Earl of Newport v. Mildmay, S. C.

18. If an Infant suffers a Common Recovery by Guardian, in which he is Tenant to the Præcipe, at full Age he may have a Writ of Error as well as within, and assign for Error that he was within Age at the Time of the Recovery suffered; for if he had brought this

this Writ within Age, it ſhould not have been tried by Inſpection. P. 9 Car. B. R. between *the Earl of Newport and the Duke of Buckingham*, per Curiam reſolved, and not ſuffered to be argued at the Bar, where the Queſtion in Law was, whether he could avoid the Recovery by Writ of (*) Error which was ſuffered by Guardians when he was within Age? and it was adjudged quod non.

but S. P. does not appear. —— Jo. 318. pl. 4. S. C. but * Fol. 752.

S. P. does not appear. —— 2 Saund. 94. Paſch. 22 Car. 2. Hesketh v. Lee, S. P. in Error to reverſe a Judgment in a Common Recovery in the County Palatine of Lancaſter, notwithſtanding Exceptions taken to the Admittance and Appearance of him by Guardian, the ſame were over-ruled, and the Judgment affirmed by the whole Court. —— Mod. 48. pl. 104. S. C. adjornatur. —— If Infant comes in and ſuffers a Common Recovery, this ſhall not be reverſed for Error, per Cur. Sid. 321. Hill. 18 & 19 Car. 2. B. R. cites Ld Newport's Caſe. —— And in the principal Caſe there of **Raby v. Robinſon**, the Court on Conference with the other Judges held, that where an Infant comes in as Vouchee in Perſon, and ſuffers a Common Recovery, a Writ of Error does not lie after full Age; But if he appears by Attorney and ſuffers a Common Recovery, this may be reverſed for Error after his full Age, becauſe it ſhall be tried per Pais, whether the Warrant of Attorney was made when he was an Infant &c and this is the Reaſon that Judgments ſo obtained againſt Infants may be reverſed after their full Age, viz. becauſe the Trial is not by Inſpection but per Pais, and cites Cro. E 569. Mo. 460. Co. Litt 380. b. and F. N. B. 104 (K) —— Lev 142. **Reby v. Robinſon**, S. C. the Parties agreed before Judgment given, but the Opinion of the Judges was ſaid to be, that Error lay not after his full Age.

See tit. Trial (C) per totum.

19. In Account, Writ of Error came *after Judgment given that the Defendant ſhould account, and after Capias ad Computandum was awarded, and before that he had accounted in Fact*, and therefore per Cur. this ſhall not be ſent till he has accounted; For the Plea is not ended before he has accounted in Fact. Br. Accompt, pl. 39. cites 21 E. 3. 9.

Writ of Error cannot arreſt Execution, becauſe Judgment was given before when he was adjudged to account, and all Times after he ſhall be adjudged in Ward, and he who is in Ward cannot be taken out by Writ of Error. Br Accompt, pl. 45. cites 21 H. 6. 26.

20. 9 R. 2. *cap.* 3. *S.* 1. *If Tenant for Term of Life, Tenant in Dower, Tenant by the Curteſy, or Tenant in Tail after Poſſibility be impleaded, and plead to Inqueſt, and loſe by the Oath of twelve, or loſe by Default, or in other manner, he to whom the Reverſion pertains at the Time of ſuch Judgment given, his Heirs and Succeſſors, ſhall have an Attaint, and alſo a Writ of Error, as well in the Life of ſuch Tenants as after their Death.*

21. If a *Quare Impedit* is brought *againſt two*, and *one pleads to Iſſue*, and the *other confeſſes the Action*, upon which Judgment is given, *he ſhall not have a Writ of Error till the Matter is determined as to the other*, for the Writ of Error muſt rehearſe all that are Parties to the Original, and then the Writ ſays, Si Judicium inde redditum ſit tunc Recordum illum habeatis, and as to one Judgment is not given, and if the Record ſhould be removed before the intire Matter is determined, there would be a Failure of Right; Per Curiam, 11 Rep. 39. a. b. in Metcalf's Caſe, cites 34 H. 6. 41. a. in Humfrey Bohun's Caſe.

Fitzh. Error pl. 35. cites S. C. and Priſot cited it as lately adjudged in Ld. Cornwall's Caſe, where Treſpaſs was brought againſt two,

and own appeared and pleaded, and was attainted, and Judgment given againſt the other, that he could not have Writ of Error till the Matter was determined againſt the other &c. ——— Br. Error, pl. 15. cites S. C. and Priſot cited it as lately adjudged in Ld Cromwell's Caſe.

22. Writ of Error was *diſcontinued*, and the *Plaintiff after the Record removed into B. R. brought another Writ of Error* there, quod *coram vobis* reſidet; Quod nota. Br. Error, pl. 140. cites 2 H. 7. 12.

23. *Information* was made in the Exchequer *againſt the Merchants of the Still-Yard for diverſe Merchandiſes Shipp'd not Cuſtom'd*, and Judgment given againſt them, upon which they ſued *Writ of Error*, which was *diſcontinued for the not coming of the Chancellor and Treaſurer*, to whom it was directed ſecundum formam Statuti, by which they ſued to

have *another Writ of Error*, which was *diſcontinued in the ſame Manner*, and *they ſued the third*, and then the Kings Attorney pray'd Execution, and could not have it; For the Writ of Error is a Superſedeas in itſelf, and the *Party cannot compel the Judges to come*, and a Man who is nonſuited in Writ of Error may have another Writ of Error, but not with Superſedeas as the firſt Writ was; For this is his own Default; Contra here by the not coming of the Juſtices. Br. Error, pl. 147. cites 6 H. 7. 15, 16.

24. *So* of Demiſe of the King, or Death of the Party, or *by Adjournment of the County*, in thoſe Caſes the Party ſhall have Superſedeas upon the ſecond Writ of Error. Ibid.

25. An *Exigent* being *awarded in an Appeal*, a Writ of *Error was brought immediately*; For he by the Exigent awarded, in Caſe of Felony, forfeited all his Goods immediately; Wherefore for as much as he *was at preſent Loſs* and Prejudice he might have a Writ of Error preſently; Cited by Coke, Cro. J. 357. in Caſe of Metcalf v. Wood, as a Caſe he had ſeen a Precedent of 8 H. 8.

26. If *in a Formedon* the *Tenant as Judgment for Part*, no Writ of Error lies until the intire Matter in demand is determined; for the Judgment is, Si Judicium inde redditum ſit, which Word inde goes to the intire Demand. 11 Rep. 39. b. per Curiam, cites Dyer 291. b. [D. 290. a. pl. 62. and 291. b. pl. 67. Trin. 12 Eliz. Fitzwilliams v. Copley.]

27. *Error in Proceſs* cannot be alleged *after in Nullo eſt erratum pleaded*; For if it had been alleged the other Party might alledge Diminution. Cro. E. 83. Hill. 30 Eliz. in Caſe of Robſert v. Andrews.

28. J. S. had a Judgment againſt W. *in Debt*, and afterwards *W. made a Feoffment to C.* the Plaintiff *of his Land*; Then J. S. ſued an *Elegit* upon the Judgment, but before it was executed C. brought a Writ of Error, and would aſſign Error in the Judgment. The Court thought that a Writ of Error *would not lie for C. the Feoffee unleſs* it be *for Error in ſuing out Execution*. 2dly Till Execution ſued he is not a Party grieved, which is the true Reaſon why *he in Reverſion* or Remainder *ſhall not have Error in the Life-time of the Tenant for Life* upon a Judgment given againſt ſuch Tenant for Life, becauſe he was not then a *Party grieved*. Cro. Eliz. 289. pl. 6. Mich. 34 & 35 Eliz. B. R. Charnock v. Sherrington.

29. Error *to reverſe an Amerciament in a Court Leet*, becauſe it was unreaſonable; It was inſiſted that after an Amerciament is once affeered, the Writ of Moderata Miſericordia doth not lie; And per tot. Cur. clearly this is no Error now to be aſſigned, and the ſame was affirmed. Bulſt. 125. Paſch. 9 Jac. Stubbs v. Flower.

Cro. J. 324. pl. 4. S. P. reſolved by the whole Court in S. C. and likewiſe in the Caſe of Rawlins v. Barret.

30. In *Action of Account* it was inſiſted, that a Writ of Error does not lie on the firſt Judgment, and Man ſecondary informed the Court upon a general Writ of Error, upon a Judgment given in an Account, the firſt Judgment that he ſhall accompt, and the ſecond Judgment alſo, ſhall be reverſed, if Error be therein. Doderidge J. ſaid, By this it appears that *the general Writ of Error goes to both the Judgments*, as well to the one as to the other; The whole Court agree with him herein. 2 Bulſt. 120. Trin. 11 Jac. Porter v. Agar.

S. P. Arg. 2 Roll Rep. 125. cites S. C. and 12 E. 4. 1.

31. In *Debt againſt divers by ſeveral Præcipes*, if there be Error in the *Judgment againſt one*, he may have Error before Determination of the Matter as to the others, for in thoſe Originals in which are *ſeveral Counts*, and Error is againſt one, he ſhall have Writ of Error, and the Record of his Count and the pleading ſhall be ſevered from the Original, and removed in B. R. and yet the Original remains in C. B. as well becauſe the Court of C. B. is in Poſſeſſion of it as becauſe otherwiſe the Court of C. B. could not proceed to determine the Reſidue

ſidue without the Original. 11 Rep. 41. a Mich. 12 Jac. cites 36 H. 6. tit. Fieri Fac. 3. and in ſuch Caſe Coke ſays it ſeems to him, that if there be Error in the Original upon a Certiorari, the Ch. J. ſhall only certify the Tenor of it. *But where the Original is one and one Count, he cannot have Writ* of Error *till all is determined*; For the Record cannot be in B. R. and C. B. at the ſame time.

32. *Where ſeveral Judgments are to be given, the one dependent on the other*, there the Writ of Error does not lie till the laſt Judgment is given of the Thing of which the Judgment is given before; Per Doderidge J. 2 Roll Rep. 126. Mich. 17 Jac. B. R.

All the Books ſtand upon theſe *Differences*, 1ſt *If Judgment be had after Judgment* he ſhall *not have Error till the laſt Judgment*, as in *Account, Admeaſurement*, and ſuch like. 2dly, When the *Things are ſeveral*, then he ſhall not tarry till the laſt Judgment. 3dly, *Though* they are *ſeveral Things in their Nature, yet if the Damages are intire*, there the Error ſhall not be before Judgment be of the whole and final; Per Doderidge. And per Haughton, In *Debt, Detinue, Dower* &c. *if Defendant confeſſes Part, and has Judgment for this, Error lies, becauſe it is ſeveral*, but *otherwiſe in Treſpaſs, becauſe the Damages are entire.* Litt. Rep. 6. Mich. 17 Jac. B. R.

33. Where a *Suit is of ſeveral Things*, yet *if the Damages are intire* the Writ of Error does not lie till all is determined, as in Treſpaſs againſt ſeveral &c. Per Doderidge J. 2 Roll Rep. 126. Mich. 17 Jac. B. R.

34. In *Debt, Detinue and Dower, by ſeveral Præcipes*, Writ of Error does not lie till all is determined; But otherwiſe in *Treſpaſs*; Per Haughton J. 2 Roll. Rep. 126. Mich. 17 Jac. B. R.

35. If in a *Quo Warranto Judgment be given as to Part of the Liberties claimed*, that they ſhall be ſeiſed, and that the Defendants capiantur pro Fine, *and as to the other Part, Curia adviſare vult*, a Writ of Error lies before any Judgment given for the other Part. Paſch. 17* Car. 2. adjudged upon a Writ of Error upon a Judgment in a Quo Warranto againſt the Corporation of Dublin. 3 Danv. 22. pl. 26. cites Palm. 1, 2, &c. 17 Jac. B. R. and ſays ſee a long Argument and the Judgment accordingly.

2 Roll 113. The King v. Cuſack, S. C. adjornatur.

* This is miſprinted and ſhould be 17 Jac.

36. In *Treſpaſs* when the *Recovery is had by Default* no Writ of Error will lie before the Writ of *Inquiry of Damages is returned*; for the Defendant is not grieved until Judgment is given upon the Return of the Writ of Inquiry. Jenk. 25. in pl. 48.

37. Error lies *after a Confeſſion or Retraxit*, but not after a *Diſclaimer*. Jenk. 283. pl. 12. cites 8 Rep, 58. 6 Jac. Beecher's Caſe.

38. Writ of *Error bore Teſte before the Plaint there entered*, the Court viz. Mallet, Heath and Brampſton were clear of Opinion, without any ſolemn Debate, that *the Record was not removed by that Writ* of Error, becauſe if there be not any Plaint entered at the Teſte of the Writ, how can the Proceſſus according to the Writ be removed, when there is no Proceſſus entered? And that failing all fails; and beſides it is meerly for Delay of Juſtice. Mar. 140. pl. 212. Mich. 17 Car. Dale v. Worthy.

39. A Writ of Error *bearing Teſte before Judgment* is good, as is the Book of 1 E. 5. 4. becauſe in that Caſe the Foundation of the Writ ſtands good, and it is the uſual Courſe of Practice for the preventing and ſuperſeding of Execution; Agreed per Curiam. Mar. 140. pl. 212. Mich. 17 Car. Dale v. Worthy.

A Writ of Error that bears Teſte before the Judgment given, is good to remove the Record, ſo as Judgment be given before the Return of it; Per Cur. Vent. 255. Hil. 25 & 26 Car. 2. B. R. Baker v. Bulſtrode.

Judgment, when ever it is entered, *has relation to the Day in Bank*, viz. the firſt Day of the Term; ſo that a Writ of Error returnable after will remove the Record, whenever the Judgment is entered; Per Hale Ch. J. Mod. 112. pl. 9. Paſch. 26 Car. 2. B. R. Anon.

40. A Writ of Error may be brought *before the Writ of Inquiry is returned in an Ejectment*; for in that Action the Judgment is compleat at the

the Common Law before it is returned; for the Judgment is only to gain Poſſeſſion. And *ſo* it is in a Writ of *Dower*; *But in Treſpaſs, where Damages only are to be recovered*, the Judgment is not compleat till the Writ of Enquiry is returned, nor can be made up before, as in this Caſe it may; but here being no compleat Judgment entered, there being no Capias which ought to be in all Actions Quare Vi & Armis, that the King may have his Fine, which he cannot otherwiſe have if the Party does not proceed in his Writ of Enquiry, the Writ of Error is brought too ſoon, and Plaintiff may proceed to Execution in C. B. becauſe the Compleat Record is not here; Per Roll J. and bid them adviſe what to do in C B. for it is miſchievous either way. Sty. 109. Trin. 24 Car. B. R. Glide v. Dudeney.

41. Error *returnable the ſame Term* in which Judgment was given, is good when the Record is removed; Per Twiſden J. Sid. 104. Hill. 14 & 15 Car. 2. B. R.

42. Defendants in *Indictment* in B. R. were found guilty, and after View Judgment there, brought Writ of Error there, but upon Search and of the Roll there was only *Judgment entered Quod Capiatur*, and therefore the Court directed that the Writ of Error ſhall *not* be *allowed till the Defendants come in proper Perſon*, and in the Interim Proceſs ſhall be made againſt them to come in to hear their Judgments. Sid. 208. pl. 2. Trin. 16 Car. 2. B. R. The King v. Cornwall & Ux.

43. Hale ſaid, that about three Years ſince at Norfolk Aſſizes, the *Defendant in an Indictment of Barretry brought a Writ of Error Teſte before the Aſſizes*, and it was diſallowed, becauſe if ſuch Practice ſhould obtain it would diſappoint all the Proceedings at the Aſſizes. Vent. 255. Hill. 25 & 26 Car. 2. B. R. in Caſe of Baker v. Bulſtrode.

19. A Writ of Error will lie on a *Judgment in Ejectment quod recuperet* &c. *before a Writ of Inquiry executed*, for that is only as to the Damages; Per Holt Ch. J. Carth. 205. Hill. 3 W. & M. in B. R.

44. 10 *W.* 3. *cap.* 14. *S.* 1. *No Fine or Common Recovery, nor any Judgment in any real or perſonal Action, ſhall be reverſed or avoided for Error, unleſs the Writ of Error, or Suit for the reverſing ſuch Fine, Recovery or Judgment, be brought and proſecuted with Effect within* 20 *Years after ſuch Fine levied, or ſuch Recovery ſuffered, or Judgment ſigned or entered of Record.*

45. Error of a Judgment in Debt *upon a Bond* in C. B. and the Error aſſigned was, that it was a Bond *for Appearance taken by the Plaintiff Colore Officii*, and it was no where ſaid that the Plaintiff was a Sheriff but only that he took the Bond, *per nomen Vicecom'*; Holt ſaid, then you ſhould have pleaded the Statute and that matter, and now you are too late and Judgment was affirmed. 12 Mod. 634. Hill. 13 W. 3. Jones v. Sweetapple.

(N) *How* the Writ ſhall be *brought*.

1. IF a Writ of Error be brought in this Manner, videlicet, This is directed to Sir Edward Littleton, (he being then Chief Juſtice de Banco) to certify a Judgment in Querela, quæ fuit coram Vobis et Sociis veſtris where it was before Sir John Finch, then Chief Juſtice the Predeceſſor of Sir Edward Littleton is, this Writ ſhall abate. Tr. 16 Car. B. R. between *Lowes and Webble*, adjudged per Curiam.

2. So

2. So if a Writ of Error be directed to Oliver St. John, he being Chief Juſtice de Banco, to certify a Judgment in querele, quæ fuit coram vobis et Sociis veſtris, where it was before Edmund Reeves and Sociis Suis, there not being then any Chief Juſtice; this is not good, but the Writ ſhall abate. Hill. 1649 Several Writs abated for this Cauſe.

3. But if a Writ of Error be directed to Peter Pheaſant, to certify a Judgment in Loquela quæ fuit Coram vobis & Sociis veſtris, where it appears by the Record that it was held Coram Edmundo Reeves et Petro Pheaſant, this is a good Writ; for though in the Return Edmund Reeves is firſt named, yet this is well enough, inaſmuch as Peter Pheaſant is alſo named, and it does not appear which of them was the eldeſt. Hill. 1649. between *Clarke and Sprigg* adjudged, Intratur P. 1649. Rot. 458.

4. If a Writ of Error be directed to the Mayor, Aldermen and Recorder of Lanceſton in Cornubia, and the Record is certified by the Mayor, Aldermen, and Deputy-Recorder, the Court being held by Letters Patents, this is not well certified, inaſmuch that this ought to be certified in the Name of the Judges of the Court; and it does not appear that the Recorder had Power to make a Deputy by the ſaid Letters Patents. Hill. 1649. between *Sprye and Mill*, adjudged, and the Writ abated accordingly. Intratur P. 1649. Rot. 208.

Sty. 183. S. C. adjornatur. — Ibid. 203, 204. S. C. and the Writ was abated.

5. In a Writ of Error to *reverſe an Outlawry*, it is *not mention'd at whoſe Suit* he was outlawed, *nor in what Action*, and yet held good, becauſe of the many Precedents. 4 Rep. 93. b. cites 4 E. 4. 44. Paſton's Caſe.

In ſuch Caſe he need not ſhew in what Action it was; Per Coke Ch. J. Roll Rep. 22. cites S. C.

6. But in the Principal Caſe where the Writ of Error was brought to remove a Judgment in quadam Loquela by Writ of certain Land and Paſture, and ſhews not in what Action this Plea was, the Court for that Reaſon adjudged, that the Writ ſhould abate. Roll Rep. 22. pl. 27. Paſch. 12 Jac. B. R. Watſon v. Bernard.

2 Bulſt. 212. Paſch. 12 Jac. Osborn v. Makeburne. S. P. exactly, and the whole Court were clear of Opinion that it ought always to be ſhewn in what Action the Judgment was given, and for ſuch Omiſſion the Writ of Error was quaſhed.

7. A Writ of Error *directed to the Chief Juſtice de Banco* upon a Judgment given in a *Quare Impedit by Judges of Aſſiſe*, and held good; and the Plaintiff in Error had a Superſedeas, viz. non Moleſtandum to the Metropolitan to ſurceaſe Execution until the Error was diſcuſſed, and this iſſued out of the Common Pleas, and the Defendants ſued a Scire Facias Quare Executio non &c. againſt the Biſhop and Incumbent; at the Return whereof the Plaintiff came and aſſigned his Errors. Dyer. 76. b. 77. a. Mich. 6 E. 6. Henſloe v. Keble.

8. A Writ of Error was brought *directed to Sir A. Brown Ch. J. of C. B.* but *before the Return of the Writ Sir A. was remov'd, and Sir J. Dyer made Ch. J.* there, this was held ill, and the Plaintiff was forced to bring a new Writ of Error De Recordo quod Coram Vobis reſidet. D. 173. b. pl. 16. Mich. 1 & 2 Eliz. Kirk v. Parrott.

9. When a Writ of Error is brought to reverſe a Fine, there *muſt be one Writ ſent to the Ch. Juſtice de Banco*, another *to the Cuſtos Brevium* to certify Tranſcriptum pedis Finis cum omnibus eundem Finis tangen', and another *to the Chirographer* to certify Tranſcriptum Notæ Finis. 5 Rep. a. 39. b. Trin. 34 Eliz. B. R. Tey's Caſe.

Cro. E. 891. pl. 8. Andrews v. Ld. Cromwell. S. C. & S. P. resolv'd that the Writ was not good for that Reason, and that it should abate; but Fenner e contra. And though in 5 E. 6. D. [76. b. 77. a. pl. 34 &c. Mich. 6 E. 6. Henslow and Stanby v. Keble.] where a Judgment was in Quare Impedit before the Justices of Nisi Prius, by the Statute of Westm. 2. and Error thereof being brought, Exception was taken, because he does not shew in the Writ where the Judgment was, and yet held to be good; For there the Record began, and remained in the Common Bench, and where the Judgment was, was not material; Bnt in this Case, the Record was not at first in the Common Bench, and therefore he ought to shew How it came thither. And Gawdy said, when the Record begins in one Place, and is finished in another, there of Necessity, in a Writ of Error, the Proceedings in both Places ought to be mentioned.

10. If an *Assise* be *summoned before the Justices of Assise*, and *they are after removed, and the Chief Justices of B. and another Justice, are made Justices of Assise in the same County, and the Assise is taken before them, and propter Difficultatem adjourned into B.* and Judgment there given for the Plaintiff, and a Writ of *Error is directed to the same Ch. J.* before whom the Assise passed, reciting the Assise summoned before the Justices of Assise by Name; & postmodum capt' before the Ch. J. &c. but does not recite how the Assise came in B. viz. by Adjournment or otherwise, this Writ of Error is not good, for as it took Notice of the Change of the Justices a fortiori it *ought to take Notice of the Adjournment*, for by that both the Judges and Court were changed. Yelv. 3. Pasch. 44 Eliz. Ld. Cromwell v. Andrews. Adjudged per totam Curiam against the Opinion of all the Curitors; but Yelv. 6. in the same Case it was adjudged that *the Record was removed by this bad Writ, and* that *the Party might have a new Writ de Recordo quod coram nobis resident.*

And Yelv. 3. a Diversity was taken between the Case of an Assise, and a Quare Impedit; for the Assise ought to be commenc'd originally before the Justices of Assise, and so by Presumption and Intendment, Judgment given also before them, and not in C B unless upon Adjornment; and therefore if Judgment be given in C. B. it ought to be appriz'd certainly how the Record of Assise came into C B. But in Error to remove a Record of a Quare Impedit the Writ is not of such Precise Form, because the Action originally commenc'd before the Justices of C. B. and by Intendment Judgment given there, though by the Statute to avoid a Lapse Judgment may be given before the Justices of Assise.

11. In the 5 E. 6. where *Judgment in a Quare Impedit* by the Statute of Westm. 2. was given *by Justices of Nisi Prius*, and a *Writ of Error thereof brought without shewing where the Judgment was given*, it was held good; for the Record beginning and remaining in C. B. it was held not material where the Judgment was given, per Curiam; and Gawdy said, When the Record begins in one Place, and is finished in another, there of Necessity in a Writ of Error the Proceedings in both Places ought to be mentioned. Cro. E. 891, 892. pl. 8. Pasch. 44 Eliz. in Ld. Cromwell's Case.

12 Error brought *as Cosen and Heir of C. Earl of Devon to reverse a Fine levied by the said Earl*, and Errors were assigned, and a Scire Facias ad audiend. Errores but he does *not shew either in the Writ of Error or in the Sci. Fa. how he is his Cousin.* Resolved it was good enough without shewing the same in any of the said Writs, for the one is but a Commission to hear the Errors, and needs not such Certainty; And the other is but a Writ founded thereupon, and therefore *how Cousin, need not be shewed in them.* Cro. J. 160. pl. 15. Pasch. 5 Jac. B. R. Champernoon v. Godolphin.

13. *Nor is it requisite that the Title be shewed therein, unless* it be *in a special Case* varying from the Common Course; *As where an especial Heir in Tail brings a Writ of Error, or he in the Remainder*, because he is to entitle himself, he *ought to shew specially how Cousin, or how he has the Remainder*, but otherwise not. And although in some Writs it is shewn how Cousin, as in **Penner's Case**, and is good enough, yet it is not of Necessity; And the omitting thereof is no Cause of abateing the Writ. Cro. J. 161. Pasch. 5 Jac. B. R. in Case of Champernoon v. Godolphin.

God. 248. pl. 345. Heydon's

14. If a Writ of Error be brought *upon a Judgment in an Assise capt' coram J. Fleming nuper capital' Justiciar' ad placita*, & J. Doderidge

deridge uno Juſticiar' ad placita coram nobis tenend' aſſignat' Juſticiar' noſtris ad Aſſiſas, this Writ is naught, for there was no ſuch Record before Fleming Juſticiar' ad placita, the Words Coram Nobis Tenend' Aſſignat' being omitted, and thoſe after Doderidge cannot refer to the firſt; adjudged per Curiam præter Doderidge. Cro. J. 341. pl. 7. Paſch. 12 Jac. Sir Chriſtopher Heyden v. Godſalve.

Caſe S. C. & S. P. and Crook agreed with Doderidge, but Haughton and Coke Ch. J. e contra.

15. A Writ of Error was brought *in Recordo & Proceſſu Aſſiſæ &c. inter A. and B. ſummonit'* Exception was taken becauſe he did *not ſhew which was Plaintiff* and which Defendant in the Writ of Error, nor in the Aſſiſe; Sed non Allocatur, becauſe the Precedents are both Ways. Cro. J. 341. Paſch. 12 Jac. Heyden v. Godſalve.

16. A Writ of Error was brought *to remove a Record in Curia Manerii de Cuttinby*, where *the Record was in Curia Cuſtodum Libertatis Angliæ Authoritate Parliamenti de Cuttingly.* It was moved that here was a *Variance* between the Writ and the Record; But per Roll there is no direct Oppoſition between them, for they both may ſtand together, and though de Facto it is the Court of the Lord of the Manor, yet Virtually and in Dignity it is the Court of the King. Sty. 344. Mich. 1652. Reckwith v. Moyle.

17. Writ of Error *to certify the Record of a Plaint held before the Mayor and Aldermen, and the Mayor and Conſtables of the Staple of Briſtol, and alſo before the Sheriffs and Bailiffs*, Mayor and Commonalty of the ſaid City &c. and this was *directed to them & eorum cuilibet*, and *the Record certified was only by the Sheriffs and Bailiffs*; but adjudged to be well, for that it ſhall be taken diſtributively, viz. That the Record of a Judgment, upon a Plaint held before the ſaid Officers or either or any of them ſhould be certified; And Judgment was affirm'd. 2 Sand. 291. Hill. 22 & 23 Car. 2. Gay v. Adams.

Vent. 109. Guy v. Adams, S. C. but S. P. does not appear —— S C. cited as held accordingly 2 Ld. Raym. Rep. 1200.

(O) *What* ſhall be *a Removal of a Record.*

1. If a Writ of Error be brought in Banco Regis to remove a Recovery of the Manor of M. in M. cum pertinentiis, where the Record of the Recovery is of the Manor of M. cum pertinentiis, yet the Record is well removed. Co. 3. Marqueſs of Wincheſter, 2. adjudged per Curiam, for upon ſuch Writ the Recovery is reverſed.

2. *Debt* was brought *by F. againſt E. Feme and Executrix of J. N.* and he recovered, and ſhe brought *Writ of Error* and removed the Record, and the Writ *made mention of Record between the Feme and J. N. the Teſtator*, and *not between the Feme and F. who recovered*, and it was doubted where the Record remains, and the Opinion was that it is in B. R. becauſe the Roll in C. B. makes mention that it is removed; Quære; For Per Babb. it may be amended; Quære inde. Br. Error, pl. 5. cites 9 H. 6. 4.

3. In *Partition* the *Judgment was, Quod fiat Partitio*, but *before the final Judgment was given a Writ of Error was brought*, and it was held that the Record was not removed for that Cauſe, whereupon the Writ of Error was quaſhed. 3 Salk. 145. pl. 2. Mich. 12 W. 3. B. R. Finch v. Renew.

Ld. Raym. Rep. 619. Finch v. Ranow. S C. ruled accordingly.

4. A Judgment in C. B. given after the Return of a Writ of Error is not removed, and Nul tiel Record may be pleaded to a Scire Fac. Quare Executio non brought upon it to compel the Plaintiff to aſſign Errors. 2 Ld. Raym. Rep. 1179. Trin. 4 Ann. B R. Willon v. Ingoldsby.

5 One

5. *One of the Defendants brings a Writ of Error without the other*, tho' the Writ ſhall be quaſhed, the Record is removed. 2 Ld. Raym. Rep. 1403. Trin. 11 Geo. Ginger v. Cowper.

(P) *Record removed.*

What Thing ſhall be *removed thereby.*

1. IF a Writ of Error upon any Judgment but a Fine be brought in B. R. the Record itſelf ſhall be removed there and not the Copy only. 22 E. 3. 6. per Thorpe. * 40 Aſſ. 29.

* Br. Record, pl. 46. cites S. C.

2. In a Writ of Error upon a Fine levied in Banco the Tranſcript only ſhall be removed in Banco Regis, becauſe if the Record itſelf ſhould be removed, there is no Chirographer in Banco Regis to engroſs it, and then no Quid Juris clamat could be brought, if it ſhould be affirmed there, for this lies only in Banco and does not lie there, and this ſhall not be removed out of the King's Bench after it comes there. ‡ 21 E. 3. 24. † 22 E. 3. 6. adjudged.

‡ Fitzh. Error, pl. 76. cites S. C. —— Br. Protection, pl. 62. cites S. C. more fully. † Fitzh. Record, pl. 11. cites S. C. —— S. P. by Coke Ch. J. Godb. 248. Paſch. 12 Jac. B. R.

3. But if in B. R. they conceive the Fine is to be reverſed, they may * ſend for the Note itſelf and reverſe it. 21 E. 3. 24. D. 1. Ma. 89. 4.

* Fol. 753. Fitzh Error, pl. 76. cites S. C. — Fitzh. Protection, pl. 62. cites S. C.

4. Where they may ſend a Writ to the Treaſurer and Chamberlains to draw the Fine off the File. 22 E. 3. 6. adjudged.

Fitzh. Record, pl. 11. cites S. C. and ſays Vide 40 Aſſ. and 16 E. 3.

5. If a Writ of Error be brought in B. R. upon a Fine levied in the Huſtings of Oxford, the Record itſelf ſhall be removed. 50 Aſſ. 9.

Br. Parol ou Ple &c. pl. 6. cites S. C. —— Br Conuſance, pl. 61. cites S. C.

6. If a Writ of Error be brought in Banco Regis to reverſe a Judgment given in Banco, the Original ſhall not be removed if it be not by Special Matter, as if Error be aſſigned in the Original. 24 E. 3. 24. b.

When a Writ of Error is brought, the Court ſaid that there is no Occaſion to bring it into B. R but only the Record, and the original Writ, and the Warrant of Attorney, and not the Eſſoin Roll, unleſs Diminution be alleged. Br. Error, pl. 158. cites 1 H. 7. 21. —— Fitzh. Error, pl. 10. cites S. C.

7. If a Writ of Error be brought in B. R. upon a Judgment in an Inferior Court againſt the Plaintiff, there the Court may reverſe the Judgment, though the Original be not removed, no Error being aſſigned in the Original, for this is removed but to ſue here upon the ſame Original. 37 Aſſ. 5. adjudged.

8. If a Writ of Error be brought in B. R. upon a Judgment in Ireland, the Original ſhall not be removed. 37 Aſſ. 5.

Br. Error, pl. 27. cites S. C. — S. C. cited 2 Bulſt. 163. —— It is only a Tranſcript which is ſent hither, becauſe it muſt come over

over the Sea, and ſo in Danger of being loſt; Arg. Quod fuit conceſſum, per Coke and Doderidge. Rol. Rep. 17. Paſch. 12 Jac. B. R. —— Cro J 535. S. P. per Cur. Paſch. 17 Jac. pl. 19. in the Biſhop of Oſary's Caſe.

9. **upon a Writ of Error in** Parliament upon a Judgment in B. R. the Roll in which the Record is **ſhall be brought into Parliament by the Chief Juſtice himſelf.** 22 E. 3. 3.

10. **When a Writ of Error is brought in Parliament upon a Judgment given in B. R. the Chief Juſtice de B. R. ſhall carry with him in Parliament** the whole Roll, in which is contain'd the Plea and Proceſs in which the Error is ſuppoſed, and **there ſhall** leave a Tranſcript **of the Record in which the Error is aſſigned,** and **ſhall** carry in B. R. the Roll itſelf, **becauſe the Roll concerns other Matters &c. and for that if the Judgment be affirmed the Court of B. R. may proceed upon the Record, there to grant Execution, and therefore if the Record itſelf ſhould be removed, and Judgment there affirmed, and the Parliament be diſſolved, there could not be any Proceedings thereupon to have Execution.** 1 H. 7. 19. D. 23 El. 375. 19.

Same Caſes cited Godb. 249. but it was anſwered, that it is at the Pleaſure of the Parliament to have either the one or the other. —— S. C cited Cro. J 341. pl. 7 —— 2 Bulſt. 166. and that after the Tranſcript is examined, the Ch. J. carries back the Record itſelf into B. R.

S. P. —— Ibid. 173. ſame Caſes cited, and 10 H. 6. —— 4 Inſt. 21. cap. 1. S. P.

11. A Writ of Error *in all Caſes (except* the Caſe *of a Fine)* removes the Record; for it takes it out of the inferior Court to the ſuperior. In the Caſe of a Fine, the Tranſcript only is removed upon the Writ of Error. Jenk. 31. pl. 61. cites 26 Aſſ. 24.

12. The *Common Bench upon a Writ of Error* does not ſend but the *Tranſcript* of the Writ and Record, and not the Original itſelf; Per Knivet. Br. Error, pl. 127. cites 34 Aſſ. 7.

S. C. cited Arg. 2 Bulſt. 163.

13. *But Ancient Demeſne*, *Franchiſe*, and *Juſtices of Aſſiſe*, upon Writ of Error ſend the Original Writ and Record itſelf, and not the Tranſcript; Per Knivet. Br. ibid.

14. *But* by 37 Aſſ. 5. *Ireland* does not ſend the Original itſelf, but the Tranſcript; Per Finch there. Br. ibid.

15. Upon a Writ of Error the Record itſelf ſhall be removed, and not a Tranſcript of the Record, for *upon the Tranſcript Error cannot be aſſigned, unleſs* it be in a Writ of Error ſued *upon the Tranſcript of a Fine*, that Errors may be aſſigned upon the Tranſcript of the Note of the Fine; and if the Juſtices think that this is Error then they ſhall ſend for the Note of the Fine and reverſe it. F. N. B. 20. (F)

16. By the Writ of Error *all is certified which is with the Ch. J.* of C. B. *which is only the Body of the Record*; but the Original and Judicial *Writs remain with the Cuſtos Brevium; and other Officers*, which are never certified but where Error is aſſigned for want of them. Cro. E. 84. Hill. 30 Eliz. B. R. in Caſe of Robſert v. Andrews.

17. In Caſe of Error *upon Indictments* to reverſe them *the Body of the Record itſelf is to be removed*, and a Tranſcript of it is not ſufficient; Per Williams J. And per Fleming Ch. J. If the Error be *aſſigned in the Outlawry*, only Dimunition may be alleged, there being only a Tranſcript of the Record, but if the Errors be *aſſigned upon the Outlawry, and alſo upon the Body of the Indictment*, here in this Caſe the Body of the Record ought for to be removed, and to be in Court, and a Tranſcript is not ſufficient, and ſo it was in this Caſe, and therefore by the Rule of the Court, a Certiorari was granted for to remove the Record itſelf, and that afterwards Dimunition may be alleged. Bulſt. 181. Paſch. 10 Jac. B. R. Baker v. Baker.

18. A Writ of Error *lies in Parliament upon the Tranſcript of the Record*, without bringing the Record into Parliament, for the Parliament is holden at the King's Pleaſure, and may be diſſolved before the Errors are diſcuſſed, and ſo the Record itſelf cannot be brought here again, becauſe the Parliament, which is a higher Court, was once poſſeſſed of it; Agreed per tot. Cur. Godb. 247. pl. 345. Paſch. 12 Jac. B. R. and cites 8 H. 5. Error 88.

19. The *uſual Form* of all Writs of Error *is to certify Recordum & Proceſſum*, and *yet they do only certify the Declaration and the Pleas* omitting the Writs. And the Record ſhall be intended the Principal Record, and not the Writ and Proceſs. Bridgm. 57. Hill. 12 Jac. cites 11 Rep. Metcalf's Caſe, and the Words of the Writ of Error, "Si "Judicium inde redditum ſit" ſhall be taken to be the Principal Judgment.

20. There is no *Difference between a Writ of Error upon a Fine, and* upon *another Judgment*; for where it is brought *to reverſe a Fine the Tranſcript of Record is only removed*; for none can have the Record of the Fine but C. B. But otherwiſe it is where the Writ of Error is to reverſe another Record there; And yet in both Caſes the Record or Roll in C. B. is not ſent out of C. B. for it remains there, but the Difference is in the entering of them; For when the Writ of Error is brought to remove the Record out of C. B. into B. R. the Entry is "Mittitur Tranſcriptum Recordi." Per Ley Ch. J. 2 Roll Rep. 253. [233] Trin. 19 Jac. B. R.

Sid. 466. pl. 1. Bridier v. Thomas, S. C. ſays that there were four Cauſes between the ſame Parties, and the Plaintiff pray'd the Steward to certify the two laſt Cauſes, but he certified the two firſt, and omitted entering Judgments in the laſt till the Return of the Writ of Error was paſt. And per Twiſden J. in ſuch Caſe the Steward may certify which he pleaſes without any Contempt; But in Caſe no Judgment was given before the Return he may return the ſpecial Matter, viz. That the Writ of Error was returnable ſuch a Day, before which no Judgment was. —— Raym. 189. Rinch's Caſe, S. C. reſolved accordingly, and that the Steward could not certify the two laſt, becauſe no Judgment was given upon them, and the Writ of Error commands to certify Si Judicium redditum ſit, and the Defendant might have helped this by moving the Court below, after Coſts taxed, to have Judgment entered in the two laſt Actions as well as the Plaintiff; For Judgment ought to have been given at the Requeſt of either Party, and ſo the Contempt was diſcharged.

21. A Writ of Error was brought *upon two Judgments* given *in an in an inferior Court*, and *they returned two Records between the ſame Parties, but* it ſeems *not thoſe which the Plaintiff intended*, and this was complained of to the Court; and it appeared that *thoſe, which the Plaintiff brought his Writ of Error upon, were not determined; for Writs of Inquiry of Damages were returned, but no Judgments entered.* Per Curiam, If there be divers Records between the ſame Parties, the inferior Court may remove which they pleaſe, they being warranted by the Writ ſo to do; and here was an Omiſſion in the Plaintiff, that he did not ſee that Judgment was entered; for after a Writ of Inquiry of Damages returned, the Court is to give Judgment at the Prayer of either Party, and not without. Vent. 96. Mich. 22 Car. 2. B. R. Prydyerd v. Thomas.

22. In an Action of *Waſt brought in the Huſtings* in London, there *was a Verdict for the Plaintiff*, which being after *quaſhed for the Inſufficiency, and a new Venire awarded*, whereupon a *Verdict was given for the Defendant*, and Judgment for him, and a Writ of Error being thereupon brought before ſpecial Commiſſioners, it was reſolved that *the firſt Verdict ſhould be certified in the Record, becauſe it was not ſet aſide, for that the Jurors had found againſt Evidence, or for any undue Practice or Miſfeaſance of the Parties*, but only for the Inſufficiency thereof in Point of Law, which the Court had adjudged upon the Verdict appearing before them upon Record. 2 Saund. 254. Mich. 22 Car. 2. Green v. Cole.

23. If

23. If the *Record varies from the Writ of Error*, yet the inferior Court ought to remove it. Vent. 97. in a Nota Mich. 22 Car. 2. B. R.

24. In *Debt upon a Record in an inferior Court*, if the Defendant *pleads Nul tiel Record*, they ſhall certify only Tenorem Recordi, and grant Execution afterwards. Vent. 212. Paſch. 24 Car. 2. B. R. Anon.

25. It is the true Record which *comes here out of Ireland*, and not the Tranſcript, but * *when it comes here* it is the true Record, and not before, and *that* which is in Ireland *ceaſes to be a Record*; And *ſo* it is of *a Record of C. B.* that comes hither by Writ of Error; Per Holt Ch. J. 12 Mod. 255. Mich. 10 W. 3. B. R. Coot v. Linch.

* Yelv. 118. S. P. —— S. P. and it is no Objection that it ſhould be the Tranſcript for Fear of the Peril of the Sea, for one might object in the ſame Manner, that upon Error in C. B. the Tranſcript only is removed hither for Fear it ſhould be burnt or loſt before it comes into B. R. But in Fact, when the Record in both Caſes arrives here, then it is the true Record, and not before; and that which is in Ireland or C. B. ceaſes to be the Record; Per Holt Ch. J. Ld. Raym. Rep. 427. Hill. 10 W. 3. Coot v. Linch.

(Q) *Quod coram vobis reſidet.*

When a Writ of *Error* ſhall *abate.*

In what Caſes the Record is ſo removed, that this Writ lies.

1. If a Record be removed by Writ of Error out of one Court into another, if the Writ of Error be abated the Plaintiff may have a Special Writ of Error Quod coram vobis Reſidet &c. 3 H. 6. 3. 26.

Br. Error, pl. 4 cites S. C. —— Fitzh. Record, pl 16. cites S C.

2. If the Writ of Error be diſagreeable to the Record of the Judgment or otherwiſe bad, yet if the Record be removed by it, another Writ Quod coram vobis reſidet lies. M. 3 Ja. B. R. per Curiam.

3. If the Writ of Error mentions the Judgment to be in loquela inter A. and two others, where it was between A. and the two Perſons, and another Perſon alſo not named, the Writ ſhall abate, and the Record is not removed to have a Writ of Error, Quod coram vobis reſidet, but he ought to have a new Writ. P. 1649. adjudged in a Writ of Error. Intratur M. 23 Car. B. R. Rot. 242. between *Worgon and Kedwin*, and the like Judgment given the ſame Term between *Hacker and Whatten*, where the Writ of Error mentions Five, and the Loquela was between Seven, ſo two of them were not named.

4. If the Addition of the Myſtery of one of the Parties be miſtaken in the Writ of Error, by which it abates, the Record is not removed ſo as to have a Writ of Error Quod coram vobis reſidet; as if the Plaintiff in the firſt Action be named A. B. de London, Citizen and Sadler, and the Writ of Error is to * remove a Record in loquela inter A. B. de London, Citizen and Salter &c. the Record is not removed by this, but ſhall abate, and a new Writ of Error ſhall be awarded de novo. D. 1 El. 173. 16.

* Fol. 754.

5. If

Br. Error, pl. 5. cites S. C. —— Fitzh. Error, pl. 21. cites S C.

5. If the Writ of Error abates for Miſtake of the Name of either Party, there no Writ of Error Quod Coram &c. lies, for that the Record is not removed thereby. 9 H. 6. 4.

Br. Error, pl. 5. cites S. C. —— Fitzh Error, pl. 21. cites S. C.

6. As if F. recovers in Debt againſt the Executor of B. and the Executor brings a Writ of Error of a Record between the Executor and B the Teſtator, where it ſhould be between the Executor and F. by which it abates, no Writ Quod Coram, &c. lies, for that the Record is not removed. 9 H. 6. 4.

7. If a Man 3 Jac. ſues a Writ of Error to reverſe a Judgment given in the time of Queen Eliz. and the Writ is Judicium redditum in Cur' noſtra, by which is intended in the time of King James, (in whoſe Time the Writ of Error is brought) for which the Writ is abated, it ſeems that he cannot have a Writ Quod Coram vobis reſidet, but ought to have a new Writ of Error, for the Record is not removed, for there is not any ſuch Court mentioned. M. 3 Ja. B. R. Dubitatur.

11 Rep. 41. b. Metcalf's Caſe, S. C. & S P. unanimouſly reſolved. —— Roll Rep. 33, 34. pl. 33. S. C. & S. P.

8. If Judgment be given in an Account quod computet, and before the ſecond Judgment a Writ of Error is brought in B. R. where the Writ is abated, becauſe it does not lie before the ſecond Judgment, the Record is not removed by this; For the Writ commanded them to ſend the Record, Si Judicium inde redditum ſit, but no Judgment was given here, upon which the Writ of Error lies thereupon. M. 12 Ja. B. R. between *Wood and Metcalf*, per Coke.

* Br. Error, pl. 4. cites S C. —— Fitzh Record, pl. 16. cites S. C.

9. This Writ may be awarded by the Court, in which the Record is returned. 3 H. 6. 3. * 26.

Cro. J. 384. pl. 14. Sandelow v. Deverton, S. C in the Exchequer-Chamber, and S. P held accordingly. —— Roll Rep 294, pl. 9. S.C. and S. P. held accordingly by Coke and Haughton. —— Hob. 72. pl. 85. Foreſt v. Sandland, S. C. adjudged.

10. If Judgment be given againſt J. S. in B. R. and he and his Bail bring a Writ of Error in Camera Scaccarii, which is of a Record between J. S. and the Bail &c. this does not remove the Record, becauſe the Bail are not parties to the Record. H. 13 Ja. B. R. between *Verten and Sir James Sandeloe.*

Cro. C. 561. pl. 5 the Court doubted, and would adviſe, whether the Bail might have a Writ of Error, Quod coram vobis reſidet Mich. 15 Car B. R. Anon. —— Lev. 137. Trin. 16 Car. B. R. Atherton v. Hole, S. P. adjornatur; But Twiſden J. cited Hill. 21 Car. B. R. Rot 217 that by Writ of Error brought by the Bail the Judgmen, againſt him only may be removed; but ſaid, that in the principal Caſe, there being no Judgment againſt the Bail, nothing is removed, becauſe Judgment againſt him is not yet given.

11 If the Bail bring a Writ of Error as well upon the principal Judgment as in the Judgment againſt them upon a Judgment in Banco, or in an inferior Court, and the Writ abates, becauſe it does not lie upon the principal Judgment, it ſeems the principal Judgment is not removed by this, but it ſeems that the Judgment againſt the Bail is removed, ſo that the Bail may have a Writ of Error quod coram vobis reſidet. M. 15 Car. B. R. between *Williams and Worral*; a Doubt among the Juſtices.

Error in Boſton to reverſe a Judgment given there upon a Scire Facias grounded upon a Recognizance entered into by the Defendant, as Bail for one Townſend at the Suit of the Plaintiff; The Court of Boſton do certify not only the Judgment upon the Scire Facias, but alſo the principal Judgment, and all Proceedings therein, and reſolved good enough, becauſe if they ſhould certify only the Judgment in the Scire Facias it could not well be underſtood by this Court, becauſe in inferior Juriſdictions there are not ſeveral Rolls to enter the Judgment for the Principal, and another for the Scire

Scire Facias, and another for the Bail, but all Proceedings, as well againſt Defendants as againſt the Bail, are entered (for the moſt part) in a Book, and never entered at large, unleſs when a Writ of Error is brought, and then they make up an intire Record, and not otherwiſe; and Judgment was affirmed. Raym. 431. Paſch. 33 Car. 2. B. R. Johnſon v. Taylor.

12. **If a Writ of Error be** brought in B. R. to reverſe a Judgment given in Banco, **and in the Writ** the Sum of the Damages in the firſt Action is miſtaken, **though a** Mittitur **be** entered upon the Record upon the Receipt of the Writ **of Error, yet the Record is not removed by it. H. 7 Ja. B. between** *Stocker and Kemiſh*, **per Curiam.**

13. **If the** Judgment **be given in Banco** tempore of one King, **and the Writ of** Error brought tempore of another King, **and the Writ of Error be to remove a Record** in Loquela quæ fuit in Curia noſtra; et coram Juſticiariis noſtris, et per breve noſtrum, between the Parties, **and thereupon the Record is certified in B. R. yet it is not removed de Banco. ſo that no Writ of Error lies in B. R. Quod Coram vobis reſidet. D. 1. 2. Ma. 106. 16.**

Roll Rep. 200. pl. 2. Trin. 13 Jac. B. R. Loyd v. Bethel, S. P. agreed per Curiam, that it is not good. —— Bridgm. 56. S. C. & S. P.

14. **If the** Writ **of Error** mentions the Judgment to be Coram the Conſtable and Bailiffs, **and the** Record **is, that it was** Coram the Deputy Conſtable and Suitors, **and not the Bailiffs, the Record is not removed, but it ought to be abated, and a new Writ of Error to remove it. P. 1649. between** *Worgan and Kedgwin* **adjudged. Intratur H. 23 Car. B. R. Rot. 241.**

See Sty. 131. Mich. 24 Car. Exception taken on the like Point, in the Caſe of Tomkins v. Jourden, Curia adviſare vult.

15. **If a Writ of Error be** brought in B. R. in Hibernia, upon a Judgment * **given** in Banco there, **and upon this the** firſt Judgment is reverſed, **upon which a Writ of** Error is brought in B. R. in England upon the Judgment given in Hibernia, and **in this the** Judgment given there reverſed, **and that the Judgment given in Banco in Hibernia ſhall ſtand in its Force; If there be Error in the Judgment given in Banco in Hibernia, Writ of Error may be brought in B. R. in Hibernia [Anglia] in Recordo quod Coram vobis reſidet, though the Record itſelf is not removed, but only the Tranſcript, for the Danger of the Miſcarriage over the Sea. Tr. 5 Ja. B. R. between** *Comyn and St. John*, **agreed.**

* Fol. 755. Yelv. 117. Seint-John v. Comyn, S. C. the Court after much Debate granted that they ſhould have a new Writ Quod coram vobis reſidet, de bene eſſe.

16. **If a Writ of Error** brought in Camera Scaccarii upon a Judgment **given** in B. R. **by the Statute of 27 El.** be abated by Death or otherwiſe, **it ſeems that no Writ lies there quod coram vobis reſidet, for upon this Writ of Error the Record** itſelf **was not removed, but only the Tranſcript, and therefore he ought to have a new Writ of Error. Dubitatur H. 13 Jac. B. R. between** *Verton and Sir James Sandeloe.* **Mich. 19 Jac. in Scaccario, adjudged per Curiam.**

Cro. J. 384. pl. 14. Sandelow v. Deverton, S. C. in the Exchequer-Chamber reſolved accordingly. Roll Rep. 294. S. C. & S. P. per Coke and Haughton. —— Hob. 72. pl. 81 Foreſt v. Sandland, S. C. adjudged. —— Error Coram vobis lies on Affirmance of a Fine in B. R. 1 Salk 337 Winchurch v. Belwood.

18. If *Record* be *removed out of* this Court of *C. B. into B. R. by Writ of Error, and Scire Facias is brought againſt the Party, and after the Plaintiff in the Scire Facias is nonſuited, and the other brings Scire Facias to have Execution, and the other ſhews Writ of Error, Quod penes illos reſidet*

reſidet and aſſigns Errors, yet the other ought to have Execution without Anſwering to the Errors. Br. Faux Judgment, pl. 9. cites 21 H. 6. 34.

19. *But* if he will *firſt ſue Writ of Error* and pray Scire Facias againſt the Party, and after be nonſuited, there if the other ſues Scire Facias to have Execution, the Party who was nonſuited ſhall have Writ of Error Quod coram vobis reſidet and aſſign his Error, *Contra in the Scire Facias*. Br. Faux Judgment, pl. 9. cites 21 H. 6. 34.

20. *And* ſo there ſeems *a Diverſity where he ſues Scire Facias and is nonſuited*, and where he *prays Scire Facias and does not ſue it out*. Br. Faux Judgment, pl. 9. cites 21 H. 6 34.

21. A Writ of Error is *brought* of a Judgment *in the Exchequer before the Chancellor, Ld. Treaſurer, and two Chief Juſtices*, and *afterwards another is brought, but not quod coram vobis reſidet, becauſe the Record is not removed out of the Cuſtody of him who had it before*, but the Record remains in the ſame Cuſtody after the Writ of Error purchaſed as it was before. 3 Rep. 11. b. 15. b. Mich. 26 & 27 Eliz. in Scacc. Sir William Herbert's Caſe.

Yelv 211. S. P. adjudged and that the Record being brought in B. R was well removed and remained there.——2 Ld. Raym. Rep 1200. cites S. C. that the Record was held to be well removed; For if the Parties are rightly named, any other Variance will not hurt.

22. If a Writ of Error be brought *to remove a Record before the Biſhop of Durham and eight others*, and thereupon *a Record before the Biſhop and nine others is removed*, the Record cannot be examined upon this Writ, but there *ought to be a new Writ* de Recordo quod coram vobis reſidet; Cro. J. 224. pl. 14. Mich. 7 Jac. Odell v. Morton.

Yelv. 212. S. C. & S. P. per Cur. for that the anſwer was not ſo full as the Command of the Writ and therefore ill, and the Anſwer ought to be by all unleſs ſome are dead after the Writ awarded, and if ſo then it ought to appear by the Anſwer of thoſe that are alive.

23. But upon View of the Record it appeared the *Writ was directed to the Biſhop and eight others, and eight of them only certified, and not the ninth, and it appeared not that he was dead or removed*, and therefore alſo the Writ was held to be ill &c. per Curiam. Cro. J. 254. pl. 14. Mich. 7 Jac. Odell v. Morton.

24. *A. brought* a Writ of *Error againſt B. upon a Fine*, upon which *the Tranſcript of the Fine and Proclamations are removed* in Banco, and afterwards A. is nonſuited; Now another who has Cauſe may have a Writ of Error Quod coram vobis reſidet. 3 Le. 107. pl. 157. Trin. 26 Eliz. B. R. in the Caſe of Ragg v. Bowley.

Cro. J. 620. pl 6. Cave v. Polewheel, S. C. adjudged notwithſtanding ſeveral Precedents were cited to the contrary, which the Court ſaid had paſſed without Debate.

25. The *Plaintiff recovered in B. R.* and the Defendant brought a Writ of *Error in the Exchequer-Chamber*, and after the Record was certified, the *Writ was diſcontinued*, and *then the Defendant brought a Writ* of *Error Coram vobis reſidet, in the Exchequer-Chamber*; and reſolved by all that it did not lie, becauſe the Writ of Error is given by the Statute 27 Eliz. in a ſpecial Manner, viz. either to affirm or reverſe the Judgment, and the Execution thereof is referred to B. R. and therefore no Coram vobis reſidet lies; but upon a Diſcontinuance or Miſcontinuance, the Tranſcript of the Record is remanded to B. R. Jo. 14. pl. 16. Mich. 18 Jac. Polhill v. Cate.

26. *If a Writ* of Error *does abate upon the Plea to the Writ and the Record be well removed*, the *Party may have a new Writ* of Error *Coram vobis reſidet* &c. But if the Record be not well removed, then the Party ſhall not have a new Writ of Error here; Per Doderidge. Godb. 375. pl. 463. Trin. 3 Car. B. R. Carliſle Dean and Chapter's Caſe.

27. Error

27. Error was brought in the Exchequer-Chamber of a *Judgment in a Sci. Fa. by an Executor to have Execution of a Debt recovered by Teſtator.* The Court doubted whether this Sci. Fa. being grounded on a *Judgment* in an Action of Debt, be not within the Equity of the Statute; Advſare vult. Cro. C. 286. pl. 32. Mich. 8 Car. B. R. Nevil v. South and Delabarre.

28. Where the Writ of Error *recites truly the Names of the Parties* to the Action, *the Action itſelf*, and the *Thing in Demand*, though the Writ of Error abates for other Defects, a new Writ of Error De Recordo Quod coram vobis reſidet well lies. Jenk. 306. pl. 81. Yelv. 6. Trin. 44 Eliz. B. R. Cromwell v. Andrews S. P. but if there is any Miſtaking in the ſaid matters it is otherwiſe.

29. Error to reverſe a Judgment in C. B. in an Action on the Caſe; Exception was taken that the Record was not removed, the *Judgment in C. B.* being *given Coram Petro Pheſant*, and the *Writ of Error was to certify a Record Quod coram vobis reſidet*; And the Court abated the Writ of Error for this Exception. Sty. 183. Mich. 1649. Gilbert v. Marden.

30. *A Writ* of Error *quod coram vobis reſidet is*, when a Writ of Error is brought to reverſe a Judgment given in C. B. or other Court, where the Record was formerly removed into the Court of B. R. and by Reaſon of the Death of the Party, or for ſome other cauſes reſts undetermined, by reaſon of the abatement of the former Writ of Error. Sty. 470. Mich. 1655. Anon.

31. Where a Writ of *Error abates, or is diſcontinued in Cam. Scacc.* the Judgment is not again in B. R. till a *Remittitur* is entred; For without ſuch Remittitur it cannot appeal to the Court of B. R. but that the Writ of Error is ſtill pending in the Exchequer Chamber 1 Salk. 261. pl. 1. Trin. 4 W. & M. in B. R. Howard v. Pitt. Show. 402. S. C. accordingly.—— Carth. 236. S. C. and per Curiam, unleſs a Remittitur is entered the Plaintiff muſt ſue a Scire Facias.

32. A Writ of Error coram vobis was brought, *reciting the former Writ to be returnable Coram Nobis, where it was in the Time of the late Queen as well as of the King*, and therefore was quaſhed. *But* Holt Ch. J. ſaid, *if* the Writ of Error had been *granted in the Time of the King and Queen, and then the Queen had died*, and then the Record had been brought into B. R. this had been ſuch a Record as the Coram Nobis reſidet deſcribes. Ld. Raym. Rep. 151, 152. Hill. 8 & 9 W. 3. Walker v. Stokoe. Carth. 367. S. C. the Court held that this Writ was no Warrant for the Court to proceed upon, and quaſhed it.

33. And Holt took the Diſtinction in Yelv. 211. that *where the Suit is to defeat a Record*, then the Variance is fatal, *but where the ſuit goes to another Collateral matter*, and not to defeat the Record, there it is otherwiſe. Ld. Raym. Rep. 152. in S. C. Carth. 370. S. P. in S. C.

34. It lies *on a Judgment in B. R. for any Error in the Record, As want of an Original* &c. or concerning *Matters of Fact, as Nonage, Death of the Party*; For Error in Fact is not the Fault of the Court, therefore it may be determined by the Judges when the Record is before them. 8 Mod. 317. Mich. 11 Geo. in a Note there at the Bottom of the Page.

35. Where a Writ of Error in this Court *abates by the Death of the Parties*, another Writ of Error will lie Quod coram vobis reſidet, but in no other Caſe. 2 Barnard. Rep. 253. Paſch. 6 Geo. 2. B. R. Herne v. Buſhel.

(R) *Who may assign* Error in the Thing. The *Vouchee.*

Br. Error, pl. 39. cites S. C. —— Fitzh. Error, pl. 61. cites S. C. —— Jenk. 69 pl. 31. S P. and cites S. C and 9 H. 4. 1.

1. IN a Writ of Error by the Vouchee he may assign Error which was between the Demandant and Tenant. 8 H. 4. 3. b. because the whole is upon one Original.

Jenk 69. pl. 31. cites 8 H. 4. 4. and 9 H. 4. 1. that the Tenant cannot. The Vouchee may have Prejudice by this Error, but the Tenant cannot, because he has recovered in Value; If the Tenant reverses the Judgment, the Vouchee shall have a Sci. Fac. to restore the Value; If the Vouchee prevails by Means of the Writ of Error brought by the Vouchee, the Tenant shall be restored.

2. So the Tenant may assign Error between the Demandant and the Vouchee. Contra 22 E. 4. 32.

See (K) pl. 7 supra.

Br. Error, pl. 39. cites S. C. —— Fitzh. Error, pl. 61. cites S. C.

3. So the second Vouchee may assign Error between the Tenant and the first Vouchee. Contra 8 H. 4. 5.

Fitzh Error, pl. 61. cites S. C.

4. If the Heir of the Husband brings a Writ of Error upon a Judgment given against him, being Vouchee in a Writ of Dower, he may assign Error in the whole Process. 8 H. 4. 5.

5. The Vouchee may assign Error in the Judgment of the Value against himself. 18 E. 3. 38. b.

Cro E. 739. pl. 13. Hill. 42 Eliz. B. R. Holland v Dauntzey, S. P. held accordingly per tot. Cur. —— Palm. 123. and 224. to 258. S C. argued by Counsel and the Court, and Judgment accordingly. —— Brtdgm. 69. Holland v. Jackson & al' S. C. argued, but the Writ abated by Death of one of the Plaintiffs in Error —— Roll Rep. 301. to 309. S. C. Arg. sed adjornatur, and afterwards the Writ abated by the Death of one of the Plaintiffs. —— Mo. 622. pl. 850. S. C. but S P. does not appear. —— All. 75. S. C. cited by Hale, and that the intire Judgment was reversed. —— See Tit. Attorney (C) pl. 4. and the Notes there.

6. If Tenant in Tail within Age, being vouched in a Common Recovery, appears by Attorney where he ought to appear by Guardian, he in Remainder may assign it for Error, because he is privy to the Record in Regard of his Interest, and the Appearance of the Infant by Attorney was void. H. 13 Ja. B. R. between *Holland and Lee.*

7. If A. recovers against three in a Dum fuit infra Ætatem, and two of the Tenants are within Age, yet all may bring a Writ of Error, and assign the Nonage for Error. Dyer 1, 2. Ma. 104. 10. adjudged.

Cro C. 517. pl. 19. S. C. and for the Defendant in Error it was insisted, that for as much as there be two several Sci-

8. If A. recovers against B. Debt and Damages, and after B. dies, and upon the Return of the Death of B. upon a Testatum a Scire Facias is awarded to the Sheriff of Kent, and another Scire Facias to the Sheriff of Surry, against the Tertenants, and the Sheriff of Kent returns C. Tertenant of the Land there, which was the Land of B. at the Time of the Judgment; and the Sheriff of Surry returns D. Tertenant of the Land there; and upon this C. and D. appear, and C. pleads that J. S. a Stranger, is Tertenant of the Land, which

which was the Land of B. at the Time of the Judgment; to which A. the Plaintiff ſays, That J. S. is not Tertenant of any Land &c. Upon which ſeveral Pleas ſeveral Iſſues are joined, and ſeveral Venire Facias's, and ſeveral Trials, one in Kent and the other in Surry; and the Iſſue is found againſt C. ſcilicet, that J. S. was not Tertenant; and the other Iſſue is found for D. ſcilicet, that he is not Tertenant; upon which ſeveral Verdicts Judgment is given accordingly for the Plaintiff A. If C. brings a Writ of Error only upon this Judgment, (*) he cannot aſſign for Error that D. died before the Verdict was given for him, for he is a meer Stranger to the Proceedings between A. and D. for if A. had relinquiſhed his Writ againſt D. C. could not prevent it; for he hath not pleaded that D. was alſo Tertenant, but hath put himſelf upon another Plea, and this being found againſt him he ſhall not have any Advantage of any Proceeding between D. and A. Mich. 14 Car. B. R. between *Angell and Cowper*, adjudged per Curiam in a Writ of Error upon a Judgment in B. and the firſt Judgment affirmed accordingly, notwithſtanding this Error. Intratur.

re Facias's in ſeveral Counties, they be as ſeveral Suits, the one not depending upon the other, and

* Fol. 756.

he Proceedings are ſeveral; and although there be Death &c. alleged in the one, yet it is not material as to the other Suit; nor is there any

Cauſe that the other, againſt whom the Verdict is found, ſhould aſſign it for Erorr, and he cited for this Point 5 E. 4. 7. and of that Opinion was Brampſton, Jones, and Croke; Whereupon Rule was given that the Judgment ſhould be affirmed.

9 *If a Man be vouched, and enters into Warranty, and loſes*, he may have a Writ of Error, and *aſſign the Errors* which happened *betwixt the Demandant and the Tenant*, *or* betwixt the *Demandant and the Vouchee.* F. N. B. 21. (C)

10. And *ſo he in the Reverſion* who prays to be *received upon the Default of the Tenant for Life*, *or for his faint Pleading*, if he be received, and pleads, and loſes, he ſhall have a Writ of Error, and *aſſign the Error betwixt the Demandant and the Tenant*, *or* between the *Demandant and him who prays to be received.* F. N. B. 21. (C)

11. Note alſo, The *Vouchee may aſſign Error between the Demandant and Tenant*, and ſo of Tenant per Reſceit. 8 H. 8. 4. 5. 8 H. 4. 3. But the Tenant (himſelf) ſhall not have Error, becauſe he is out of Court. Quære 17 E. 2. Recovery in Value 32. F. N. B. 21. (C) in the new Notes there (b)

12. Writ of Error *to reverſe a Judgment* given *in an Aſſiſe againſt A. and* 19 *others* Hill. 43 Eliz. but nothing being done thereupon, a *Seire Facias was ſued* Quare Executionem habere non debet, returnable quinque Paſch. *A. appeared*, and *the others exacti non venerunt*; and *A. only aſſigns the Errors*, and this Aſſignment was held to be null and void, *without ſuing a Summons and Severance of the others.* Cro. E. 891, 892. pl. 8. Trin. 44 Eliz. B. R. Cromwell v. Andrews.

Yelv. 3. S. C. for all ought to have aſſigned the Errors together, and by this the Writ of Error is diſcontinued;

but he that appeared ought to have prayed Proceſs ad ſequend' ſimul, and upon this Judgment of Severance ought to have enſued, for before Appearance there cannot be any Judgment of Severance without Proceſs, but otherwiſe it is after Appearance.

(S) Aſſignee.

In what Judgment Error may be aſſigned.

[By Default or falſe Surmiſe.]

This ſeems to be miſprinted, and that it ſhould be 19 Aſſ. pl. 8. —— A Judgment by Default is a Judgment, but if it be erroneous it cannot be affirmed. Sty 122. Trin. 24 Car. per Roll J. in Caſe of Crook v. Samm.

1. A Man may aſſign Error upon Law in a Judgment given againſt him by Default. 19 Aſſ. 10.

Br. Error, pl. 117. cites 19 Aſſ. 8. S. P. and Roll ſeems miſprinted.

2. So a Man may aſſign Error in Fact upon a Judgment given againſt him by Default. 19 Aſſ. 10.

Br. Error, pl. 117 cites 19 Aſſ 8. S P. —[and Roll ſeems to be miſprinted,] and Brooke ſays, Sic vide that upon Judgment upon Default Matter in Fact may be alleged for Error. — See (P. b) infra, pl. 17. S. C.

3. As in a Writ of Meſne againſt two Coparceners, if one dies pending the Writ, and after both are fore-judged, upon their Default, the Survivor and the Heir of him that is dead may aſſign for Error the Death at the Time of the Judgment of him that is dead. 19 Aſſ. 10. adjudged, though it be Matter in Fact.

Cro. C. 426. pl. 17. Tyſſin's Caſe, S. C. and it was objected, that the Death of one of the Defendants ought to have been ſurmiſed before the Iſſue tried, and therefore Henden Serjeant very much urged it to be an Error; But it was reſolved by all the Court, that ſuch Surmiſe needs not to be in judicial Proceſs to alter it, and therefore although a Venire Facias iſſued againſt a dead Perſon, yet one of the Defendants being alive is ſufficient, and no Cauſe of Error; whereupon the Judgment was affirmed.

4. In an Ejectione Firmæ againſt Two, if after Iſſue joined, and Venire Facias awarded, one of the Defendants dies, and after a Verdict is given at the Miſi Prius for the Plaintiff, and after, before Judgment, the Plaintiff ſurmiſes the Death of one, ut ſupra, and prays Judgment againſt the other, and Judgment is given accordingly, without any Anſwer to it by the Plaintiff [Defendant]; if it be not true that he died as is ſurmiſed it may be aſſigned for Error; for inaſmuch as the Plaintiff had made this Surmiſe, this being a Matter of Fact, the Plaintiff [Defendant] cannot have any Anſwer thereto, (the Uſe not being thereupon to enter that the Plaintiff [Defendant] did not deny it) the Plaintiff [Defendant] hath no other Remedy but to aſſign it for Error. Mich. 11 Car. B. R. between *Tiffin and Lenton*, per Curiam.

Error of a Judgment in C. B. in Treſpaſs of Aſſault and Battery were aſſigned; That the Action was brought againſt H. and J. S. and J. S. died before the laſt Continuance; It was holden, that in regard the Judgment was only againſt H. that the Writ ſhould abate as againſt J. S. and the Judgment ſtand good againſt H. Cro. E. 145. pl. 4. Mich. 31 & 32 Eliz. Hill v. Tempeſt.

In Treſpaſs againſt divers, one dies pending the Action, and notwithſtanding the Venire and Diſtringas mentions all, and the Verdict is againſt all, if this Matter be ſurmiſed before Judgment, ſo that the Judgment be againſt the Survivors, it is well enough. Vent. 249. Mich. 25 Car. 2. B. R. Anon.

Aſſumpſit was againſt two Men, mean betwixt the Verdict and the Judgment one of them died, and notwithſtanding Judgment was given; the Judgment was reverſed; for the Opinion of the Court was, that the Death of one of the Parties did abate the Writ. Cro. E. 105. pl. 19. Trin. 30 Eliz. B. R. Meggot v. Broughton. —— It was ſaid, that the Caſe is not like the Caſe of an Action of Treſpaſs, for every Treſpaſs done by many is ſeveral by each of them, but every Aſſumpſit is joint and not ſeveral. 2 Le. 54 pl. 77. Mich. 29 Eliz. B. R. Megot v. Broughton.

See (Q. a) infra, pl. 1. S. C. —— See (I. c) infra, pl. 11.

5. An

5. An Action of *Trover was brought by Five*, and *before Verdict one of them died*, and *yet they proceeded to Trial, and a Verdict* was given *for the Plaintiffs, and they ſuggeſted that one of them was dead, and Judgment was given for the reſt*; this was Error, for every one ought to recover according to that Right only which he had at the bringing the Action; and this differs from the Caſe in Treſpaſs where one Defendant dies. Upon a Writ of Error adjudged by three Judges, (the fourth, viz. Dolbin doubting) and the Judgment reverſed accordingly, and Spring's Caſe 2 Bulſt. 262. diſapproved, and ſaid the Reaſon of the Judgment in that Caſe was miſtaken. Raym. 463. Paſch. 34 Car. 2. Hedgewood & al' v. Bayly & al'.

Skinn. 39. pl. 7. Wedgewood v. Baily, S. C. ſays, that all the Court, (Dolben and the others) were of Opinion, that the Judgment ſhould be reverſed mainly upon the Reaſon of Read and Redman's Caſe 10 Rep. 134. and 2 Bulſt. 262. not allowed, but thought by Pemberton that Coke's Opinion was miſtaken by the Reporter, and ſo it was reverſed. —— 2 Show. 177. pl. 173. S. C. adjornatur. —— S. C. cited that the Judgment could not be entered 3 Mod. 249. Arg. —— See the Stat. 8 & 9 W. 3. cap. 11 S. 7. at tit. Abatement (Q a).

(T) In what Judgment; And by *whom*.

1. IN Debt the Plaintiff recovers by Judgment againſt B. who after dies, and upon a Scire Facias againſt the Tertenants, three are returned Tertenants, who appear and plead ſeveral Pleas, and thereupon there are ſeveral Judgments againſt them; and after one of them brings a Writ of Error, he cannot aſſign Error in the firſt Judgment given againſt B. as that the Judgment was not that B. ſit in Miſericordia, becauſe he is not privy thereto. Tr. 9 Car. B. R. between *Hill and Witlach* adjudged, and upon ſuch Writ of Error and Aſſignment the firſt Judgment affirmed.

2. If a Judgment be given againſt the Principal, and after another Judgment againſt the Bail in a Scire Facias, the Bail cannot in a Writ of Error aſſign Error in the firſt Judgment, becauſe he is not privy thereto. Hill. 11 Car. B. R. between *Hardy and Brown* adjudged in a Writ of Error upon a Judgment in Rippon, but the Judgment given in the Scire Facias againſt the Bail was reverſed.

S. P. by Roll J. Sty. 39. Trin. 23 Car. —— See (K) pl. 25. S. C.

3. If the *Defendant in the firſt Action dies before Ca. Sa. ſued*, and *afterwards the Plaintiff obtains Judgment againſt the Bail in Sci. Fa.* Audita Querela lies and not Error. Ld. Raym. Rep. 27. Mich. 6 W. & M. Lampton v. Collingwood.

(U) *What Thing* may be *aſſigned* for Error.

Fol. 157.

[Things contrary to the Certificate or Record, or Admittance of the Party.]

1. A Thing againſt the Certificate of the Juſtices of Record cannot be aſſigned. 1. M. 89. 3. Dyer 4. 5 Ma. 163. 56.

2. But otherwiſe where the Aſſignment ſtood with the Certificate ſc. Dyer 1. Ma. 89. 3. as the Death of the Conuſor before ingroſſing and recording the King's Silver.

3. But

S. C. cited per Cur. Cro. J. 12. Paſch. 1 Jac. B. R. in pl. 15.

3. But if the Judge of the Niſi Prius dies before the Certificate of the Verdict and Day in Bank, and notwithſtanding the Clerk of the Aſſiſe returns the Verdict, which is received and entered, he cannot after aſſign for Error the Death of the Juſtice aforeſaid, becauſe it is contrary to what the Court de Banco did as Judges. Dyer 4 5 M. 163. 56.

4. In a Writ of Error to reverſe a Fine, it cannot be aſſigned for Error, that the Conuſor was dead before the Teſte of the Dedimus Poteſtatem, for this is directly contrary to the Record of the Conuſance taken by the Commiſſioners. Dyer. 1 Ma. 89.

Cro. E. 468, 469 (bis) pl. 27. S. C & S P. agreed per Curiam. —— Ow. 21. S. C. but S P. does not appear. —— Mo. 413. pl. 569 S. C. but not fully S. P.

5. In a Writ of Error to reverſe a Fine, it cannot be aſſign'd for Error that the Conuſor died between the Teſte of the Writ of Covenant and the Return thereof, though the Conuſance in this was taken by Dedimus Poteſtatem in the Country, although it was objected that this Aſſignment ſtood with the Record, inaſmuch as the Dedimus Poteſtatem iſſued before the Writ of Covenant, and ſo it might be that he died after the Conuſance, and between the Teſte of the Writ of Covenant and the Return; for it ſeems it cannot be intended or averred, that the Dedimus iſſued before the Writ of Covenant, for by the Dedimus the Writ of Covenant is ſuppoſed to be pending, and ſo this Death ought to be before the Conuſance taken, and ſo againſt the Certificate of the Commiſſioners. M. 38, 39 El. B. R. between *Wright and the Mayor of Wickam* adjudged per Curiam.

Cro E. 468. (bis) pl. 27 S. C. held accordingly. ——2 Jo. 181 Mich. 33 Car 2. B. R. Cockman v. Farrer, S. P. accordingly. —— Raym. 461. S. C. accordingly. —— 2 Sid 94, 95. Trin. 1658. B. R. Row v. Evelyn, S. P. per Cur.

6. But it may be aſſigned for Error, that after the Conuſance taken, and before the Certificate thereof the Conuſor died, for this ſtands with the Record. M. 38, 39 El. B. R. in *Wright's Caſe.*

Cro. E. 677. pl. 7 S. C. the Court ſpake nothing to this Error, nor ſeemed much to regard it; Et adjornatur. —— Cro. J 11, 12. pl. 15. Paſch. 1 Jac B. R. the S. C. adjudged accordingly per tot. Cur and the Fine was affirmed. —— Yelv. 33, 34 S.C. adjudged that this ſhall not be aſſigned for Error; For the Record is an Eſtoppel, and he might as well ſay, and for the ſame Reaſon, that there was no ſuch Roger Manwood in Rerum Natura, which he cannot do, becauſe it is againſt the Record. —— S. C cited Arg. 3 Mod. 141.

7. In a Writ of Error to reverſe a Fine it cannot be aſſigned for Error that the Dedimus Poteſtatem was directed to Sir Roger Manwood Knight, where there was not any ſuch at the Time, but he was but an Eſquire, and yet he certified it according to the Writ, for this is againſt the Record. Dubitatur 43, 44 El. B. R. between *Arundel and Arundel.*

8. If in *Aſſiſe of Freſh-Force*, which paſſed againſt the Defendant, the *Record* had *made mention that he had been attached and ſummoned*, and *he was not* attached and ſummoned, *he ſhall not aſſign this for Error*; For it is contrary to the Record, and then it ſeems that he is put to the Action againſt the Sheriff who returned it. Br. Error, pl. 116. cites 19 Aſſ. 7.

9. *Upon Judgment upon Default, Matter in Fact may be alledged for Error.* Br. Error, pl. 117. cites 19 Aſſ. 8.

10. *As two brought* Writ of *Error becauſe Writ of Meſne* was brought *againſt the one and the Father of the other*, who were Forejudg'd by Judgment, where the Father was dead at the Time of the Judgment given, by which the *other Coparcener, and the Heir of him who was dead, brought Writ of Error, for they were Co-Heirs in Gavelkind*, and aſſigned for Error the Death of the Father before Judgment, by which the Judgment was reverſed, and the Plaintiffs reſtored to their Meſnalty, and the

the Tenant to be attendant on them as before. Br. Error, pl. 117. cites 19 Aſſ. 8.

11. Error to reverſe a Judgment in the Court of M. becauſe the *Judgment was entred before the Mayor and J. S.* and J. D. Aldermannis &c. and at the ſame Time the *Plaintiff was made Mayor pending the Suit*; Sed non allocatur; For if he admits him to be his own Judge it is not Error. Cro. E. 320. pl. 8. Paſch. 36 Eliz. B. R. Walſh v. Collinger.

12. Another Error was, that the *Preſcription is to hold Courts before the Mayor and two Aldermen*, and it is *alleged that at ſuch a Court held before the Mayor and J. S. and J. D. Aldermen* &c. *and alleges in facto that the ſaid J. S. was not then Alderman*; The Court held that to be a manifeſt Error, for that the Court cannot be holden unleſs there be two Aldermen at the leaſt, and if J. S. was not an Alderman there were not two Aldermen, and for that Cauſe the Judgment was reverſed. Cro. E. 320. in S. C.

13. A *Statute-Merchant was by Mittimus removed out of the Chancery into C. B.* and *Execution awarded there ſuper Tenorem Recordi*, Reſolved, that in that Caſe the Conuſor *cannot allege for* Error, *that the Statute wants one of the Seals* that ought to be to it, becauſe he has admitted the ſame in C. B. Mo. 570. pl. 778. Trin. 41 Eliz. B. R. Worſley v. Charnock.

14. Error to reverſe a Judgment in the Court of Abington, which *Court is mentioned to be held before the Mayor, ſecundum Conſuetudinem Burgi a Tempore cujus* &c. but it does not appear there was any ſuch Cuſtom there to hold Pleas; it was reſolved the Aſſignment, being directly againſt the Record, is not receivable; And the Judgment was affirmed. Cro. J. 359. pl. 19. Mich. 12 Jac. B. R. Whiſtler v. Lee.

Roll Rep. 53. pl. 26. S. C. and the Writ of Error held not good; For the Writ admits it to be a Court of Record and therefore it cannot be aſſigned that there is no ſuch Cuſtom.——2 Bulſt. 243. S. C. and Judgment affirmed accordingly.—— Jenk. 327. pl. 47. S. C. the ſuit by the Writ of Error admits it to be a Court.

15. If the *Defendant appears by J. G. his Attorney*, it cannot be *aſſigned for Error, that the ſaid J. G. was dead before the Day of Appearance*, becauſe that it is againſt the Record; Adjudged upon a Writ of Error in the Exchequer-Chamber. Cro. C. 53. pl. 11. Mich. 2 Car. Morris v. Fletcher.

16. *Nothing* is aſſignable for Error *which proves the Writ abateable, but* that only *which proves it abated*; As where Error was brought of a Judgment in Ejectment, and it was aſſigned that after Verdict and before Judgment the Plaintiff entered, the Court held it not aſſignable, and affirmed the Judgment. Lev. 155. Hill. 16 & 17 Car. 2. B. R. Bois v. Norcliffe.

Sid. 238. pl. 8. S. C. and the Court held it to be Error.

17. In a Writ of Error upon a *Judgment in an Inferior Court*, it may be aſſigned for *Error, that the Mayor, who was the Judge, had not received the Sacrament, and taken the Oaths according to the 25 Car. 2.* becauſe his Office is made void, and ſo the Proceedings coram non judice; adjudged, and Judgment reverſed accordingly. 2 Lev. 184. Mich. 27 Car. 2. Hipply v. Tuck.

2 Jo. 81. Hippeſley v. Tucke S. C. adjudged by all, præter Wild, that the Error is well aſſignable, and though it cannot be alledged that he was not Judge, yet it may be that he was not Mayor, and without ſuch Averment the Statute would be uſeleſs.——2 Mod. 193. Ipſley v. Turk S. C. and Judgment reverſed.——3 Keb. 721. pl. 6. S. C. and Judgment reverſed —— S. C. cited Arg. 2 Ld. Raym. Rep. 885. Paſch. 2 Ann. but denied by Holt Ch. J. to be good Law.

Sid 94. pl. 20. Mullens v. Weldy, S. C. & S. P. agreed per Cur. and that one cannot assign Error

18. In a Writ of Error *upon a Judgment in the Palace-Court held coram Jacobo Duce Ormond*, it cannot be *assigned for Error, that the Duke was not there*, because that is contrary to the Record; Adjudged, *the Court* in Fact *being held before his Deputy according to the Patent.* 1. Lev. 76. Trin. 14 Car. 2. Molins v. Wheatley.

contrary to a Record out of an Inferior Court, any more than out of one of the Great Courts here.—— Lev. 311. cites S. C. and several other Cases to the same Purpose.

2 Jo 137. Deveney v. Norris, S C. resolved e contra.— 2 Ld Raym. Rep. 885.

19. It is not *assignable* for Error *that the Person who tried the Cause was not Judge, by reason of his not having taken the Oaths, and subscribed the Declaration, according to the Statute* 13 *Car.* 2. Stat. 2 cap. 1. For this is contrary to the Record and Admittance of the Parties. 2 Lev. 242. Hill. 30 & 31 Car. 2. B. R. Denning v. Norris.

S. C. cited by Holt Ch. J. who says he was (and as Jones reports him to be) Counsel in the Cause, and argued that it was Error, but says the Court held there, that since the Defendant had admitted the Judge to be a Judge by pleading to the Action, he was estopped to say afterwards that he was not a Judge.

20. *Nothing* shall be assigned for Error *which the Party might have pleaded to the Action, and had a proper Time so do*; Arg. said it is a Rule; But because in the Principal Case the Plaintiff had no Time to plead the Matter; For *by the Death of* J. S. *(one of the Tertenants) before the Return of the* Writ of *Resummons all the Proceedings* on the Sci. Fa *were discontinued, and the Parties out of Court*, and so had no Time to plead any thing afterwards, and the Death of one Tertenant puts the whole without Day; and for that Holt Ch. J. cited Keilw. 69. Fitzh. tit. Error, pl. 7. and Judgment was given for the Plaintiff in Error; and the Court said, that the Defendant must bring a New Sci. Fa. against the Tertenants, because the Old Writ was put without Day Causa qua supra. Carth. 200, 201. Mich. 3 W. & M. in B. R. Blake v. Gell.

1 Salk. 262. pl. 3. S. C. held accordingly, and and quashed the Writ of Error, and said he must bring his Audita Querela —— Carth. 282.

21. Error in Fact Coram Nobis upon a *Judgment in Scire Facias against the Bail*, the Scire Facias *suggested that Lampton survived, whereas in Fact the other survived*; But per Cur the Writ of Error lies not in this Case, for *the Merits of the Cause or Foundation of the Suit cannot be assigned for Error in Fact, but only mistakes in Fact pendente placito, which might hinder the Proceedings*, As where an Infant appears by Attorney, but this being the very Gift of the Action, the Party can be relieved only by Audita Querela. Comb. 325. Pasch. 7 W. 3. B. R. Lampton v. Collingwood.

S. C. adjudged accordingly; And per Holt Ch. J. it will not lie, because the Fact assigned for Error is in the suggestion of the Writ itself, and not in any of the Proceedings in the Cause. —4 Mod. 314. S. C. the Widow and Administratrix of one of the Defendants after two Nichils returned, and Judgment awarded against her by Default, brought a Writ of Error Coram vobis residen', and the Error in Fact assigned was, that she never was summoned, but the Writ was quashed. Afterwards she brought Audita Querela, suggesting the same, and that her Husband died in the Life of the other Debtor, and so his Estate was there by discharged of the Debt; And the Court held, upon the Authority of the Case of **Barcock v. Thompson**, that the Administratrix should have an Audita Querela, because now she has no other Remedy.

22. It is not assignable for Error *that he who returned the Writ was not Sheriff.* 2 Ld. Raym. Rep. 884 Pasch. 2 Ann. Andrews v. Linton.

23. *Debt* on a Bond; Non est Factum pleaded; *Verdict and Judgment for the Plaintiff* in C. B. *Error* on this Judgment *was assigned, that the Defendant died before the Day of Nisi Prius*; and held it was not assignable for Error, because *the Record mentioned that he appeared that Day*; Judgment was affirmed November 7. 1729. 2 Ld. Raym. Rep. 1415. in a Note of the Reporter, cites Mich. 3 Geo. 2. B. R. Plommer v. Webb.

(U. 2) Stile &c. of the King.

See Tit. Amendment, and Tit. Contra Pacem (A).

1. WRIT of Error was brought on a Judgment, reciting that it was *in Curia Noſtra, viz. Jac.* 2. whereas all the *Proceedings were in the Reign of Car.* 2. this was held a Fault incurable, and a Judgment in B. R. reverſed in the Exchequer Chamber, and thereupon the Plaintiff brought another Writ of Error. Carth. 158. Mich. 2 W. & M. in B. R. Dicken v. Greenvill.

2. *So* in a Writ of Error of a Judgment in C. B. the Writ recited the *Loquela* to be *Curia Noſtra*, viz. *Will.* 3. when it was a Loquela in the Time of *W. & M.* and the Court denied to alter or amend it by the Inſtructions to the Curſitor. Carth. 520. Paſch. 12 W. 3. B. R. Tonkyn v. Crocker.

(U. 3) Want of entering Pledges, Bail &c.

1. THE *Plaintiff an Attorney in C. B. ſued an Attachment of Privilege* againſt the Defendant, *and recovered* againſt him *by Non ſum informatus*, and upon a Writ of Error brought, this being certified, and *in Nullo eſt erratum pleaded*, and becauſe he did not find Pledges, the Judgment was reverſed. Cro. J. 329. pl. 7. Mich. 11 Jac. B. R. De la Hay v. Vaughan.

2. After a Verdict for the Plaintiff in an *Action of Aſſault* in B. R. the Error aſſigned was, That there were *no Bail in B. R.* Upon a Certiorari awarded, the *Ch. J. certified Bail there of John Hayes, but without any Addition, and with a Blank for the Place of his Habitation*; and thereupon the Judgment was reverſed, becauſe it did not appear that they were Bail for the Party who was ſued; and ſo he was never in the Cuſtody of the Marſhal, and if not, then he could not be ſued in B. R. Mo. 694. pl. 961. Bucknell v. Hayes.

3. Error to reverſe a Judgment in C. B. in which the Plaintiff *alleged Diminution for Want of an Original*, and upon a Certiorari to the *Cuſtos Brevium* he *certified no Original, and that there was not any Original between the ſaid Parties remaining with him, becauſe there were no Pledges that was aſſigned for Error*; and it was agreed that if no Pledges had been found it had been Error; but adjudged that *Pledges ſhall be intended to be on the Original*, (though it could not be found) becauſe *in C. B. they are always entered on the Original, and not on the Roll*; and where there is no Original, that is a Fault which is aided by the Statute, though a bad Original is not. Sid. 84. pl. 12. Trin. 14 Car. B. R. Wheeler v. Wilkinſon.

But ſee Tit. Amendment (P) (N. a) &c. And Tit. Pledges (B).

(X) A Thing *for his Advantage.*

[*Not againſt a Record.*]

* Br. Error, pl. 37 cites S. C. † Br. Aſſiſe, pl. 56. cites 11 H. 4. 44. that if in Præcipe quod reddat he loſes his Land where the Attorney had no Warrant, and the Tenant is ouſted, he ſhall have Aſſiſe; But Brooke ſays, that the contrary ſeems to be Law. —— Fitzh. Judgment, pl. 71. cites S. C. accordingly. —— But Ibid. Fitzherbert cites Hill. 35 H. 6. that in Treſpaſs Judgment was given notwithſtanding ſuch Allegation; and 13 R. 2. that Judgment was given for the Plaintiff notwithſtanding the Defendant alleged ſuch Matter in Detinue.

1. A Man may aſſign the Want of the Warrant of Attorney of his own Attorney, which is for his Advantage. * 7 H. 4. 16. and his own Default. † 11 H. 4. 44. 88.

See (A) pl. 4. S. C. and the Notes there.

2. In Scire Facias againſt the Bail after Judgment againſt the Principal it is no Plea for the Defendant to ſay, that the Principal died before Judgment, for this is againſt the Record, inaſmuch as a Judgment ought not to have been given againſt a dead Perſon. Mich. 32, 33 El. B. R. between *Walter* Plaintiff, *and Perry and Spring* Defendants, per Curiam, præter Wray, who doubted, Quære, for by Intendment the Party was not preſent in Court at the Judgment, and this is Error in Fact.

Roll Rep. 51. pl. 21. * Fol. 758. S. C. & S. P. ruled by Coke Ch. J. accordingly.

3. In a Writ of Error upon a Judgment given at the great Seſſions in Wales, by the Statute of 34 H. 8. the Juſtices there may make Deputies, who may give Judgment, and this Judgment was given by J. S. who is ſuppoſed by the Record to be a Deputy of the Juſtice, it cannot be * aſſigned for Error that the ſaid J. S. was not Deputy to the ſaid Juſtice, for this is againſt the Record. Tr. 12 Ja. B. R. between *Floyd and Beſt* adjudged in a Writ of Error.

Cro. C. 410. pl. 5. S. C. but S. P. does not appear. —— Ibid. 421. pl. 12. S. C. & S. P. the Defendant in Error pleaded that J. S. was made Sheriff before the Return of the Writ, prout patet de Recordo, and upon Nul tiel Record pleaded, at the Day he procured in Court the Letters Patents. The Judgment was affirmed. —— Original return'd by one not Sheriff is not aſſignable for Error. 1 Salk. 265. pl. 9. Paſch. 2 Ann. B. R. Andrews v. Linton.

4. In a Writ of Error to reverſe a Judgment given in B. in a Formedon, it may [not] be aſſigned for Error, that whereas the Record is, that the Venire Facias to try the Iſſue, which was tried in that Cauſe, was returned by J. S. Sheriff of the County of D. that the ſaid J. S. was not then Sheriff of the ſaid County, for this is againſt the Admiſſion of the Court, who know their Officers, and have recorded him to be their Officer of the Court. Mich. 11 Car. B. R. between *Smith and Smith*, ſuch Matter was aſſigned for Error, and this certified by a Record under the Seal of the Exchequer, Scilicet, that he was Sheriff, upon which the Judgment was affirmed; But ſome then ſaid this could not be aſſigned for Error againſt the Record of the Court de B. Intratur M. 10 Car. Rot. 192. Vide 12 H. 4. B. R. Return de bre 40.

5. If Error be aſſigned, that whereas by the Record the Defendant appears by *Francis Dennington* his Attorney, where his Name is *Henry Dennington*, and the Warrant of Attorney is certified, by which he is named Francis Dennington, the Judgment ſhall be affirmed; for this Averment is againſt the Record, and therefore it

it is not to be assigned for Error. P. 15 Car. B. R. between *Weblyn and Kirby* adjudged in a Writ of Error upon a Judgment in Banco. Intratur H. 14 Car. Rot. 1195.

6. In a Writ of Error upon a Judgment in Banco, the Plaintiff may assign for Error, that whereas the Record de Banco is, that the Defendant there appeared per J. Newton, his Attorney, and pleaded non sum Informatus, upon which Judgment was given for the Plaintiff, that J. Newton was not then any Attorney, but was foredjudged usque and during all the Term in which he so appeared and pleaded; and upon a Writ directed de Banco it is certified accordingly; and per Curiam, this may be assigned for Error, because this is not the Act of the Court, as an Admittatur by Guardian is. H. 10 Car. B. R. between *Bawtrie and Herne* per Curiam, the Judgment given in Banco reversed accordingly. Intratur Tr. 9 Car. Rot. 207. contra Mich. 6 Ja. Rot. 435. and in another Action the same Term. Rot. 506. between *Lumley and Marwood* adjudged quia Contra Recordum.

2 Roll Rep. 53. Haydon v. Miller, S. C. but S. P. does not appear. — Jenk. 332. pl. 66. cites Cro J. 521 16 Jac. Heydon v. Mynn. Where D. has appeared as an Attorney for A. in an Action brought by A. against B. it cannot be assigned for Error that D. was not an Attorney, or that there is no such Person in Rerum Natura; For it is against the Record; and the Admittance of him for an Attorney by the Court makes him an Attorney, if he was not an Attorney before this Admittance. In a Writ of Error brought in this Suit, and Error assigned ut supra, the Defendant in the Writ of Error in this Case pleads in Nullo est Erratum; this does not confess that he was not an Attorney; but this Plea est quasi a Demurrer, that this is not an Error at all. Judged and affirmed in Error.

7. In a Writ of Error upon a Judgment in an inferior Court, if the Stile of the Court be Curia tenta Coram J. S. Seneschallo Curiæ &c. a Tempore &c. an Error may be assigned that J. S. was not Steward at the Time of the Court held, for this is an Error in Fact. Hill. 9 Car. B. R. between *Hatch and Nichols*, per Curiam in a Writ of Error upon a Judgment in the Court of the Tower of London, but the Judgment was affirmed, because the Error was not well assign'd, for that it was assigned that J. S. had no Authority to hold Court, which was more general, and not Matter in Fact to be tried by the County, but may be a Matter in Law.

8. Upon an Issue tried, if *William Atkinson* de R. be return'd and sworn of the Principal & alii de Circumstantibus also sworn, among whom *William Atkinson* without Addition is returned and sworn, and a Verdict given for the Plaintiff, and Judgment in a Writ of Error, the Defendant cannot assign for Error that the said *William Atkinson* of the Principal, and of the Tales was one and the same Person, and so there were but 11 Jurors that tried the Cause, for this is against the Record, inasmuch as the Record is, that alii de Circumstantibus Juratt, of which *William Atkinson* is one, and therefore if the Record be true, this cannot be one and the same Person. P. 14 Car. B. R. between *Stevenson and Estoft* per Curiam adjudged, this being assigned for Error, and the first Judgment affirmed accordingly.

9. In an Action upon the Case upon a Promise in the Borough Court of Bewdly in Comitatu Worcestriæ, if the Plaintiff declares there that the Defendant at Bewdly within the Jurisdiction of the Court, in Consideration of 1*l.* given to him by the Plaintiff, assumed to pay 5*l.* to the Plaintiff, if at any Time after he should sell at any Fair held within the Borough of Walsal, within the Jurisdiction of the said Court, any Woollen Cloth, and avers that the Defendant after sold at a Fair held at Walsal aforesaid, within the Jurisdiction of the Court, a Woollen Cloth, and therefore he had brought this Action, and the Defendant pleads that he did not sell the said Woollen Cloth at Walsal aforesaid, Modo & Forma, upon

Fol. 759

This Case is not Law. 2 Lutw. 1569. — Mod 81. Cox v St. Aubin, agreed that it is not assignable for Error.

upon which Iſſue is taken and tried at Bewdly by a Venire Facias de 12 de Burgo de Bewdley, and a Verdict and Judgment there given for the Plaintiff, the Defendant in a Writ of Error may aſſign it for Error, that Walſal is in Comitatu Staffordiæ, and out of the Liberty of the ſaid Borough of Bewdly, for this is a Matter in Fact. Mich. 11 Car. B. R. between *Lea and Ceely* adjudged in a Writ of Error, and the firſt Judgment reverſed, in which the Defendant in the Writ of Error being warned, made Default, which in Law was as much as if he had pleaded in nullo eſt erratum, which acknowledges the Matter in Fact aſſigned, to be true. Intratur Tr. 11 Car.

* See (K) pl. 18. S C and the Notes there.

† See (K) pl. 18. S. C. and the Notes there.

10. If an Action upon the Caſe be brought againſt A. S. a Feme Covert, as a Feme Sole, and ſhe appears and pleads there as a Feme Sole, and Judgment is given againſt her, and thereupon ſhe and J. S. her Husband bring a Writ of Error, they may aſſign for Error that ſhe was a Feme Covert at the Time of the Appearance and Pleading, &c. for otherwiſe the Wife might be taken in Execution without the Conſent or Conuſance of the Husband, and ſo he ſhould be bereaved of the Society of his Wife, for he has no other Remedy to defeat it. Mich. 15 Car. B. R. per Curiam, between * *Edwards and Simpſon*, in a Writ of Error upon ſuch Judgment in the Court of Marſhalſea. Intratur Mich. 15 Car. 18 E. 4. 4. per Curiam, accordingly. Tr. 1651. between † *Hayward and Williams*, adjudged in a Writ of Error, and the Judgment reverſed accordingly. Intratur. H. 1649. Rot. 824.

11. It was argued if Judgment may be *reverſed for the Damages and ſtand for the Land*; Brooke ſays it ſeems that No. Br. Error, pl. 12. cites 28 H. 6. 10.

12. In *Treſpaſs* the Defendant pleaded Not Guilty, and the Judgment paſſed, and Error brought and aſſigned, becauſe *after the Iſſue joined, and before Verdict, the Defendant's Attorney died* at D. and by the Opinion of the Court this is not Error; for the Writ ſhall not abate by the Death of the Attorney, nor the Iſſue by it is not waived nor diſcontinued; for he may appear by another Attorney, or in Perſon, and the Continuance is not entered between the Attornies, but between the Parties, and a Man cannot aſſign Error but in proper Perſon, and ought to ſue Proceſs immediately after Delay of the other Party; Per Trem. Br. Error, pl. 144. cites 5 H. 7. 3.

13. A Man cannot aſſign any Thing for Error which is for his Advantage, as to aſſign that he had Day, and *that the Day was given much longer then the Common Day*, or that he was *eſſoined* where he ought not, or *had Aid granted* to him where he ought not. 2 Saund. 46. cites F. N. B. 22. (F)

14. A Man ſhall not reverſe a Judgment for Error, unleſs he can ſhew that the Error is to his Prejudice. 5 Rep. 39. b. per Cur. Trin. 34 Eliz. B. R. in Tey's Caſe ad finem, cites 8 H. 5. 2. b. and F. N. B. 11.

15. In the firſt Action the *Jury gave 4 d. Coſts, and the Court* gave *de Incremento* 23 s. *In the Judgment the 4 d. was omitted*, and this was aſſigned for Error. The Court held that for that Cauſe the Judgment ſhould be reverſed, although it is for the Party's Advantage. 4 Le. 61. pl. 154. Hill. 31 Eliz. B. R. Buſhy v. Milfield.

16. Error is brought by the Defendant upon a Judgment in a Court of Piepowders; the Error aſſigned is, *That the Defendant was not amerced*; this was allowed for Error; for *although it be for the Advantage of the Defendant, yet it concerns the King* and his Profit. Jenk. 211. pl. 48.

17. The

17. The Plaintiff in Error ought to assign nothing for Error but that which makes to his Disadvantage; and therefore he cannot assign for Error that a *Day over was given beyond the Time expressed* in the Writ. 2 Sid. 94, 95. Trin. 1658. Per Glyn Ch. J. in the Case of Row v. Evelyn.

18. *A. Tenant in Tail, Remainder to B. in Tail, Remainder to C. in Tail; A. and B. levy a Fine,* which proves erroneous. *C. may bring Error,* for the levying the Fine was for his Disadvantage; Per Cur. 2 Sid. 92. 95. Trin. 1658. Row v. Evelyn.

19. Where the Court awards a *Respondeas Ouster when the Judgment ought to be final,* it can do no Harm, because the Defendant cannot assign it for Error no more than he can the awarding an *Essoign* where it ought not to have been, being for his Advantage; Per Holt Ch. J. 12 Mod. 525. Trin. 13 W. 3. in Case of Slanney v. Slanney. Ld. Raym. Rep. 594. S. P. by Holt Ch J. and cites it is a Case in Hill. 12 W. 3. Rosier v. Sawkins. —— S. P. admitted by Holt Ch J. 2 Ld. Raym. Rep. 1018. Hill. 2 Ann.

(Y) *Who may assign* the Error.

Where *he that hath Benefit* by the Error.

1. WHERE the Error is by the Default of the Court, though this be for the Advantage of one Party, yet the Party that hath the Benefit by it may assign it for Error, for the Course of the Court ought to be observed. Mich. 15 Ja. B. R. between *Holmes and Twiste* agreed per Curiam. Co. 8. *Beecher* 59. resolved. A Man shall not reverse Judgment by Error unless he can shew that the Error is to his Disadvantage. 5 Rep. 39. b.

2. As if in an Action of Debt it be found, that the Defendant owes the Plaintiff 5 *l.* and the Jury assess Damages to 2 *d.* and Costs 2 *d.* and after Judgment is given, that the Plaintiff shall recover Debitum & Damna præd' to 2 *d.* and no Judgment is given for the Costs, though this is for the Advantage of the Defendant, yet he may assign it for Error, because this is the Error of the Court to alter the Manner of Judgments. Mich. 15 Ja. B. R. between *Holmes and Twiste*; adjudged and the Judgment reversed accordingly.

3. So the Plaintiff in a Suit retracts, by which Judgment is given against him, but he is not amerced as he ought, though this is for his own Advantage, yet for that the Amercement ought to be Parcel of the Judgment, and so the Judgment is not perfect without it, he may assign it for Error. Co. 8. *Beecher* 59. resolved. Cro. J. 211. pl. 3. Beecher v. Shirley S. C. & S. P. held accordingly. —— Jenk. 283 pl. 12 S. C. & S. P.

4. So in every Case where a Judgment is given against a Man in which he ought to be amerced, if he be not amerced he may assign it * for Error though it be for his own Advantage. Co. 8. *Beecher* 59. resolved.

* Fol. 700.

for it concerns the King's Profit, and the Publick is concerned where the King is concerned —— S. C. cited 2 Saund. 47. at the End of pl. 4. —— But see Stat. 16 & 17 Car. 2. cap. 8. S. 1. at Tit. Amendment (P) that no Judgment shall be reversed for want of a Misericordia.

5. So

5. So if a Man be amerced by Judgment where he ought to be fined, though this be for his Advantage, yet he may assign it for Error, for that the Form of the Judgment, which is the Act of the Court, is altered by it. Co. 8. *Beecher* 59. adjudged.

11 Rep. 56. a. Bentham's Case, alias, Marsh v. Bentham, S. C. and Judgment was affirmed, because the Plaintiff had released his Damages and Costs, which is for the Defendant's Benefit. ——— Roll Rep. 288. pl. 40. S. C. & S. P. and Judgment affirmed; For the Defect here is in the Verdict, and not in the Judgment, and the Release has made it all clear. —— 2 Bulst. 270, 280. S. C. held accordingly, and Judgment affirmed. ——— Jenk. 286. pl. 20. S C. the Plaintiff shall have Judgment for the Reason abovementioned, and likewise the Release shall be understood to be before the Verdict; Adjudged and affirmed in Error. —— See (R. b) pl. 1 S. C. and pl. 7. S. C.

6. [But] in a Writ of Annuity if the Issue be found for the Plaintiff, and no Damages found for him, and Judgment is given according to the Verdict, the Defendant cannot assign it for Error that no Damages were tared against him, because this is for his Advantage, and here the Defect is not in the Judgment, as it is where there is a Capiatur for a Misericordia, but in the Verdict. Mich. 12 Ja. B. R. between *Bent and Marsh* per Curiam.

7. A Man cannot assign Error in Process or Delay which is for his own Advantage. Co. 8. *Beecher*. 59. resolved. Fitz. Nat. 21. F.

8. Upon an Issue between a Peer of the Realm and another if the Venire Facias be quod summoneat 12 Liberos & Legales homines, and does not say tam Milites quam alios as the Register is, though the Peer of the Realm may assign it for Error, yet the other cannot, because it does not concern him. P. 40 El. B. R. between the Earl of *Worcester* and *Trade*.

Cro E. 107. pl 2. Mich. 30 & 31 Eliz. B. R. Bellicote v. Talboys. The Judgment was Capiatur where it ought to have been in Misericordia, and the Judgment was reversed.

9. Error of Judgment *in Trespass of Assault and Battery*, because the *Judgment was Quod sit in Misericordia*, whereas it should be Quod Capiatur. Tanfield moved, that this is for the Plaintiff's Benefit, and is the Default of the Clerk, and so shall not be assigned for Error; but the Judgment for that Cause was reversed. Cro. E. 84. pl. 2. Hill. 30 Eliz. B. R. Crow's Case.

If an Infant levies a Fine, and takes back an Estate for Life or in Tail by Render, he shall not after avoid the Fine by Error, but is without Remedy. Mo. 74. pl. 202. Trin. 6 Eliz. in the Star-Chamber by Catlyn.

10 The *Conusor shall not assign Error in the Grant and Render by which he himself takes the Estate*, any more than the Conusee shall do in the Conusance, for that would be to defeat the Estate given him by the Fine; *nor* shall the *Recoveror* bring Writ of Error *to defeat the Record in which himself recovered* the Judgment in Error, being to be restored to all that he lost by the Fine or Judgment, and not to avoid and lose what he gained by them. 3 Rep. 32. b. Trin. 34 Eliz. B. R. the third Resolution in Tey's Case.

11. If a *Plaintiff is not amerced where he ought to be* it is Error, yet he may assign it for Error though it be to his Advantage, for it *concerns the King's Profit*, and the Publick is concerned where the King is concerned. Jenk. 283. pl. 6.

12. In Error to reverse a *Judgment in Ejectment*, the Error assigned was, because the *Judgment is not Quod capiatur* as it ought to be, it being Vi & Armis; and it was reversed. Poph. 203. Mich. 2 Car. B. R. Rochester v. Rickhouse.

13. In

13. In a Writ of Error brought *by the Tenant* of a Judgment in the Grand Seſſions in Wales, it cannot be *aſſigned* for Error, *that the Court awarded a Grand Cape, where they ought to have given Judgment for the Demandant to recover*, becauſe the Award of the Grand Cape was only in Delay of the Demandant, and not to the Prejudice of the Tenant, and therefore not by him to be alleged for Error, becauſe it is not Ad grave Damnum Querentis, as the Writ of Error ſuppoſes; Adjudged. 2 Saund. 45, 46. Paſch. 20 Car. 2. Williams v. Gwyn.

Vent. 60. S. C. ſtates it that the Error aſſigned was, that the Court had awarded a Petit Cape where they ſhould have given Judgment upon the Nient dedire; but the Court held that this was only the awarding of Proceſs more than ſhould be, and in Advantage of the Tenant, and therefore reſolved they could not reverſe it for Error. And Twiſden ſaid, that admitting it were erroneous they might then give Judgment in this Court.

14. The *giving Oyer where it ought not* to be allowed, is no Error, nor aſſignable by the Defendant, being in his Advantage; *but the Denial of it where it ought to be allowed, is Error*; quod Powell conceſſit. 2 Ld. Raym. Rep. 970. Trin. 2 Ann. in Caſe of Longueville v. Thiſtleworth Inhabitants.

(Z) Where the Error came *by the Default of him that aſſigns it.*

1. A Man may Aſſign the Want of a Warrant of Attorney of his own Attorney, though it be his own Default. 11 H. 4. 44. 48.

See (X) pl. 1. S. C. and the Notes there.

(A. a) *In what Thing* it may be aſſigned.

1. IT cannot be aſſigned in a Record which is not in the Court where the Writ of Error is brought. 11 H. 4. 47.

Fitzh Error pl. 63. cites 11 H. 4. 4. [which is the Commencement of the Caſe, and continued at Fol. 47 b. pl. 22.] ——— Br. Error, pl. 46. cites S. C. but S. P. does not appear. ——— See (H) ſupra Worſeley v. Charnock.

2. If a Man recovers an Annuity and hath Judgment in a Scire Facias thereupon, if a Writ of Error be brought upon the Judgment in the Scire Facias only, he cannot aſſign Error in the firſt Judgment, for that was not come before them. 11 H. 4. 4. 47. adjudged.

Fitzh. Error pl. 63. cites S. C. ——— Br. Error, pl. 46. cites S. C. & S. P.

3. In a Writ of Error upon a Judgment in Banco, if the Plaintiff aſſigns for Error that whereas a Venire Facias was returned by J. S. as Sheriff of the City of Exeter, he was not Sheriff of the City, this Error is not well aſſigned, becauſe the Venire Facias is not certified upon which the Error is aſſigned, for this is upon Record in Banco, and this Court cannot take Notice of this Matter of Record by Averment without Certificate thereof; for he ought to have had this certified, and after Certificate thereof, then to aver that whereas it is mentioned by the Record to be returned by J. S. Sheriff, that he was not then Sheriff. Paſch. 1649. between *Barcroft and Richards* adjudged, not being well aſſigned, and the

Judgment affirmed accordingly. Intratur T. 23 Car. Rot. 1311. B. R.

4. Error may be aſſigned in every Part of the Record, 18 E. 4. 9.

5. The Plaintiff aſſigned for Error, *that where he* in the Exchequer *pleaded ſufficient Plea in Bar* before the Barons, *upon which the other Party, then Plaintiff, demurred, and Barons awarded that he ſhould recover where they ought to have awarded that he ſhould be barred*; and per Cur. the now Plaintiff ſhall not be compelled to ſhew Cauſe why the Plea is not good; For by his Pretence the Plea is good, and *he ſhall not be compelled to ſhew Diſability of his own Plea*; for he is to affirm the Plea. Br. Error, pl. 108. cites 39 H 6. 52.

6. *But* he who is to prove the Plea ill, as where a Man aſſigns for Error *that the Court awarded a Plea good*, and barred the Plaintiff, *where the Plea was ill* and inſufficient, there *he ſhall ſhew Cauſe of* the Inſufficiency; quod fuit conceſſum. Ibid.

(B. a) *In what Thing* it may be aſſigned *upon the Writ.*

Cro. J. 324. pl. 4. S. C. but S. P. does not appear —— 2 Bulſt. 119. 120. S. C.

1. IF a Feme recovers Land in **a Writ of** Error, **and after the** Sheriff returns Damages from the Writ purchaſed to the Delivery of Seiſin, **when it** ought to be **from the Writ purchaſed** uſque diem Judicii, **and after the** Tenant brings **a Writ of** Error in Redditione Judicii, **he** may **upon this Writ** aſſign Error in the Judgment given for the Damages, upon the Return of the Sheriff; **for the laſt Judgment is not an Execution, but an Inqueſt** (*) **of Office by the Statute of Merton, and it is uſed always to bring but one Writ in ſuch Caſe, and there is not any Writ Quia Judicia reddita ſunt, but Judicium. Trin. 11 Ja. B. R. between** *Porter and Ager* **adjudged.**

* Fol. 761. but S. P. does not appear. —— See (E. b) pl. 5. Tie v. Atkins. —— And ſee (M. c) pl. 9. S. C.

2. Error on a Judgment in a Sci. Fa. upon a Recognizance, the *Writ bore Teſte Die Solis*, which is not dies juridicus; and it was reverſed. Dyer 168. a. pl. 17. Trin. 1 Eliz. Barett v. Cleydon.

(C. a) *In what Thing* it may be aſſigned *upon the Writ.*

† Fitzh. Error, pl. 64. cites 11 H. 4. 6. and the Error was brought upon the Judgment of Reditſeiſin, as well as upon the Judgment of Outlawry. —— Fitzh. Error, pl. 64. cites 11 H. 4. 6.

1. IN **a Writ of** Error upon an Outlawry after a Judgment in a Reditſeiſin, **an** Error may be aſſigned in the Record of the Reditſeiſin (**ſcilicet, the** Caption out of the Land) **and this is ſufficient to reverſe the Outlawry, though the Judgment of the Reditſeiſin continues, for the Outlawry cannot be good upon an erroneous Judgment. 11 H. 4. † b. 94. adjudged Co. 8. Altham ‡ 158. b.**

4 6. [and ſo it ſhould be in Roll, and this Caſe is continued in the Year-Book at fol. 94] and is as well upon the Rediſſeiſin as upon the Outlawry. —— Br. Error, pl. 45. cites 9 H. 4. 5. that upon Judgment given by the Sheriff in Writ of Rediſſeiſin Writ of Error lies, and ſays ſee Judgment in this and the firſt Judgment reverſed, and cites tit Rediſſeiſin, pl. 1. [where the Caſe is taken more at Large]

‡ This is miſprinted, and ſhould be 152. b. where the Caſe in the Year-Book is cited and taken ſomewhat fully.

2. C. and A. recovered in a Writ of Account againſt R. Hill. 29 Eliz. R. aſſigned for Error *that the ſaid Writ of Account was brought againſt him as Receiver of Monies for to render Account Quando ad hoc requiſitus fuerit*, whereas it ought to have been more ſpecial; But the Court held the Writ good, and ſaid that it was ſo held in one **Gomerſal's Caſe**, viz. Quod reddat ei rationabilem Computum ſuum de Tempore quo fuit Receptor Denariorum ipſius A. Hill. 30 Eliz. B. R. Collet v. Robſton. 2 Le. 118. pl. 160.

3 Le. 230. pl. 311. Trin. 31 Eliz. B. R. the S. C. in totidem Verbis. —— Cro. E. 82. pl. 1. Robſert v. Andrews and Cockett, S. C. and Judgment was affirmed.

(D. a) *How* it may be *aſſigned.*

1. **If two** bring ſeveral Writs of Error and ſeveral Scire Facias's to reverſe a Judgment in an Aſſiſe **againſt them, they may aſſign Errors jointly.** 11 H. 4. 92. b. **adjudged.** Br. Error, pl. 50. cites S. C.

2. **In a Writ of Error it is** no good Aſſignment **of Error** quod in omnibus erratum eſt; **for the Court is not bound to inquire of the Errors, if the Party does not ſhew them to him.** 6 E. 4. 6. Br. Attaint, pl. 86. cites S. C. —— Br. Error, pl. 163. cites S. C. & S. P. by Suliard.

3. **In a** Dum fuit infra ætatem againſt three, **as Daughters and Heirs of J. S. if the Plaintiff recovers by Default, and the Defendants bring Error and aſſign their Nonage for Error, without alledging that their Anceſtor died ſeiſed &c. [Quære if good or not] Dyer. 2 Mar. 104. 10. adjudged.**

4. Diverſe Parties *upon diverſe Writs of Error* may aſſign the Errors in Common or Severally. Br. Error, pl. 50. cites 11 H. 4. 52. 65. 92. Per Hulſ. and Gaſc.

5. The form to aſſign Errors is to put a Bill into the Court, and to ſay that *In hoc erratum eſt* &c. and to *ſhew in certain what Things*, *Et in hoc erratum eſt &c.* and *ſhew in certain another Thing*, Et *ſic de ſingulis* in which he will aſſign the Errors; but to ſay In Omnibus erratum eſt is not good becauſe of the Uncertainty. F. N. B. 20 (G) the ſecond Part.

6. If a Writ of Error *upon a Judgment in an Aſſiſe be brought by four*, and *only one appears*, and the others make Default, *he cannot aſſign Errors alone till the others are ſummoned and ſevered*; Adjudged. Yelv. 3. 4. Paſch. 44 Eliz. Cromwell v. Andrews. Cro. E. 891. pl. 8. Andrew v. Ld. Cromwel, S. C. & S. P. reſolved accordingly.

7. If *two are outlawed in an appeal of Murder*, and they bring a Writ of Error to reverſe it, and *one appears*, but the other does not, *he ſhall not aſſign Errors till the other appears*, becauſe he has joined with him in 2 Keb. 141. pl. 11. S. C. and in a Nota there

says, that Both were brought to the Bar to assign the Error jointly, and one alone cannot do it without Summons and Severance.

in the Writ of Error; Adjudged. 1 Sid. 316. Hill. 18 and 19 Car. 2. The King v. Tothill & al'.

(E. a) A Man *cannot assign Error in Fact, and* also Error *in Law.*

[And how to take Advantage of such Assignment.] pl. 2.

[And what shall be said Error in Fact, and what Error in Law.] pl. 3, 4

1. **A Man cannot assign for Error** that Judgment was given for the Plaintiff, where it should have been given for the Defendant and also an Error in Fact. **Trin. 10 Car. Camera Scaccarii between** *Davis and Selby* **adjudged in a Writ of Error upon a Judgment in B. R. where the Error in** Fact was, that the Plaintiff **who brought the Action as** Administratrix to her Husband, was a Feme Covert, and **that** her Husband **was** then in full Life.

One cannot assign an Error in Fact, and another Error in Law; For this is double, and may be demurred to; Per Roll J. Sty. 69 Mich. 23 Car. B. R

2. But **if a Man assigns for Error** that **the** Judgment was given for the Plaintiff, where it ought to have been for the Defendant, and **also** that he being Defendant appeared there by Attorney, being then within Age, **and the** Defendant in **the Writ of** Error pleads in nullo est erratum **he shall** not have Advantage for the Doubleness, if he does not shew it specially in his Plea, **but the Judgment shall be reversed, inasmuch as he acknowledges himself to be within Age, which is a Matter of Fact. Mich. 11 Car. B. R. between** *Mayhew and Basnet* **adjudged, and a Judgment given in an inferior Court reversed accordingly.**

——— Where there is Error in Fact and Error in Law, it must be demurred to for the Doubleness, otherwise no Advantage shall be taken of it on a General Demurrer; Agreed per Cur. Lev. 76. Mich. 14 Car 2. B. R. Molins v. Werby. — Sid. 94. pl. 20. Mullens v. Weldy, S. C. but S P. does not appear.

3. **In a Writ of Error upon a Judgment in an** inferior Court **if the Stile of the Court be** Curia tenta coram J. S. Seneschallo Curiæ &c. a tempore **&c. an Error may be** assigned that J. S. was not Steward at the Time of the Court held. **Hill. 9. Car. B. R. between** *Hatch and Nichols*; **per Curiam, in a Writ of Error upon a Judgment in the Court of the Tower of London, for this is Error in Fact.**

* Fol. 762.

4. But **in the said Case** if **the Error be** assigned that J. S. had not any Authority to hold Court, **this is not well assigned, for this is uncertain, and * Matter in Law peradventure, and more general, and not Matter of Fact to be tried by the Country. Hill. 9 Car. B. R. between** *Hatch and Nichols* **adjudged per Curiam, and the Judgment given in the Court of the Tower of London affirmed accordingly. Intratur. Trin. 9 Car. Rot. 426**

* Hob. 264 pl. 343. Lancastell v. Sidley, S. C. accordingly.

† Hob 264, 265 pl. 344. S. C.

5. **In a Writ of Error** upon a Judgment in B. R. **he** cannot assign **for Error** that there is not any Bail filed for the Defendant, **for this is not material** if he was in Custodia Mareschalli **&c. for if he was in Custodia, the Proceedings might be against him without any Bail,** but if he was not in Custodia, he ought to assign **the Error,** that he was not bailed nor in Custodia. **Hobart's Reports, Case** 341.

* *Lancastel's*

* *Lancaſtel's Caſe*, and 342. between † *Willis and Woodhouſe* adjudged, but Quære, whether he may aſſign it contrary to the Record, that he was not in Cuſtodia Mareſchalli when the Declaration ſuppoſes it, and the other ſo anſwers.

Error of a Judgment in Debt in B. R. was aſſigned, becauſe the Bill was aſſigned 11 Feb. and the Bail was filed 12 Feb, ſo as the Bill was before any Bail, and it did not appear that the Defendant was in Cuſtodia Mareſchalli, but becauſe the very Day of filing the Bill is not material, for whenever it is filed it has relation to the firſt Day of the Term, this Error was diſallowed. Cro. J. 684 pl 13. Mich 13 Jac. in Cam. Scacc. Plat v. Plummer. ——— Hob. 70 pl. 82. S. C. accordingly. —— Jenk. 295. pl. 44. S. C. affirmed in Error ; For Bail relates to the firſt Day of the Term.

Error aſſigned was, that there was not any Bail upon the File, and this was certified accordingly, and that he was not in Cuſtodia Mareſchalli ; and it was held by all the Juſtices and Barons, that it could not be aſſigned for Error, for it is contrary to the Record ; For the Declaration is againſt him as in Cuſtodia Mareſchalli, and he appears and pleads to the Iſſue as a Priſoner who was in Cuſtodia Mareſchalli, therefore he ſhall not be now received to ſay the contrary; wherefore the Judgment was affirmed. Cro. J. 568. pl. 7. Paſch. 18 Jac. B. R. Webley v. Gilman.

9. A Man may aſſign *as many Errors in Law as he will*, but he can aſſign *only one Error en Fait*, becauſe this Error en Fait is to be tried by the Country, and the Errors in the Record ſhall be tried by the Juſtices. F. N. B. 20 (E.)

7. In Replevin there are *two Avowants, one of them was an Infant, and appeared by Attorney* when he ſhould appear by Guardian, and this was aſſigned for Error; but in the *Aſſignment* of it he *concluded Et hoc paratus eſt verificare* &c. and the Defendant pleaded In Nullo eſt Erratum ; Per Cur. he *ought to have concluded to the Country*, becauſe the Error which he aſſigned is an *Error in Fact*, and the Jurors only ſhall be Triers of it, and not the Judges, therefore it is as if there had been no Error aſſigned at all ; For the Defendant by pleading In Nullo eſt Erratum has not confeſſed it to be Error, but only put himſelf on the Judgment of the Court, who cannot be Triers of it ; And Judgment affirmed. Yelv. 58. Hill. 2 Jac. B. R. King v. Goſpor.

Error was aſſigned that the Defendant was an Infant at the Time of the Judgment given againſt him, Et hoc paratus eſt verificare prout Curia vult, to which the other pleads, In Nullo eſt Erratum; this is a good Plea ; For it lies not in the Breaſt of the Court to know whether he be within Age or not ; but if he had concluded, Et hoc paratus eſt verificare only, without more, this had been good and traverſable, and to be tried by the Country ; And Judgment affirmed. Bulſt. 37. Trin. 8 Jac. Barker's Caſe.

8. If one aſſigns Error in Fact, and alſo Error in Law, it is Double, and the other Party *may well demur upon it* ; but it ſeems that the *Aſſignment of Error in Fact is no Waver of the Aſſignment of Error in Law*; Sic dictum fuit. Sid. 147. pl. 7. in a Nota, Trin. 15 Car. 2. B. R. Anon.

Lev. 105. —— Slaughter v. Tucker S. P. and ſeems to be S. C. and the Plaintiff waived the ſaid Error, and aſſigned new Error.

9. Error upon a Judgment given in C. B. *in Caſe upon ſeveral Promiſes*, in which upon Non Aſſumpſit pleaded, *as to two of the Counts, Verdict and Judgment were given for the Plaintiff, and as to the reſt for the Defendant* ; And the *Error aſſigned was, that the Defendant was an Infant at the Time* of the Promiſe made, *and alſo appeared by Attorney*; To which Aſſignment the Defendant in Error demurred ſpecially, becauſe it contained Matter of Fact and of Law alſo ; And therefore the Judgment was affirmed. 2 Ld. Raym. 883. Paſch. 2 Ann. Burdett v. Wheatley.

10. Error in Fact was aſſigned, viz. *that the Plaintiff was a Feme Covert at the Time of the Action brought*, Sed non allocatur; becauſe it might have been pleaded in Abatement, and it is a *general Rule not to ſuffer that to be aſſigned for Error in Fact, which might have been* taken Advantage of, by being *pleaded in Abatement.* 10 Mod. 166. Trin. 12. Ann. B. R. Groſvenor v. Stephens.

(F. a) *At what Time* it may be *aſſigned.*

[Or what may be aſſigned for Error after a Scire Facias.]

* Br. Error, pl. 188. cites S. C. —— Jenk. 140. pl. 86. cites S. C. ——

1. AFTER a Scire Facias **awarded againſt the Defendant,** he cannot aſſign **any Error which is** Matter of Fact. * 22 E. 4. 45. **Fitz. Nat.** 20 E. 8 H. 4. 23.

After Errors aſſigned, and a Scire Facias againſt the Defendant upon that Aſſignment, he ſhall not aſſign an Error in Fact, as to ſay that the Plaintiff was dead at the Time of the Judgment, or before the Judgment &c. F. N. B. 20. (E).

After Award of Execution on a Scire Feci Defendant cannot have Advantage of Matter pleadable to that; otherwiſe after two Nihils. 1 Salk. 264. Wicket v. Creamer.

Br. Error, pl. 188. cites S. C.

2. As in Avoidance of an Outlawry, **to ſay** that he was in France, **or other Place** under ſuch Captain in War, **for this is Matter of Fact, for it ſhall be tried by Certificate of the Captain.** 22 E. 4. 46.

Br. Error, pl. 188. cites S. C.— Jenk 140. pl. 86. cites S. C and it is repugnant

3. Or **in Avoidance** of a Judgment **given** for the Plaintiff in **a Writ of** Dower, to ſay, **that** there is not any Warrant of Attorney for the Tenants certified, **for this is Matter of Fact.** 22 E. 4. 45. **adjudged. But quære this, for it ſeems this is not Matter of Fact, but to be tried by the Record.**

to ſay that no Warrant of Attorney was entred, and to pray a Certificate to be made of it; And the Scire Facias admits the Record to be full.

* Br. Error, pl. 188. cites S. C. ——

4. But after a Scire Facias **awarded, the Plaintiff** may aſſign Errors in the Record. * 22 E. 4. 45. 34 Aſſ. † 6.

Jenk. 140. pl. 86. cites S. C. For the Record is in Court, but the Warrant of Attorney is not ſo.

† Quære if this ſhould not be pl. 7.

Br. Error, pl. 188. cites S. C.

5. As **to ſay** there is not any Original. 22 E. 4. 45.

6. Or **to ſay** in avoidance of an Outlawry, **that** he was but quarto exactus, **for this is to be tried by the Record of the Exigent, when it is certified.** 22 E. 4. 46.

7. The Plaintiff *may aſſign other Errors in another Term apparent in the Record, but the Defendant cannot then allege Diminution*; Quod Nota. Br. Error, pl. 12. cites 28 H. 6. 10.

2 Le. 2. pl. 3. Werdman v. Yate, S. C. adjornatur.

8. Error; *After Errors examined* the *Plaintiff diſcontinued his Writ, and obtained a new Writ out of the Chancery, to remove the Reſidue of the Record*, which being ſent in B. R. he *brings a new Writ* of Error *coram vobis reſidet*, and would aſſign Errors upon the new Part of the Record. It was ſaid, It was not warranted by any Courſe; for this is to allege Diminution after In Nullo eſt Erratum pleaded. It was the Opinion of the Juſtices, that inaſmuch as the firſt Writ is diſcontinued, and this is a new Writ ſued, the *Plaintiff is not tied to the former Errors, but may aſſign other Errors at his Pleaſure*, for it is now as if no Error were aſſigned before, and he may aſſign other Errors *in the Record*, or other Errors *out of the Record.* Cro. E. 155. pl. 38. and 281. pl. 2. Trin. 34. Eliz. B. R. Yates v. Windham.

9. A

9. A Writ of Error may *ſleep ſeven Years or more*; For it is only a Commiſſion, and the Parties have no Day in Court by it; *But* the Defendant in a Writ of Error may *by Motion force the Plaintiff in Error to aſſign Errors the ſame Term*, and bring a Sci. Fac. returnable the ſame Term, or the next Term. Jenk. 140. pl. 86.

Jenk. 25. pl. 48. S. P. the Parties have no Day in Court till the Plaintiff in Error ſues a Sci. Fac. ad audiendum Errores, or the Defendant in Error ſues a Sci. Fac. Quare Executionem habere non debet.

10. The Court was moved that there was a Scire Facias iſſued out to certify Errors, and *Time was deſired to aſſign them*; But the Court anſwered, that the bringing of the Writ of Error is delay enough, and therefore if you have *not aſſigned* the Errors *according to the Rules of the Court, they ſhall not be now accepted.* Sty. 208. Hill. 1649. Hudſon's Caſe.

(G. a) At what *Time* it *ought to be* aſſigned.

1. THE Plaintiff in Error ought to aſſign ſome Error before he ſhall have any Scire Facias ad audiend' Errores. 24 E. 3. 31.

Fitzh. Error pl. 11. cites S. C.

2. If A. recovers againſt B. in Banco, and C. is Bail for B. and after a Scire Facias is awarded againſt C. the Bail, and after two Nihils returned a Judgment is given againſt C. and after he brings a Writ of Error in Banco Regis upon this Judgment, he cannot aſſign for Error that there was not any Capias returned againſt B. the Principal before the Scire Facias ſued, for that if he had appeared and had not pleaded it, or had been returned ſummoned, and had not appeared and pleaded this Matter, he ſhould not aſſign it for Error, becauſe he might have pleaded it to the Scire Facias, and here the Return of two Nihils amounts to a Summons and is all one with it, and this is a Matter of Record and not a Matter of Fact, and there would be no End if he ſhould be admitted to aſſign it after ſuch Judgment, in which if he had appeared he might have been aided. Trin. 1651. between *Barcock and Tompſon* adjudged, and the firſt Judgment affirmed. Intratur. M. 1650. Rot. 444.

Sty. 281. S C. adjornatur — Ibid. 288. S. C. ruled to ſhew Cauſe why Judgment ſhould not be affirmed, and take Liberty to bring an Audita Querela. — Ibid. 323, 324. Paſch. 1652. S. C. adjudg'd for the Plaintiff. ——

Scire Facias was brought againſt the Adminiſtratrix of one of the two Perſons againſt whom Judgment was given, and after two Nihils return'd Judgment was awarded againſt her by Default; Afterwards ſhe brought a Writ of Error Coram vobis reſiden' and the Error in Fact aſſign'd was, That ſhe was never ſummoned. The Queſtion was, Whether this Writ of Error would lie or not? Becauſe the two Nichil's return'd amount to a Scire Feci; and ſo there being a Judgment by Default after two Nichils, it is two late now to bring a Writ of Error. And upon the Authority of the Caſe of Barcock v. Tompſon reported by Style, and mention'd by Ld Roll, and agreed by him the Writ of Error was quaſh'd. 4 Mod. 314. Mich. 6 W. & M. in B. R. Lampton v. Collingwood.

3. Error *of a Judgment in Dower*; he aſſigned Error that the *Tenant in Writ of Dower appeared by Attorney who had no Warrant* here, and *prayed Writ to certify* if any Warrant be or not, and was Ouſted of it; For when the Record is removed, if the Plaintiff will aſſign any Error in Fact, he ought to aſſign it before that Scire Facias iſſues againſt the Defendant; For *after this Scire Facias iſſues he ſhall not aſſign any Error in Fact*, and therefore he was deny'd the Certificate by Award. Br. Error, pl. 188. cites 22 E. 4. 45.

4. *And*

4. *And* where a Man *aſſigns that he was Ultra Mare at the Time of the Outlawry* &c. he ſhall do it before Scire Facias awarded againſt the Defendant. Ibid.

5. *And* per Huſſey, a Man ſhall not aſſign *Diminution* after ſuch Scire Facias. Ibid.

6. *So* where *Original* is wanting, or *Capias or Exigent is wanting*; For *by the ſuing of the Scire Facias he affirms that the Record is full*; Per Huſſey, quod non contradicitur. Ibid.

7. A Man outlawed of Felony, and brought to the Bar to ſay why he ſhould not be put to Death, pleaded that he was *impriſoned* in the Caſtle of Oxon, at the Time of the Outlawry, and *did not ſay under whoſe Cuſtody, nor in what County Oxon is, nor took Averment, et hoc* &c. and by the Juſtices, he ſhall not aſſign Error before the Writ of Error by him purchaſed, and againſt the King does not lie a Writ of Scire Facias upon Errors aſſigned, becauſe the King is always in Court a third Perſon preſent, therefore the *Priſoner muſt plead every Thing certain at firſt*. Br. Error, pl. 135. cites 1 H. 7. 13.

8. When the Record is removed, Errors muſt be aſſigned *before Sci. Fa. ad audiend' Errores is* ſued out. F. N. B. 20. (E.)

9. And the Error *ought to be aſſigned the ſame Term*, and a Sci. Fa. ad audiend' Error' ſued out returnable either that Term, or the Term enſuing, elſe all the Matter is diſcontinued. F. N. B. 20. (G.)

10. When the *Record comes into Court*, the Plaintiff ſhall aſſign his Errors and have a Sci. Fa. before the Record *ſhall be entered*, for that ſhall not be entred *until the Parties have a Day by Sci. Fa.* F. N. B. 22. (F.)

11. *In Civil Caſes* the Errors neither are nor can be aſſigned *before the Writ of Error is allowed, and the Record removed*; But *in Caſes of Outlawry of Felony or Attainder of Felony* the Error ought to be firſt aſſigned and allowed before a Writ of Error ſhall be granted. Jenk. 165, 166. in pl. 19.

12. The Plaintiff brought a Writ of Error upon a Judgment obtained againſt him; and afterwards the *Record was removed* into B. R. he for ſome Time *neglected to ſue out a Scire Facias ad audiend' Errores*; whereupon the *Plaintiff in the original Action ſued out a Scire Facias quare Executionem habere non* &c. and upon 2 Nihils returned had Judgment, and Execution executed. Carth. 40. Trin. 1. W. & M. in B. R. Moſeley v. Cocks.

13. 10 & 11 *W.* 3 *cap.* 14. *No Fine, Recovery or Judgment ſhall be reverſed for Error, unleſs Writ of Error is brought within twenty Years after ſuch Fine levied &c.*

14. In Ejectment Judgment is not compleat till Damages are found, and yet a Writ of Error lies of the Judgment *before any Damages are found*; Becauſe by the Judgment that is given the Poſſeſſion is touched immediately; And where a Judgment is final for any Part Writ of Error will lie. 7 Mod. 100. Mich. 1 Ann. B. R. ſeems admitted in the Caſe of The Queen v. Darby.

15. If the *Plaintiff in Error lies ſtill after a Writ of Error brought* this is no Diſcontinuance of the Writ, but that the *Defendant in Error* has no other way but to *bring a Scire Facias againſt him, to ſhew Cauſe Quare Executionem non haberet*, and it will be no Plea for the Plaintiff in Error to plead that there is a Writ of Error depending, but he *muſt aſſign his Errors forthwith* after ſuch Scire Facias brought; And in this Caſe there is a Difference (viz.) if the Scire Facias is entered on the ſame Roll with the Writ of Error, then he may aſſign Errors without a Scire Facias ad audiendum Errores, otherwiſe not; Per Holt Ch. J. 3 Salk. 144. pl. 1. Lynch v. Coot.

16. In

16. In a Writ of Error Quod Coram vobis reſidet the Court on Motion made a Rule that Plaintiff ſhould aſſign his Errors *within four Days*. Barnard. Rep. in B. R. 328. Paſch. 3 Geo. 2. Cowworth v. Throuſtout.

In a like Caſe the Court gave a Week only. Barnard. Rep. in B. R. Paſch. 4. Geo. 3. Goodright v. Jennings.

(G a. 2) Bar of Execution.

Where the bringing a Writ of Error will bar the Execution of the former Judgment.

1. WHERE a Writ of Error is brought *upon a Judgment in Annuity in C. B.* that Court cannot proceed upon a Sci. Fac. to execute this Judgment. Jenk. 74. pl. 40. cites 10 H. 6. 6. 17 E. 3. Fitzh. Quare incumbravit, and Dr. Drury's Caſe. 8 Rep. 42.

2. *But* where a Judgment is given *in Debt*, and the Record is removed by Error, yet *before Reverſal an Original Writ of Debt lies upon this Record.* Jenk. 74. pl. 40 cites 4 H. 6. 31. and Dyer 32.

3. *In Treſpaſs after Judgment by Default a Writ is awarded to enquire of Damages*, and before the Return thereof a Writ of Error is brought, yet this Writ to inquire of Damages ſhall be executed, though iſſued after the Writ of Error was brought; For in this Caſe the Writ of Error does not lie *before the Return of the Writ of Inquiry*, becauſe till then *no perfect Judgment is given by which the Defendant may be damaged*; but it is *otherwiſe in Ejectione Firmæ, or Writ of Dower*, and a Writ of Inquiry of Damages awarded; *For the Land and Dower are recovered by the firſt Judgments.* Jenk. 74. pl. 40.

4. *Execution* was made *after Allowance of a Writ of Error in Parliament.* It was moved that the Writ of Execution was ſealed before the Writ of Error taken out, and as Bail to it was not put in, it could not be a Superſedeas. The Court allowed, that *where Bail is afterwards put in, the Writ of Error is a Superſedeas by Relation from the very ſealing of it*, but as Bail was not yet put in, the time of Service of the Execution was at preſent to be conſidered as Regular; But *where indeed no Bail is to be put in, the Writ of Error is a Superſedeas from the Sealing it.* Barnard. Rep. in B. R. 176. Trin. 2 Geo. 2. Gurnel. v. Fawl.

(G a. 3) By whom.

Where ſeveral Perſons may have ſeveral Writs, or muſt all join.

1. A *Præcipe quod reddat* is brought againſt a *Tenant*; he *vouches*; *Judgment* is given for the Demandant *againſt the Tenant, and for the Tenant againſt the Vouchee*; They may have ſeveral Writs of Error upon this Judgment; the Vouchee may aſſign Error between the Demandant and the Tenant, but the Tenant cannot aſſign Error

between the Demandant and the Vouchee. The Vouchee may have Prejudice by this Error, but not ſo the Tenant, becauſe he has recovered in Value; If the Tenant reverſes the Judgment, the Vouchee ſhall have a Scire Facias to reſtore the Value; If the Vouchee prevails by Means of the Writ of Error brought by the Vouchee, the Tenant ſhall be reſtored. Jenk. 69. pl. 31.

2. *So* where an erroneous Recovery is had againſt *Tenant for Life, he in the Reverſion, and the Tenant ſhall have ſeveral Writs* of Error, and Judgment for one of them, and Execution thereof ſhall reveſt their Eſtates. Jenk. 69 pl. 31.

Vent 165. Mich 23 Car. 2. B. R. Brell v. Richards S. C. reſolved accordingly, and they all held that the Judgment ought to be reverſed againſt.

3. Error of a *Judgment in Ejectment againſt ſeveral* Defendants, and the *Writ concluded Ad damnum ipſorum*, which muſt be againſt all, when it appeared by the Record that the *Judgment was only againſt three, and* that *all the reſt were acquitted*; Per Cur. yet the Writ of Error is well brought, for all muſt join in the Writ, which is only a Commiſſion to examine Errors; *and ad damnum ipſorum may be intended only of thoſe who were found Guilty*, viz. that they were damnified by this Judgment. 3 Salk. 146. pl. 8. Ball v. Richards.

——2 Keb. 823. pl. 39. and 844. pl. 83. S. C. and the Judgment wholly reverſed.

4. If *one Executor appears upon the Capias, and another makes Default*, Judgment ſhall be againſt Both De Bonis Teſtatoris; And the Judgment being againſt Both, *one only ought not to bring the Writ of Error, but Both muſt join*; For the Judgment is ad grave Damnum of them all. 1 Salk. 312. pl. 17. Paſch. 1 Ann. B. R. Rouſe v. Etherington.

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(H. a) Scire Facias *ad audiendum.*

In what Caſes it ſhall be *ſued.*

Fitzh Error, pl. 24 cites Trin. 18 H. 6 17. S. C.

1. IF theſe Matters which are aſſigned for Error, appear to the Court to be no Error, nor Colour of Error, it ſhall not grant any Scire Facias. 18 H. 6. 18. 19. Curia.

Fitzh. Error, pl. 24 cites Trin. 18 H. 6. 17. S. C.

2. If a Matter of Fact be aſſigned for Error, a Scire Facias ſhall be granted. 18 H. 6. 19.

3. *In a Falſe Judgment againſt an Abbot the Plaintiff was Nonſuit*, and the *Abbot had a Scire Facias* againſt the Plaintiff to ſhew why he ſhould not have Execution, and to have the Judgment executed returnable at 15 Paſch. at which Day the *Plaintiff appeared, and aſſigned his Errors, and tendered Sureties to ſue with Effect*, and prayed a Scire Facias againſt the Abbot to hear Errors. And the Opinion of the Court was, that he might aſſign the Errors againſt the Abbot, without ſuing any Scire Facias againſt him, becauſe *they had Day by the Roll.* F. N. B. 18. (F)

4. *But if the falſe Judgment abate for Default in the Writ*, the Plaintiff ſhall not have a Sci. Fa. ad audiend' Errores upon the Record certified, and if the Plaintiff dies, if the falſe Judgment be given in a Writ

Writ of Droit Patent, the Heir ſhall have a Writ of Sci. Fa. ad audiend' Errores. F. N. B. 18. (G)

5. *Three Women and the Husband of one recovered Debt* in C. B. and Judgment affirmed in B. R. *The Husband died.* The Women ſued out a Capias againſt the Party without firſt ſuing a Sci. Fa. But adjudged that a Sci. Fa. ought to have been firſt ſued forth, becauſe perhaps the Defendant might have a Releaſe of the Husband who was dead to plead. Mo. 367. pl. 503. Mich. 36 & 37 Eliz. Iſam's Caſe.

6. 17 *Car.* 2. *cap.* 2. *S.* 2. *Where any Judgment after a Verdict ſhall be had by any Executor or Adminiſtrator, an Adminiſtrator De Bonis Non may ſue a Sci. Fa. and take Execution upon ſuch Judgment.* Made perpetual by 1 Jac. 2. cap. 17.

7. The *Exchequer-Chamber doth not award a Scire Facias ad audiend'* Errores, but Notice is given to the Parties concerned. Vent. 34. Trin. 21 Car. 2. B. R. Anon. in a Note.

8. A Scire Facias ad audiendum Errores went *againſt the Executors,* where the *Defendant in the Writ of Error died.* Vent. 34. Trin. 21 Car. 2. the Secondary informed the Court of this as the Caſe of Thyn v. Cory.

9. In an *Information qui tam* &c. upon 5 Eliz. *for uſing a Trade* contra Formam Statuti, and Judgment pro Quer', and Writ of Error brought; Per Cur. in the Caſe of Indictments, there needs no Scire Facias for the Party to aſſign his Errors, but a Rule is ſufficient, becauſe the Queen is always in Court by her Attorney-General; But a Rule in this Cauſe being moved for, the Court ſaid they had order'd Precedents to be ſearched, but could find none, and therefore the Defendant in Error muſt proceed as he can by Law. Trin. 8 Ann. B. R. The Queen & al' v. Ford.

(I. a) [Scire Facias.]

Againſt whom it lies.

[*Tertenants.*]

1. If a Man condemned in an Aſſiſe be outlawed for the Fine of the King, and he brings a Writ of Error to reverſe the Outlawry only, there ſhall not be any Scire Facias againſt the Recoveror, becauſe the Outlawry is at the Suit of the King only. 7 H. 4. 40. Fitzh. Error, pl. 62. cites 7 H. 4. 39. S. C.

2. But otherways it had been if the Writ of Error had been brought of the Judgment and the Outlawry only. 7 H. 4. 40. Fitzh. Error, pl. 62. cites Paſch. 7 H. 4. 39. S. C.

3. If a Man be outlawed at the Suit of a Common Perſon, and he brings Error to reverſe the Outlawry, he ought to ſue a Scire Facias againſt the Party. * 7 H. 4. 40. 9 H. 4. 3. admitted. Contra 11 H. 4. 94. * Fitzh Error, pl. 62. cites 7 H. 4. 39. S. C.

4. But if a Man be outlawed upon Proceſs at the Suit of A. who dies, and he brings Error to reverſe the Outlawry, he ſhall not ſue a Scire Facias againſt the Executor, becauſe he cannot proceed upon Br. Error, pl. 44 cites S. C.—— Br. Utlaga-

ry. pl. 9. cites S C. —Fitzh. Utlagary, pl. 9. cites S. C.

on this Original, which is abated by the Death of the Teſtator. 9 H. 4. 3.

Br. Error, pl. 42. cites 8 H 4. 18. S. C.——Fitzh. Error, pl. 60. cites S C.

5 Upon a Writ of Error againſt the Heir of him that recovers, a Scire Facias lies againſt the Heir and Tertenants. 8 H. 4. 17.

A Writ of Error was brought to reverſe a Recovery ſuffered in the Grand Seſſions of Wales. The Queſtion was, Whether there ought to be a Scire Facias againſt the Tertenants and the Heir? The Heir in this Caſe is an Infant, ſo that it was inſiſted that if he be admitted to be a Defendant, he ought not to appear during his Minority, and there is no Remedy till his full Age. Per Curiam, It is not neceſſary in Point of Law, but it ſeems to be the Courſe of the Court and that muſt be followed; and it is reaſonable it ſhould be ſo; becauſe the Errors upon a Recovery ſhould not be examined before all the Parties are in Court, and therefore there ſhould be a Sci. Fa. againſt the Tertenants. 3 Mod. 274. Hill. 1 W. & M. in B. R. Anon.

6. A Writ of Error was brought to reverſe a Fine. Some of the Juſtices thought that it is the *beſt Way to award a Scire Facias againſt the Tertenant, before the Court proceeds* to Examination of the Errors, for *he may have ſomething to plead in Bar, as Releaſe &c.* and ſo ſave the Court the Trouble of examining the Errors; and tho' the Judgment ought to be reverſed againſt the Party and Privy, yet the Plaintiff could not have Reſtitution till the Tertenant be made privy by a Scire Facias; for if he be otherwiſe ouſted he may have Aſſiſe. Dy. 321. a. pl. 21. Hill. 15 Eliz.

7. *Scire Facias* on a Judgment in Debt was brought *againſt the Bail.* It was aſſigned for Error that it *is not mentioned that Proceſs was awarded againſt the Principal*; and Judgment was reverſed. Cro. E. 177. pl. 6. Paſch. 32 Eliz. B. R. Herd v. Burſtow.

8. Error aſſigned was that the *Bail was taken in Execution without any Scire Facias iſſued out againſt him*; This was held to be Error, and a Superſedeas was granted to deliver him out of Execution. 2 Bulſt. 133. Mich. 11 Jac. Kirkby v. Ungle.

2 Bulſt. 231. Huxley v. Harriſon S. C & S. P. by Man Secondary.

9. In Caſe of a Sci. Fa. *againſt an Adminiſtrator*, the Courſe is to grant it *ſometimes Generally againſt Adminiſtrator, and ſometimes againſt ſuch a one Particularly as Adminiſtrator*; Per Mann, Clerk. Roll Rep. 23. pl. 32. Paſch. 12 Jac. B. R. in the Caſe of Harriſon v. Hukesley.

10. *The Writ of Sci. Fa. anciently was Special, naming the Tertenants*, but of late ſuch Courſe has been charged as appears by 8 H. 4. 18. and the Writ awarded generally, and *when the Writ is General, Non tenure is no Plea* in Abatement; Per Bridgman. Bridgm. 72. Hill. 13 Jac.

11. The Scire Facias *againſt the Tertenant* is not Ad audiendum Errores, but *Ad audiend' Proceſſum & Recordum*, and therefore he cannot plead in Abatement of the Writ but only in Bar; Arg. to which Twiſden and Windham inclined. Lev. 72. Mich. 14 Car. 2. B. R. in Caſe of Wynn v. Loyd.

Hardr. 164. Hill. 1659. cites 21 E. 4 and 21 H. 7. S. P.

12. *Appellees of Murder were outlawed*, and brought Error, and *apparent Errors were aſſigned*, but the Court notwithſtanding would not reverſe the Outlawry till a *Scire Facias returned againſt the Lords Mediate and Immediate.* Sid. 316. pl. 1. Hill. 18 & 19 Car. 2. B. R. The King v. Tothill & al'.

2 Show. 505. pl. 466. S. C. The Court upon this Motion was

13. If a Writ of Error is brought *to reverſe a Common Recovery*, the Court before Reverſal thereof *ought to award a Scire Facias againſt the Tertenants*, and this is not merely diſcretionary, but *Ex neceſſitate Juris*, for they may have a Matter to plead in Bar as a Releaſe &c. Arg.

Arg. and held accordingly per Curiam; for it is not only a Cautionary Writ, but it is a legal Caution which in a Manner makes it neceſſary; Sed adjornatur. 3 Mod. 119. Hill. 2 & 3 Jac. 2. Kingſton v. Herbert.

of Opinion that awarding it to the Tertenants was not Ex Neceſſitate Juris, but Diſcretionary. —— Comb. 42. S. C. and per Cur. The Reverſal of the Recovery ought to be vacated; and it was ruled accordingly, Niſi &c. —— S. P. in Error to reverſe a Fine, and argued that it is in the Diſcretion of the Court to grant it, and that it lies as well after as before Judgment in the Writ of Error, and of this Opinion was Newdigate Ch. J. and cited 8 H. 6. and 43 E. 3. in Point, and that in D. 320, 321. no Scire Facias was awarded; Hill J. ſaid, that it ought to have iſſued before, as in 21 E. 4. and 21 H. 7. in Error to reverſe an Outlawry, a Sci Fa. to the Lords Mediate and Immediate; And Nicholas J. doubted; & adjornatur. Hardr. 163. Hill. 1659. B. R. Ford v. Bradſham.

(I. a 2) Examination of Errors. At what Time. After Execution Awarded.

1. A Man *recovered in* Writ of *Debt*, and the *Defendant brought Writ of Error*, and removed the Record in B. R. and there *did nothing, by which the Plaintiff prayed Execution*, and could not have it without Scire Facias, by which he *ſued Scire Facias and Alias, and the Defendant was twice returned Nihil*, by which the *Plaintiff had Ca. Sa.* and after Exigent, becauſe it was entered Quod Defendens exactus fuit et non comparuit, and *upon the Exigent he came and tendered the Money to the Court* as he ought, as it ſeems, and *pray'd Scire Facias ad Audiendum Errores, and Superſedeas, and had it, becauſe the Exactus fuit et non comparuit was upon the Scire Facias of Execution, and not upon the Writ of Error*, and *ſo he is not nonſuited upon the Writ of Error*; And ſo ſee notwithſtanding the Matter above, they ſhall proceed upon the Writ of Error, and the Advantage of it is not loſt. Br. Error, pl. 6. cites 9 H. 6. 13. Br. Nonſuit pl. 2. cites S. C.

2. If the *Defendant in Error ſues out a Scire Facias quare Executionem habere non debet*, this is *merely collateral to the Record removed*, and yet by Matter ex poſt Facto may become a Record, As if the Plaintiff upon the Return of the Scire Facias appears and pleads a Releaſe or other matter, as he well may, then this is a Record annexed to the firſt Record removed; But if upon the Return of the Scire Facias the *Plaintiff appears and aſſigns Errors*, or has a Day given him to aſſign them, and upon this Record aſſigns his Errors *inſufficiently*, this *Scire Facias is but a Piece of Paper filed to the Record*, no Proceeding being thereupon. Yelv. 6, 7. Trin. 44 Eliz. B. R. Crumwell v. Andrews.

3. In *Scire Facias ad Audiendum* Errores, and Scire Facias *returned, et quod Præmonitus non venit*, the Court without pleading will examine the Errors. Keb. 662. pl. 53. Hill. 15 and 16 Car. 2. B. R. Molineux v. Nelſon.

4. A Sci. Fac. does not lie on a Judgment *pending a Writ of Error* brought on that Judgment, but the Writ of Error pending is a good Plea to the Sci. Facias; and the whole Proceedings were ſet aſide on Motion as irregular, without driving the Defendant to an Audita Querela. 2 Ld. Raym. Rep. 1295. Mich. 8 Ann. in Cam. Scacc. Ludlow v. Lennard.

(K. a) *How* it ſhall be *joyned in Demurrer or Rejoinder* to the Error aſſigned.

[*In Nullo eſt Erratum.*]

1. IF a Man outlawed brings a Writ of Error to reverſe the Outlawry, and aſſigns his Errors, the King's Attorney ſhall not plead in Nullo eſt Erratum, and ſo a Demurrer, as they us'd to do between common Perſons, but only upon the Aſſignment of the Error the Court ſhall give a Day to the King's Counſel to maintain the Outlawry, and it is entered Curia adviſare vult till the Outlawry is reverſed or affirmed. Mich. 14 Ja. B. R. per Curiam and Clerks in *Chapman's Caſe.*

* Though In Nullo eſt Erratum be pleaded it is not any Confeſſion, but Quaſi a Demurrer, becauſe it is not an Error aſſignable; Per Cur. Cro. J. 29. in pl. 5. Paſch. 2 Jac. B. R. —— In Nullo eſt Erratum is a Demurrer, but is not a Confeſſion of Error in Fact not well aſſigned. Lev. 311. Hill. 22 & 23 Car. 2. B R. —— A Writ of Error aſſigned Nonage in two of the Defendants, where all appeared by Attorney, the Defendant pleaded In Nullo eſt Erratum; The Judgment was reverſed in toto, becauſe this Plea is a Confeſſion of this Matter in Fact, it being a Demurrer, and no way left for the Demurrer to try it; but he ought to have pleaded to the Infancy, ſo that Iſſue might be taken upon it. Lev. 294. Trin. 22 Car. 2. B. R. Grell v. Richards. —— A Demurrer in Law is never a Confeſſion of a Thing againſt the Record, but of that only which may ſtand with the Record; For otherwiſe his Confeſſion would be vain, and ſhould not bind the Court; Per Popham. Cro. J 12. pl. 15. Paſch. 1 Jac. B. R.

When Error in Fact is well aſſigned for Error, In nullo eſt Erratum amounts to a Confeſſion of the Fact, As if Infancy be aſſigned, the Plaintiff cannot plead In nullo eſt Erratum, becauſe by it he confeſſes the Infancy, but he ought to take Iſſue; But if the Party aſſign for Error that the Court did not ſit, or that the Defendant did not appear, which Aſſignments are of Matters of Fact, but not well made, there In nullo eſt Erratum amounts to a Demurrer; Per Hale Ch. J. Raym. 231. Mich. 25 Car. 2. B. R. Okeover v. Overbury.

2. If the Plaintiff in the Writ of Error aſſigns an Error in Fact, if the Defendant will put in Iſſue the Truth of the Fact, he ought to rejoyn by Denial of the Fact, and ſo join Iſſue thereupon, and ſhall not ſay * in nullo eſt Erratum, for by this he acknowledges the Fact alledged to be true. Dyer. 3 E. 6. † 7 E. 4. 16. and ‡ 9 E. 4. 32. it ſeems to be intended.

† Br. Error, pl. 165. cites S. C. —— Fitzh. Error, pl. 43. cites S. C.

‡ Br. Error, pl. 93. cites S. C. —— Fitzh. Error, pl 45 cites S. C.

3. But when an Error in Fact is aſſigned, if the Defendant will acknowledge the Fact to be ſo as alledged, and yet that by the Law this is not Error he ought to rejoyn in Nullo eſt Erratum, for by this he acknowledges the Fact, and yet that by the Law that is not Error. Dyer, 3 E. 6. S. 7.

Br. Error, pl. 93. cites S C. —— Fitzh. Error, pl. 45. cites S. C.

4. So if Error be alleged in the Body of the Record, in Nullo eſt Erratum is a good Rejoinder, for this ſhall put the Matter in the Judgment of the Court, the Record being agreed to be ſo. 9 E. 4. 32.

——But otherwiſe it is of Error in the Record, As want of Capias, or the like, there he may ſay In nullo eſt Erratum, and there if the Defendant will confeſs the Error, the Court ought not to reverſe the Judgment till they be aſcertained of the Error. Br Error, pl. 165. cites 7 E. 4. 16.

Fol. 764.

* Br Error, pl. 93. cites

5. So if Error be alledged in a Matter of Record which is not of the Body of the Record, but in a collateral Thing as quod non habetur aliquod Recordum of Reſummons, in Nullo eſt Erratum is a good Rejoinder, for if the Plaintiff in the Writ of Error does not prag

pray a Diminution, and thereupon procure a Certificate from the inferior Court, that there is not any Re-ſummons before the Rejoinder entered, this Aſſignment is of no Effect, but void, inaſmuch as this is to be tried by the Record itſelf; and no Diminution can be alledged after the Rejoinder entered. * 9 E. 4. 32. † 7 E. 4. 16. for if the Defendant will confeſs the Error yet the Court ought not to reverſe the Judgment till they are aſcertained of the Error by the Record itſelf.

S. C. —— Fitzh. Error, pl. 45. cites S. C. —— † Fitzh. Error, pl. 43. cites S. C —— Br. Error, pl. 165. cites S. C.

6. In nullo eſt erratum cannot be pleaded *to an Error aſſigned en Fait*, but he ought to anſwer to the Error en Fait. Dy. 65. pl. 7. Mich. 3 E. 6. in Caſe of Ld. Arundell v. Ld. Windſor.

7. Error aſſigned was, that the *Defendant appeared per J. S. Attornatum ſuum*, and that *there was not any ſuch Perſon as J. S. in rerum Natura*; The Defendant pleaded In nullo eſt erratum, which is a Confeſſion, and yet the Court held it no Error, becauſe *it is againſt the Record*, and the Party is eſtopped to ſay the contrary, but he might have aſſigned that J. S. had not any Warrant of Attorney; and Judgment affirmed. Cro. E. 665. pl. 18. Paſch. 41 Eliz. C. B. Croſſe v. Tyrer.

8. The *Parties being at Iſſue, and an Habeas Corpora awarded* C. B. in which the Action depended, awarded a *Superſedeas quia improvide* &c. which *was delivered to the Sheriff, and yet he returned the Jury*, and *the Cauſe was tried* at the Aſſizes, and a *Verdict for the Plaintiff*; this Matter was aſſigned for Error; the Defendant in Error *pleaded in Nullo eſt Erratum*, and adjudged Error; For the Error aſſigned is a *Matter in Fact depending on a Matter of Record, and ſo* the Plea *is a Confeſſion*, that ſuch a Superſedeas was awarded, and delivered to the Sheriff before Trial, and conſequently after the Superſedeas delivered the Hands of the Sheriff were bound. Yelv. 57. Mich. 2 Jac. B. R. King v. Andrews.

9. A *Double Error in Fact was aſſigned*; And per Holt Ch. J. The Way is to plead in Nullo eſt Erratum, and *ſhew the Duplicity for Cauſe to affirm the Judgment*. But if Apparent Error appears on the Record, notwithſtanding the ill aſſigning of the Error in Fact by reaſon of the Duplicity, Judgment ought to be reverſed for ſuch Apparent Error; but no ſuch Error appearing here on the Record, the Judgment was affirmed becauſe of the Duplicity of the Error in Fact; Per Curiam. 12 Mod. 650, 651. Hill. 13 W. 3. Gibbs v. Walkley.

10. *Debt on a Bond*, and the Plaintiff having had a Verdict and Judgment in C. B. a Writ of Error was now brought by the Defendants; and it was aſſigned for Error, that *one of the Defendants died before the Day of Niſi Prius*; Strange for the Defendant in Error moved, that it *appears on the Record that both the Defendants joined in bringing this Writ of Error*; ſo that *the Error now aſſigned is contrary to the Record*, and conſequently an Error which the Plaintiffs are eſtopped to aſſign; and therefore the Plea of in Nullo eſt Erratum is a Demurrer to it, and cites 1 Ro. Ab. 758. pl. 8. And the Court being of this Opinion, the Judgment was affirmed. Gibb. 109, 110. Mich. 3 Geo. 2. B. R. Webb v. Plumner & al'.

(L a) Diminution.

[Alleged; How. Not contrary to the Record.]

Diminution ſhall not be alleged in inferior Courts. Sid. 348.

1. A Man cannot alledge Diminution contrary to the Record which is certified. Paſch. 41 El. B. R.

Sid 40. 364. Shall not be alleged when it appears there is want of Continuance. —— 1 Salk 266. pl. 11. Paſch. 3 Ann. B. R. in Caſe of Hale v. Clare. S. P.

2. As if in a Writ of Error it be certified that the Judgment was that Defendant ſit in Miſericordia, the Defendant in the Writ of Error cannot alledge Diminution, ſcilicet, that the Record is quod capiatur, becauſe this is contrary to the Record certified. Paſch. 41 El. B. R.

Roll Rep. 200. pl. 2. S. C. held accordingly.

3. If upon a Writ of Error the Record be certified that a Challenge was to the Sheriff for Couſinage, and after thereupon a Venire Facias to the Coroner upon Diminution, it cannot be certified that the Challenge to the Couſinage was after the return of the Venire Facias, becauſe this is contrary to the Record before certified, for nothing can be certified but that which ſtands with the firſt Record. Trin. 13 Ja. B. R. between *Floyd and Bethell.*

4. It cannot be alledged *upon a Bill of Exceptions*, As to ſay that a Miniſter, as Sheriff &c. was examined which is omitted. Br. Error, pl. 50. cites 11 H. 4. 52. 65. 92. Per Huls.

5. Error in B. R. of *a Judgment given in Briſtow*, inaſmuch as *the Attachment was returned Tueſday was in Feſto Sancti Edmundi*, where the *Feaſt was Wedneſday*; The Defendant *alleged Diminution*, that the Record is *Tueſday the ſixteenth Day of July, Anno 5 E. 4. in Feſto Sancti Edmundi*, and ſo theſe Words (*Sancti Edmundi*) *void*, and the reſt is the Day, and prayed Writ to certify it; And per Jenny and Laicon this Diminution is not good; For it is to Falſify the Record; For *Diminution cannot be alledged in that which is contrary to the Record.* But in that which may ſtand with &c. But per Billing and Needham, this ſtands with it. Br. Error, pl. 168 11 E. 4. 10.

6. Aſſiſe was brought by A. againſt B. and others, and paſſed for A. and B. and the others brought Writ of Error, and aſſigned for Error the *Miſnoſmer of one of the Jurors, but not How*, and *alſo that the Diſſeiſin was found with Force, by which the Juſtices ſhould treble the Damages, where it was not found if* the Diſſeiſin *was before the Statute of Forcible Entry or after*, and *to the firſt Error the Defendant prayed that it be amended*, and *to the other Error he pleaded* that in this, nor in any other Part of the Record, *In Nullo eſt Erratum*, and prayed that the Judgment be affirmed, and Day was given till the next Term, at which Day the *Plaintiff ſaid that it appeared in the Record of Aſſiſe that they were at Iſſue upon two Matters out of the Point of Aſſiſe, and that the one was found, and the other not inquired*, and yet *Damages were given for all*, and therefore Error; to which the *Defendant alledged Diminution, and prayed Writ* to the Juſtices to certify it; to which the *Plaintiff ſaid, that at another Time he brough Sci. Fac. upon this Writ of Error againſt the Defendant, upon which he appeared, and the Plaintiff aſſigned the Errors, to which the Defendant had pleaded In Nullo eſt Erratum, and prayed that they proceed to the Examination of Errors*, and upon this Day is given to this Term; and therefore *Judgment if he may now allege Dimi-*

Diminution, and after the Judgment was reverſed; And ſo ſee, that the alledging of Diminution ſhall not ſerve here; For per Danby and others, the *Defendant before he pleaded ought to have ſeen that he had the whole Record* except the Writ, Proceſs, Warrant of Attorney, and the like; Quod Nota. And ſo ſee that the other *may aſſign other Errors in another Term apparent in the Record, but the Defendant cannot then allege Diminution*; Quod Nota; And there it was argued if Judgment may be *reverſed for the Damages and ſtand for the Land*; and it ſeems that No; and that if Aſſiſe be *taken by Parcels* that it is Error; Quod Nota. Br. Error, pl. 12. cites 28 H. 6. 10. Lord Clinton v. Cliderowe.

7. Error aſſigned was, *for want of a Warrant of Attorney*; The *Plaintiff in Error prayed a Certiorari to the Ch. J. of C. B. and another to the Cuſtos Brevium*, and they both *returned Non inveni aliquod Warrantum*; He who obtained the Judgment *died*. The Plaintiff brought *another Writ of Error by Journey's Accompts againſt his Son and Heir*, who appeared, and then the *Plaintiff alledged Diminution* in hoc, *that the Warrant of Attorney was not certified*, and *prayed a new Certiorari to the Ch. J. and another to the Cuſtos Brevium*; It was objected, that it ought not to be granted twice in the ſame Action, eſpecially when the firſt has been returned by one who is a Judge of Record, (viz.) by the Ch. J. who has certified, that Non inveni aliquod Warrantum, for which Reaſon Diminution cannot be alledged in this Warrant of Attorney, if another Certiorari ſhould be granted; But on the other ſide it was ſaid, that this Certiorari was only to inform the Court, and that if it was granted, and the Judge ſhould certify, that Habetur aliquod Warrantum, that Certificate would not be contrary to the firſt, becauſe that was Non inveni aliquod Warrantum, both which may be true and ſtand together; It ſeemed to Wray Ch. J. that it would be hard to grant a Certiorari, but if any Variance could be alledged, it ſhould be otherwiſe, as was adjudged in **Laſſel's Caſe**, where it was certified that there was no Warrant of Attorney, and afterwards, upon a Motion for a new Certiorari, as in this Caſe, and becauſe the Original was between John Laſſels Eſq; Executorem Teſtamenti &c. where he was not named Executor in the firſt Certiorari, and upon that Matter a new Certiorari was granted. Le. 22. pl. 28. Trin. 26 Eliz. B. R. Dayrell v. Thinn.

Mo. 148. pl. 295. Dorrell v. Thyn. S. C. that the Ch. J. certified Non inveni aliquod Warrantum Attornat', and that the Cuſtos Brevium certified Quod non habetur aliquod Warrantum Attornat', and thereupon Sci. Fac. iſſued againſt the Defendant who appeared and prayed Aid of the Queen, and had it, and then died; And a new Writ of Error was awarded againſt the Heir and Sci. Fac. after Errors aſſigned, upon which he appeared and pleaded, and alleged Diminution in not certifying the Warrant of Attorney; whereupon the Defendant demurred. And adjudged that he cannot allege Diminution, nor have new Writ contrary to the two firſt Certificates in the firſt Writ of Error.

8. In a Writ of Error, if they *alledge Diminution of the Poſtea & Habeas Corpora, and there is none to be found*, the Judgment is erroneous, becauſe there is no Warrant to enter the Verdict on a Plea Roll. Gilb. Hiſt. of C. B. 138. cites Cro. E. 340. Long v. Mitchell.

Cro. E. 340. pl. 5. Mich. 36 & 37 Eliz. B. R the S. C. and the Court held it Error; Sed adjornatur.

9. Error of a Judgment in C. B. becauſe there was *not any Warrant of Attorney for the Plaintiff* (the Judgment being for the Defendant.) Upon a Certiorari it was returned, there was not any Warrant of Attorney in that Term; It was the Opinion of the Court, that it is *not material in what Term it be entered, ſo it be entred at all*; and therefore it was commanded, that the Reverſal of the Judgment ſhould be ſtayed until it was certified; and thereupon the Parties compounded. Cro. J. 277. pl. 7. Paſch. 9 Jac. B. R. Smith v. Skipwith.

Bulſt. 21. S. C. The Judges ſaid to the Plaintiff in Error, that this was his Fault and Neglect, that the Judgment for the Reverſal was not entred of Record; For if the ſame had been entred, then this Motion had been prevented, but for this Omiſſion a Certiorari was granted by the Rule of Court.

10. In Error *upon Indictments* to reverſe them, if the Error be *aſſigned in the Outlawry only*, Diminution may be alleged, there being only a Tranſcript of the Record; Per Fleming Ch. J. Bulſt. 181. Paſch. 10 Jac. B. R. in Caſe of Baker v. Baker.

11. Error was brought of a Judgment in Aſſumpſit in C. B. After the Record certified, the Plaintiff in Error alledged Diminution *for want of an Original, which was certified and entred*, and then he aſſigned for Error a *Variance betwixt the Original and Declaration*, (as in Truth there was, for the Original was vicious) and he brought a Sci Fa. ad audiendum Errores; The *Defendant ſuggeſted, that there was another Original*, and that the Plaintiff in Error had procured an ill Original to be certified, and thereupon the *Defendant prayed a Certiorari to certify the other* Original, which was granted; for though one Perſon can have but one Certiorari, yet ſeveral Perſons may have ſeveral Writs to certify. Cro. J. 597. pl. 20. Mich. 18 Jac. B. R. Johns v. Bowen.

12. *In the Venire Facias to the Sheriff of J.* the Word *Vicecomiti was omitted*, and yet the *Sheriff of S. returned the Panel, and his Name was endorſed*, this was held Error; but becauſe on the Roll the Writ was awarded Vicecomiti S. and the Omiſſion in the Venire Facias was the Default of the Clerk, it was agreed it ſhould be amended; and Judgment affirmed, Niſi &c. Cro. C. 595. pl. 12. Mich. 16 Car. Sloper v. Child.

13. Error was aſſigned to reverſe a Judgment in *Ejectment after Verdict*, that the *Demiſe was laid before the Plaintiff had any Title, as upon the Record appeared*, For the Demiſe was on the Eſſoin-Day, and the Declaration was of the ſame Term; But per Curiam, this being after a Verdict the Chief Juſtice ſaid, that if the Plaintiff in Error would take Advantage of this Matter, he ſhould have alledged Diminution, and procured the original Writ to be certified, and if that was returnable before the Plaintiff's Title it would be Error. Carth. 288. Mich. 5 W. & M. in B. R. Cook v. Darbiſon.

14. *In inferior Courts* no Diminution can be alleged. 12 Mod. 536 Trin. 13 W. 3. Lancaſter v. Lovelace.

(M. a) Diminution.

Certiorari.

S. C. cited Noy 83, 84. —— 2 Roll Rep. 471. Mich. 22 Jac. B. R.

1. AFTER In Nullo eſt Erratum **pleaded, the Court to inform their Conſciences** may award a Certiorari to amend the Record. **Paſch. 11 Ja. B. R. Co. 5.** *Biſhop* 37. **b.**

Anon S P though they cannot have it Ex Rigore Juris, becauſe they have had Certiorari at the Suit of the Party, but they may have Certiorari ad informandam conſcientiam ex Gratia Curiæ; And Ley Ch. J. would have amended the Record, and then it was ſaid, that in the Exchequer Chamber they might move for a new Certiorari, and there they would certify it according to the Amendment; And one **Molineux's Caſe** was cited, where, upon Error in C. B the Record was amended here in B. R by the Record itſelf which was brought hither, and by a Clerk of C. B. which was done alſo by Advice of the Court of C. B. concurring with them. —— Lat. 152. Felton v. Weaver, S. C. accordingly.

* 2 Bulſt. 71. Paſch. 11 Jac. Hunley v. Alport, S. P.

2. So **after In Nullo eſt Erratum pleaded, the Court may award a Certiorari** to reverſe the Judgment. **Paſch. 11 Ja. B. R. between** * *Hunſley and Osburn* **adjudged. Co. Lib. d'Entries, Fol.** 267, 268. *Boſwell's Caſe.* **And Fol.** 242. *Downal's Caſe.* **Fol.** 266.

Lancaſt

Lancaſt and Loa. Mich. 2 Car. between *Weaver and Felton* adjudged. Intratur Hil. 1 Car. Rot. 647. B. R. and ſeems to be S. C. and a Certiorari was granted.

3. If after In Nullo eſt Erratum pleaded another Part of the Record is brought in by Certiorari, and made of Record, there the Court ought to reverſe the Judgment, if the Matter ſo requires. Co. 5. *Biſhop* 37. b. My Reports, 14 Ja. between the * Biſhop of *Rocheſter and Young* adjudged, which Intratur Paſch. 33 El. Rot. 361. * Roll Rep. 132. pl. 26. S. C. and Judgment was reverſed. —— 3 Bulſt. 224. Young v. the Biſhop of Rocheſter, S. C. but S. P. does not appear.

4. After in Nullo eſt Erratum pleaded, if one Party allege upon Record a Diminution of the Record to reverſe it, and prays a Certiorari to certify it, and thereupon a Writ of Certiorari is ſued out, and the Record thereupon is certified, but before it is entered of Record the Court is informed of this Matter, this ſhall not be received, becauſe it comes in by the Prayer of the Party after in Nullo eſt Erratum pleaded, which is not to be allowed, but upon Information to the Court the Court may grant it. Mich. 2 Car. * between *Weaver and Felton*, B. R. adjudged, and ſuch Certificate diſallowed, and a new Writ of Certiorari granted by the Court, which Intratur. Hil. 1 Car. Rot. 647. and then the Record of † the *Biſhop's Caſe* was ſhewn to the Court where the Defendant did not plead in Nullo eſt Erratum, as the Book is Co. 5. But it paſſed againſt the Defendant by nil dicit, and after Diminution alleged, as it is in the Book. Jo. 139, 140. pl. 5. S. C. reſolved that the Certiorari was not well awarded; For after In nullo eſt Erratum pleaded, neither the Plaintiff nor Defendant can allege Diminution; For by the Joinder they allow the Record; and a Nota is there added, that Biſhop's Caſe in Coke does not agree with the Record; For there the Defendant had not joined in Nullo eſt Erratum, but did not ſay any thing, Ideo remanet inde indefenſus. —— Nov 83, 84 S. C. held accordingly, but yet the Court Ex Officio may award a Certiorari ad informand' conſcientiam, and that which is certified ſhall be annexed to the Record, and is called a Rider-Roll, and ſays ſee 22 E. 4 46. a 28 H. 6. 10. Dy. 32. b 9 E. 4. 32. b. And note in Chapman's Caſe the Difference is, if a Diminution be alleged in a Thing collateral, as Warranty of Attorney, or any mean Proceſs that is not of the Body of the Record, ſo Diminution may be alleged after in nullo eſt Erratum; But otherwiſe if it be of the Subſtance and Part of the Record itſelf, As if returned in the Detinue only, where the firſt Action was in the Debet and Detinet, and ſays ſee 1 H. 7. 21. which reconciles many Differences. —— Lat. 152. Felton v. Weaver, S. C.

* Fol. 765.

† The Word (the) ſhould be omitted, and it ſhould be only (Biſhop's Caſe,) and is at 5 Rep. 37. a.

5. In Treſpaſs in B. R. Judgment was given for the Plaintiff by Default, and a Writ of Error brought in Camera Scaccarii, and there aſſigned for Error, that there was not any Writ of Inquiry of Damages filed, and upon a Writ of Certiorari certified that there was not any ſuch Writ, yet after another Certiorari granted, and upon this the Writ of Enquiry certified, and upon this the Judgment affirmed. Hill. 5 Car. between *Roror and Eſcourt*, adjudged.

6. [So] in a Writ of Right in B. R. after Judgment a Writ of Error is brought in Camera Scaccarii, and the want of Continuances aſſign'd for Error, and upon a Certiorari the want of Continuances certified; Yet after upon another Certiorari the Continuances were certified, and upon this the Judgment affirmed. Hill. 5 Car. between *Waterhouſe and Coply* adjudged, and a like Caſe between *Travis and Scot.*

7. In an Action upon the Caſe in Banco, Hill. 6 Car. and Judgment after given for the Plaintiff upon Demurrer, and upon this a Writ of Error brought and aſſigned for Error, that there was not any Original in the Cauſe de H. [Hill.] 6 Car. and upon a Certiorari it Error of a Judgment in C. B. in Covenant; The Plaintiff in

Error assigned for Error want of Original, and had a Certiorari, upon which it was certified, that there was no Original; Afterwards the Defendant applied to the Court of Chancery, and upon Affidavits that Inſtructions were given to the Curſitor for an Original, but they were loſt, the Court of Chancery allowed that the Original ſhould be ſupplied; upon which the Defendant in Error prayed another Certiorari, and an Original was certified of the ſame Term in which the Default of an Original was certified before; and now it was moved by Mr. Broderick, that this was irregular, for before the ſecond Certiorari was returned, the Defendant ought to have given a Copy of the Original to the Attorney of the Plaintiff, and the Maſter informed the Court that the Courſe was ſo when the ſecond Original certified was of another Term, but it being in this Caſe of another Term, the Motion was allowed. Comyns's Rep. 118. pl. 83. Paſch. 13 W. 3. B. R. Sir Richard Levin v. .....

it was certified accordingly; and upon this the Plaintiff ſays, That there was an Original in the ſaid Cauſe de P. [Paſch.] 6 Car. and for the Non-appearance of the Defendant upon the Return of the Summons a Capias awarded returnable T 6 Car. and an Alias returnable M. 6 Car. and a Pluries returnable H. 6 Car. upon which the Defendant appeared, and the Plaintiff declared, and the Defendant pleaded &c. and upon this prayed a Certiorari to certify the Original, which is certified accordingly, but none of the other Writs, nor any Continuance is certified between Paſch 6 Car. and Hill. 6 Car. and ſo a Diſcontinuance of the Suit for what appears to the Court. Mich. 13 Car. B. R. between *Lownes and Coggan* adjudged, and the firſt Judgment reverſed for this Cauſe.

Godb. 407. pl. 488. S. C. adjornatur. 2 Roll Rep. 352, 353. S. C. but no Judgment. — In a Writ of Error after the Record removed, Diminution of the Original was alleged, and

8. In a Writ of Error, if Error be aſſigned in the Original, and thereupon a Certiorari is granted and an Original is certified, which is erroneous; after the other Party prays a Certiorari for another Original; and thereupon another Original is certified, which is a good Original; and after in Nullo eſt Erratum is pleaded, the Court ought to intend that the Judgment was given upon the good Original, and not upon the erroneous Original, and ſo ought to affirm the Judgment; for they ought to intend more favourably for the Judgment, and to intend it to be well given. 21 Ja. between *Crouch and Hains.* B. R. adjudged in a Writ of Error.

there it was pretended that Judgment was given upon another Original, and one of the Originals was before, and the other after the Judgment; and there the Judgment was reverſed, becauſe it cannot appear to the contrary but that the Judgment was given upon the latter Original; Arg. Godb. 408. cites Paſch. 25 H. 8. Rot. 25. Plot & Ux' v Treventry.

In an Action upon the Caſe brought upon an Aſſumpſit, Error aſſigned was, becauſe that no Place was limited where the Payment ſhould be made; The Original was, that the Promiſe was in Conſideration that the Plaintiff did lend to the Defendant ſo much, he at London did promiſe to pay the ſame to him again; There were two Originals which bore Date the ſame Day, Judgment was in that Caſe for the Plaintiff, and the Defendant brought a Writ of Error, and alleged Diminution of the Original, then the other Original was certified; The Defendant in the Writ of Error ſaid, that the Original upon which the Recovery was grounded, was an Original which had a Place certain; The Judges did affirm the ſame to be the true Original which did maintain the Judgment, and agree with the Proceedings, otherwiſe great Miſchief would follow; Arg. Godb. 408. cites Trin. 18 Jac. Rot. 1013. Bowen v. Jones. ——— 2 Roll Rep. 353. S. C. cited ——— S. C. cited Godb. 306.

Sty. 176. Mich. 1649 Avery v. Kirton, S. C. and per Roll Ch. J. the Certiorari is general and not inter Partes prædict', but the Certificate is inter

9. So in a Writ of Error, if Error be aſſigned in the Original, and upon a Certiorari granted, an erroneous Original is returned, and upon this in Nullo eſt Erratum is pleaded, and after the Court ad informandam conſcientiam grant another Certiorari for another Original, and upon this a good Original is certified, the Court ought to intend that this is the Original upon which the Judgment was given, in favour of Judgments which ought to be intended to be good. Mich. 1649. between *Kerton and Avery*, and the Judgment in Banco affirmed accordingly. Intratur Mich. 23 Car. Rot. 239.

Parties prædict', and the Court may take the right Original that is certified, and the Judges are not bound

bound by the Plea in nullo eſt Erratum that is pleaded, but may grant a new original Writ of Error, but the Party cannot require it; for he is concluded by his own Plea, and if he diſcontinue his Original he may have a new one, but not if he plead, and the Certiorari is good and well certified, and therefore Judgment ought to be affirmed; Per Roll Ch. J. and Jerman, Nicholas and Ask to the ſame Effect, and ſo Judgment was affirmed.

10. Where *Two take the Tenancy ſeverally, and plead in Bar*, if the Aſſiſe *inquire of the Bar before that they inquire of the Tenancy*, this is Error, and as to the Point of the Tenancy not inquired, the Defendant of this alleged Diminution, and prayed that it be certified, alleging that it was enquired; and had it &c. Br. Error, pl. 52. cites 11 H. 4. 67. 68. Br. Aſſiſe, pl. 57. cites S. C.

11. If the Defendant pleads *in Nullo eſt Erratum*, there he *cannot allege Diminution*; For *by the Iſſue they are agreed that there is the whole Record*. Br. Error, pl. 166. cites 7 E. 4. 25.

12. *If the Juſtices* of C. B. or other Juſtices upon the Writ of Error *will not certify* all the Record, then the Party who ſues the Writ of Error *may alledge Diminution* of the Record, *and pray a Writ* unto the Juſtices who certified the Record before, *to certify all the Record*. F. N. B. 25. (A).

13. If a Writ of *Error* is *brought in C. B. of a Judgment in an Inferior Court*, and the *Judgment is there affirmed*, and then a Writ of Error is *brought in B. R. on the Judgment ſo affirmed*; In that Caſe no Diminution can be alleged of the Record in the Inferior Court; for now the Judgment in C. B. is only in Queſtion; So Reſolved Paſch. 20 Jac. B. R. Banniſter v. Kennedy F. N. B. 25. (A) in the new Notes there (a).

14. If in a Writ of Error *upon a Fine*, an Error be *aſſigned in the Proclamations*, *upon* which *a Certiorari* goes *to the Cuſtos Brevium*, and upon his Certificate *it appears that two of the Proclamations were made in one Day, but it appears in the Chirograph Office, that all the Proclamations were duly made*, Wray Ch. J. held that the Defendant ought to have his Prayer; For the Chirographer makes the Proclamations, and is the principal Officer as to them, and the Cuſtos Brevium, having only an Abſtract thereof, upon the Prayer of the Defendant, a new Certiorari was directed to the Chirographer, who having certified the Proclamations duly made, and upon Examination of the Clerks of C. B. by the Juſtices in B. R. who anſwered according to what was ſaid by Wray Ch. J. they awarded, that the Proclamations with the Cuſtos Brevium ſhould be amended according to thoſe in the Cuſtody of the Chirographer. 3 Le. 106, 107. pl. 157. Trin. 26 Eliz. Rag v. Bowly.

15. In Error the *Plaintiff prayed a Certiorari to the Cuſtos Brevium to certify an Original Writ upon which a Common Recovery was had*, and it was granted him, and the Cuſtos Brevium *certified that there was no Original*, and afterwards the *Defendant prayed another Certiorari, and had it*. Le. 22. in pl. 28. Trin. 26 Eliz. B. R. Arg. cites it as the Caſe of Ld. Norris v. Braybrook. A Writ of Certiorari de Novo was granted after the Plaintiff had pleaded in Nullo eſt erratum; For this Plea of in Nullo eſt erratum goes only to that which is contained in the Body of the Record, and not to any Collateral Matter, as Warrant of Attorneys. Le 176. in pl. 246. Hill. 31 Eliz. B. R. Wray Ch. J cites it as a Caſe greatly debated between Norris and Braybrooke. —— Mo. 95. pl. 235 Paſch 12 Eliz Brabrooke's Caſe, S. C. but S. P. does not appear. —— Ibid. 125. pl. 271. S. C. but S. P. does not appear.

16. After Aſſignment of the Errors, and in Nullo eſt Erratum pleaded, it was moved that there was a *manifeſt Error in the awarding the Venire Fac.* and prayed a *Certiorari* to certify it. Popham held it not grantable; For though ſometimes *in Affirmance of a Judgment*, it is uſed in ſuch Caſe to award a Certiorari to inform their Conſciences, becauſe they would not reverſe a Judgment if it could be helped, yet never was it grantable *to avoid a Judgment*; For it is the Folly of the

Party that he did not procure it to be removed before the Errors assigned; But the other Justices held e contra, that it is *grantable as well in the one Case as the other*; and awarded accordingly. Cro. E. 836, 837. pl. 9. Trin. 43 Eliz. B. R. Winchcomb v. Goddard.

17. Error *upon a Judgment in Trover against Husband and Wife*, of a Trover and Conversion by the Wife, and several Errors assigned, which were all over-ruled; afterwards, upon a *Suggestion that there was not any Bail entered for the Wife*, the *Court was moved for a Certiorari*; it was *objected* against the granting it, *that the Plaintiff in Error had assigned several Errors, but not this for one and that the Defendant had pleaded in Nullo est Erratum*, and the Record is examined, it is now too late, especially as it is to reverse a Record, but peradventure upon such a Suggestion, to help a Record in Affirmance of a Judgment, they may award a Certiorari Ex Officio. But the Court held, that though the Plaintiff in Error cannot assign this for an Error after in Nullo est Erratum pleaded, yet *the Court for their own Information may Ex Officio award such a Certiorari upon such a Suggestion after that Plea pleaded*; and a Certiorari was granted. Cro. J. 5. pl. 6. Pasch. 1 Jac. in Cam. Scacc. Cox. v. Cropwell.

Error of a Judgment by Nil dicit in an Action of *Debt on a Bond*, and the Error assigned was in the *Adjournment of the Continuances*; the Defendant *pleaded in Nullo est erratum*, and thereupon a *Motion was made for a Certiorari* to certify them; the Court doubted at first whether they should grant it after in Nullo est erratum pleaded, because it was in order to reverse, and not to affirm a Judgment; but at last it was adjudged, that it might be *granted to inform the Truth as well for the Reversal as in Affirmance of the Judgment*; and awarded accordingly Cro. J. 445. pl. 24. Mich. 15 Jac. B. R. Anon.

18. A *Venire Facias* was *returned in the Time of Queen Elizabeth*, and the *Hab. Corpora Juratorum was summoned in Curia Nostra, whereas it ought to have been in Curia nuper Reginæ*; For there was not any Summons in the King's Court which was moved to be a manifest Error, as was resolved in the Case of **Knowls v. Beckingshaw** in Cam. Scacc. wherefore it was *prayed that Certiorari might be awarded to certify it*, which was granted, (Popham absente.) But afterwards it being moved for Stay thereof, (Popham being in Court) because it was in the Discretion of the Court to award it or not, it being after in Nullo est Erratum pleaded, and *in Disaffirmance of a Judgment*; therefore all agreed that no Certiorari should be awarded, but that a Supersedeas should be made for Stay of that which issued before; and Judgment was affirmed. Cro. J. 138. 141. pl. 16. Mich. 4 Jac. B. R. Read v. Potter.

19. *After in Nullo est Erratum* is pleaded the Defendant cannot allege Diminution, because there *is a perfect Issue before*; Per Cur. Godb. 267. pl. 368 Hill. 13 Jac. B. R. in Case of Brook v. Gregory.

20. A Man *cannot* allege Diminution *of any Thing which appears in the Record to be true*; Per Cur. Godb. 267. pl. 368. Hill 13 Jac. B. R. in Case of Brook v. Gregory.

21. If a Writ of Error be brought *upon a Judgment in B. R. in Ireland* in a Writ of false Judgment *upon a Judgment in the Toulsil*, (which is the Court of the Mayor and Aldermen of Dublin) and it is assigned for *Error that there was no Plaint entered in the Toulsil, and that* these Words, *Per quod Actio accrevit were omitted in the Conclusion of the Declaration*; If the Defendant alleges Diminution, yet *he shall not have a Certiorari to the Ch. J. of B. R. in Ireland to certify the Residue* of the Record &c. *and that if any Part* of the Record *be not before him, that he should write to the Mayor and Aldermen to certify it, and that he should certify it to this Court*; for by his Plea of in Nullo est Erratum in B. R. in Ireland he has admitted the Record well certified by the Mayor and Aldermen, and this Court has no Authority to require the Court of B. R. in Ireland to write to the Mayor &c. and the Judgment of B. R. in Ireland is only here in Question. Such Writ being issued a Supersedeas was granted to the Whole, though it was prayed that the

the Superſedeas ſhould be as to the Inferior Court only. But at another Day it being moved, that there might be a Certiorari as to the Words *Per Quod* &c. it was granted. 3 Danv. 17. pl. 11. cites Palm. 285. Paſch. 20 Jac. B. R. Baniſter v. Kennedy.

22. In a Writ of Error in the Exchequer-Chamber upon a Judgment in B. R. it was aſſigned for Error that *in the Bill the Plaintiff declared on a Leaſe for three Years*, but *in the Plea Roll*, upon which the Iſſue was joined, and the Record of Niſi Prius, *it was upon a Leaſe for five Years*, ſo that the Bill and Declaration vary, and Diminution being alleged by the Plaintiff, *a Bill was certified*, in which it was *only for five Years*; upon which the *Defendant had another Certiorari, and thereupon a Bill was certified*, wherein he declared of a Leaſe *for five Years*, which warranted the Declaration upon the Roll and the Niſi Prius. It was held by all the Juſtices and Barons, that the ſecond Certificate upon Diminution alleged by the Defendant ſhould be received; for that warranting the Roll and the Record of Niſi Prius, ſhall be intended the true Bill, and the other a fictitious one. Cro. C. 91. Trin. 1 Car. Howell v. Thomas.

23. Diminution does not lie *after in Nullo eſt Erratum is pleaded*, for it is *repugnant* to the Plea, which goes to the Whole; for this Plea implies and refers to the Errors aſſigned by the Plaintiff, which being the Iſſue between them, no other can be aſſigned; and after Iſſue joined, ſuch new Matter is not to be alleged. But if the Original be returned, upon a Writ of Diminution, after In Nullo erratum pleaded, the Court will not reject it. Jenk. 164. pl. 13.

24. In a Writ of Error *upon a Bill of Exceptions*, the Plaintiff can allege no Diminution; For he muſt hold himſelf to the Matter of the Bill ſealed, and if it be not there it was his Folly to omit it. 2 Inſt. 427.

25. Error of a Judgment in C. B. in *Ejectment* upon Non ſum Informatus, and the Error aſſigned was, that *it appeared by the Record that the Declaration was before the Plaintiff had any Cauſe of Action*; it was ſaid it doth not appear ſo, but that if that was true, then there was a wrong Original certified; whereupon a Certiorari was prayed and granted to certify the true one, it being in Affirmance of a Judgment which ought to be favoured. Style 352. Mich. 1652. B. R. Jennings v. Downs.

26. Writ of Error was brought *upon a Judgment given by Juſtices of Oyer and Terminer*; The Error aſſigned was *becauſe there was no Adjournment.* And upon great Debate, it was ruled that Writ ſhall be directed to the Juſtices to ſupply this Diminution. Sid. 40. pl. 3. Paſch. 13 Car. 2. cited by Windham J. as adjudged in Sampſon's Caſe.

27. Diminution cannot be alleged upon a Writ of Error brought upon *a Judgment in any Inferior Court*; Per Cur. Sid. 40. pl. 3. Paſch. 13 Car. 2. B. R. Redding's Caſe.

28. *After in Nullo eſt erratum pleaded*, none may have a Certiorari to diſaffirm the Judgment, but contra to affirm it; though when it comes in Advantage it may be taken of Errors, and though the Plaintiff may have it before without Motion, yet not after ſuch Plea pleaded. Keb. 225. pl. 41. Hill. 13 Car 2. B. R. Furnage v. Norton.

29. Diminution may be alleged *in Wales*, and out of the *Courts in Counties Palatine*, but not in Ely, for that is only a Royal Franchiſe. Sid. 147. pl. 5. Trin. 15 Car. 2. B. R. Smith v. Smith. Lev. 105. S. C.

30. In *Dower* in Nullo eſt erratum was pleaded. It was aſſigned for Error that it was *againſt an Infant who appeared by Attorney*, when he ſhould have appeared by Guardian. Per Cur. though it be after in Nullo eſt erratum pleaded, yet we may grant a Certiorari ad informand' Conſcientias; and a Dowager is a Kind of a Purchaſor. 7 Mod. 104. Mich. 1 Ann. B. R. Wood v. Branford.

31. Where the *Defendant has joined in Execution* no Certiorari is neceſſary; neither is it, unleſs the Party, when he aſſigns Errors, prays it for *for want of Original* &c. Keb. 735. pl. 17. Trin. 16 Car. 2. B. R. Swain v. Shin.

32. A *Certiorari to Ireland after in Nullo eſt erratum pleaded*, was held grantable at the Prayer of the Defendant in Error, ad Informandum Curiam, and when returned, it will appear if the ſame Record or not. Show. 214. Paſch. 3 W. & M. Price v. Harſtong.

33. No Diminution can be alleged *of a Record of an Inferior Court*. 7 Mod. 103. Mich. 1 Ann. B. R. Le Noyer's Caſe.

34. Upon a Writ of Error in B. R. the *Want of an Original* was aſſigned for Error, and the *Defendant, before the Return of the Certiorari, came in gratis, and pleaded a Releaſe in Bar.* The Plaintiff in Error demurred, and the Defendant joined in Demurrer; this Releaſe was agreed to be miſpleaded for *Want of a Venue*; then the Queſtion was, *Whether the Court Ex Officio, might award a Certiorari*, that it might appear whether there was an Original or not; Holt Ch. J. held they could not, becauſe the Defendant, by pleading a Releaſe, had admitted the Want of an Original; beſides, the Queſtion was not, Whether Error or not, but whether barred by the Releaſe or not, and therefore the Court cannot depart from the Point referred to their Judgment; for if they do, then they give Judgment on the Certiorari, and depart from the Plea and Demurrer, and joined in Demurrer. But the other Judges were of a contrary Opinion, viz. that the Act of the Parties might foreclose themſelves, bnt not the Court; for they are to give Judgment upon the whole Record, and may award a Certiorari ad informand' conſcientiam. 1 Salk. 268. pl. 15. Trin 3 Ann. B. R. Carlton v. Mortagh.

6 Mod. 113. S. C. adjornatur. —— Ibid. 206. S. C. with the Arguments of the Judges, and held accordingly by three Juſtices, contra Holt. —— 2 Ld. Raym. Rep. 1005. S. C. adjudged the Plea naught for Want of a Venue, and then it amounted to a Confeſſion of the Error. But as to the granting a Certiorari a Rule was made for hearing Counſel. —— 3 Salk. 399. pl. 3. S. C. and in arguing the Demurrer it was admitted that the Plaintiff could not pray a Certiorari to certify whether there was an Original or not, becauſe the Defendant had confeſſed by his Plea that there was none, the Fault being cured by the Releaſe of Errors, and therefore doubted whether the Court could award a Certiorari, and without it they could not reverſe the Judgment. —— S. C cited 1 Salk 270.

35. Error was brought on a Judgment in C. B. and *Want of an Original aſſigned*; The Defendant in Error came in Gratis, and *alleged Diminution*, and prayed a Certiorari, and thereupon *a variant Original was certified*; Upon this he came again at the Day given, and *ſuggeſted another Original of ſuch a Term, and prayed another Certiorari.* This appearing on the Maſter's Report, the Queſtion was, Whether it was regular? And per Holt Ch. J. *If a Record below be of Eaſter Term, and a Want of Original be aſſigned* for Error, the *Defendant may allege Diminution*, and then a *Certiorari goes* to the Cuſtos Brevium *only to certify an Original of Eaſter Term*, that being the Term of which the Placita is; If then the *Cuſtos Brevium certifies a wrong* Original, *or that there is no Original*, then the *Defendant may* come and *ſuggeſt, before in Nullo eſt erratum pleaded, that there is an Original of another Term, viz. Hill. or Mich.* and then *there muſt go a Certiorari to the Cuſtos Brevium to certify that, and another to the Ch. J. of C. B. to certify the Continuances.* Alſo if the Cuſtos Brevium *certify a wrong Original of the ſame Term the Placita is of*, it has been held, the Defendant may ſuggeſt there is a right Original even of that very Term; and when both are before the Court, the Court will apply the Record to that which is a good Original. 1 Salk. 266. pl. 13. Trin. 3 Ann. B. R. Burnaby v. Saunderſon.

36. Error

36. Error of a Judgment in C. B. After Verdict the Plaintiff in Error aſſigned the *Want of an Original, but did not take out a Certiorari, as the Courſe is*; The Defendant in Error *pleaded in Nullo eſt erratum*; And per Holt Ch. J. If Want of an Original be aſſigned for Error, and the Plaintiff in Error does not ſue out a Certiorari, the Courſe is for the Defendant in Error to go to the Maſter of the Office and get a Rule for the Plaintiff in Error to return his Certiorari; And in Caſe he does not get it done accordingly, the Aſſignment of Error ſignifies nothing; but if the Defendant in Error will come gratis and confeſs the Error, there need be no Certiorari returned; And as to the Objection, that there may be a bad Original in this Caſe, that is another Kind of Error; For when Want of an Original is aſſigned for Error, the Court will never intend a bad Original; The Judgment was affirmed. 1 Salk. 267. pl. 14. Smith v. Stoneard.

Want of an Original and Warrant of Attorney was aſſigned for Error. The Defendant came in gratis without any Proceſs, and pleaded Inſtanter in Nullo eſt erratum; It was moved that this was a Confeſſion of the Errors, becauſe the Defendant has thereby prevented the Plaintiff from taking out a Certiorari to verify them. The Court reverſed the Judgment. Barnard. Rep. in B. R. Mich. 3 Geo. 2. Addey v. Hutchinſon.

37. Error in B. R. of a Judgment in C. B. the *Declaration was, Trin. 1 Annæ*, and *Want of an Original was aſſigned* for Error; and upon a Certiorari the Original was returned with the Continuances, by which it appeared, that *the Declaration was Hill. 13 Will. 3. with Imparlances to Trin. 1 Annæ, and the Original of that Term, ſo that the Suit was depending in the Reign of King William before any Original*; Sed non allocatur. For per Holt Ch. J. The Certiorari as to the Continuances was impertinent, and ſo is the Matter returned; and as to the Reſt the Return is impoſſible and contrary to the Record, and therefore *the Imparlances ſhall be intended to be in another Cauſe*; and Judgment affirmed. 1 Salk. 269. pl. 16. Hill. 3 Ann. B. R. Tyſon v. Hilliard.

38. In a Writ of Error out of C. B. the Defendant pleads in Nullo eſt erratum; it was *in a Scire Facias againſt Bail*, and the Plaintiff aſſigned for Error *the Want of a Scire Facias on the Roll.* Reſolved by Holt Ch. J. that this Error might be aſſigned, as well as the Want of an Original Bill; and that by pleading *in Nullo eſt erratum*, the Plaintiff *has confeſſed the Error*; But the whole Court, viz. Holt Ch. J. Powell, Powis and Gould agreed, That a *Certiorari ad informandam Conſcientiam* Curiæ might be *awarded*, which was done accordingly. 11 Mod. 143. pl. 15. Mich. 6 Ann. B. R. Lawn v. Sawbridge.

39. The Plaintiff had a Judgment in Ejectment, *the General Errors were aſſigned, and in Nullo eſt erratum pleaded.* It appeared on arguing the Caſe, that the *Declaration ſet forth a Demiſe* &c. *and did not ſhew that the Plaintiff entered or was poſſeſſed*; and the Truth was, that *the Declaration was right, but the Line in which thoſe Words are, was omitted in the Tranſcript*, and the Court held this Defect to be fatal; thereupon the *Plaintiff moved for a Certiorari* ad informandam Conſcientiam; which was oppoſed, becauſe by in Nullo eſt erratum pleaded the Defendant affirmed the Record to be perfect, and therefore he is now foreclоſed to ſay, that there is Error by Reaſon of ſuch a Defect, for that is directly againſt his former Suppoſal; but yet *the Court is not foreclоſed by this Admiſſion of the Party*; for the Writ of Error being a Commiſſion to them to examine the Record, the Parties cannot reſtrain them from looking into it; and that wherever by inſpecting the Court may affirm the Judgment, they ought to award a Certiorari, and a Rule was made accordingly for a Certiorari upon theſe Reaſons together with an Affidavit that the Record was right below. 1 Salk. 270. pl. 18. Paſch. 13 Ann. B. R. Meredith v. Davis.

In Wilkes's Case 4. Burr. 2527. & 2573.

Fol. 766. (N. a) What Pleas a *Party* or *Privy*, and what Pleas a *Tertenant* ſhall plead.

Pleader.

Cro. J. 332. pl. 15. Bartholomew v. Belfield, S. C. reſolved per Curiam upon ſolemn Argument.—— 2 Bulſt. 244. S. C. adjudged. —— Roll Rep. 36. pl. 5. S. C. adjudged accordingly. —— S. C. cited Ibid. 308. —— S. C. cited 2 Jo. 183. Mich. 33 Car. 2. per Cur.

1. IN a Writ of Error againſt him that recovers the Defendant may plead, that after a Recovery he levied a Fine of the Land recovered to B. and that five Years are paſſed without Claim by the Plaintiff, for this Fine bars the Right by the Statute of 4 H. 7. and the Defendant may plead in bar of the Right, though he be not Tenant of the Land. Tr. 12 Ja. B. R. between *Benfield and Batlamew.*

Br. Error, pl. 9. cites 9 H. 6. 46. S. C. —— Fitzh. Error, pl. 20 cites S. C.

2. If a Writ of Error be brought againſt the Heir of him that recovers, though he hath nothing in the Land, yet he may plead the Releaſe of the Demandant of the Error. 9 H. 6. 46. b. 48. per Curiam.

Br. Error, pl. 9. cites 9 H. 6 46. S.C. —— Fitzh Error, pl. 20. cites S. C.

3. So he may plead that the Demandant is a Baſtard, where it is material. 9 H. 6. 46. b. 49. Curia.

And it is a good Plea for the Tertenant alſo

4. So he may plead a Releaſe of the Right in the Land, though he hath nothing in the Land. 9 H. 6. 49.

Br. Error, pl 9 cites 9 H. 6. 46. S. C. per Radford, ſo that the Tertenant was Tertenant at the Time of making the Releaſe, but otherwiſe not; For then it cannot enure. —— Fitzh. Error, pl. 20. cites S. C. —— And a Releaſe of his Right in the Land after Recovery is a good Bar to a Writ of Error, becauſe he cannot be reſtored to the Land. Co. Litt. 289. a. in Principio.

Br. Error, pl. 9. cites 9 H 6. 46. S. C. & S. P. per Radford —— Fitzh Error, pl. 20. cites S. C.

5. In a Scire Facias againſt a Tertenant, he may plead a Releaſe of the Error, though he be not privy to the Judgment. 9 H. 6. 48. Curia.

Br. Error, pl. 9 cites 9 H. 6. 46. S. C. & S. P. per Hals. —— Fitzh. Error, pl. 20 cites S. C.

6. In a Writ of Error againſt him that is privy, if the Judgment be reverſed; yet in a Scire Facias againſt the Tertenant he may plead a Releaſe in Bar, or that the Demandant is a Baſtard. 9 H. 6. 47.

Br. Error, pl. 2. cites 9 H. 6. 46. per Martin.

6. Where a *Judgment is given in a Real Action*, a *Releaſe of all Actions Real* is a good Bar in a Writ of Error brought thereupon. Co. Litt. 288. b. ad finem.

7. The Tertenant may plead *that the Anceſtor was outlawed of Felony*, or that he *is not Son and Heir*. Br. Error, pl. 9. cites 9 H. 6. 46. Per Hals.

8. Error

8. Error was brought *by the Heir of him who loſt* the Land, *againſt the Heir of him who recover'd*, and had Scire Facias againſt the Heir, who *pleaded Jointenancy with B.* And per Brian, this is no Plea; For the *Scire Facias is brought for the Privity, and not againſt the Heir as Tertenant*; For it does not ſuppoſe Quod Terram illam tenet. Per Catesby Scire Facias brought againſt him who recovered, or his Heir, upon Writ of Error, *ſhall not ſay Qui Terram illam tenet*; but *otherwiſe it is againſt a ſtrange Tenant*; And therefore now the Judgment ſhall bind without Scire Facias after, and therefore Jointenancy is a good Plea. But Bill. Contra; For this Scire Facias *is only Ad audiendum Errores*, and the other ſhall be to have Execution of the Land. Nevertheleſs Yelverton agreed with Catesby. Br. Error, pl. 167. cites 10 E. 4. 12, 13.

9. The *Tertenant cannot plead in Abatement of a Writ of Error but only in Bar*, as a *Releaſe* &c. in Maintenance of his Title; For the *Scire Facias againſt him is not Ad audiendum Errores*, but Ad audiendum *Proceſſum & Recordum*, Arg. and to this Twiſden and Windham inclined. Lev. 72. Mich. 14 Car. 2. B. R. in Caſe of Winn v. Loid. The Tertenants, have thing to do with the Errors, but only with the Proceſs and Record; Per Twiſden. Keb. 352. in S. C.

(O. a) At what Time.

1. IN a Writ of Error againſt the Heir of the Recoveror within Age, and a Scire Facias againſt the Tertenant, if the Parol demurs for the Heir, and the Judgment is reverſed againſt the Tertenant, yet at full Age the Heir may plead the Releaſe of the Demandant of the Right, or of the Errors, and bar him. 9 H. 6. 48. Curia. Br. Error, pl. 9. cites 9 H. 6. 46. S. C. & S. P. per Hals. — Fitzh. Error, pl. 20. cites S. C.

2. In a Writ of Error againſt the Heir of the Recoverer, if a Scire Facias be awarded againſt the Heir and Tertenants. This in Roll is left imperfect as here.]

(P. a) *What* Thing ſhall be Error *in Verdicts*, *or* in *Proceedings after the Jury returned and before Verdict.* See (M. c)

1. IF a Man be indicted for ſpeaking ſcandalous Words &c. and upon Not Guilty pleaded it is entered that the Jury upon the Return of them appeared, & ſuper hoc Juratores præd' electi triati & ad veritatem de & ſuper Premiſſis jurati dicunt ſuper Sacramentum ſuum quod &c. and ſo give a Verdict, yet this is Error, becauſe it is not ſaid, that they were jurati ad veritatem dicendam, according to the uſual Courſe, for they may be ſworn ad veritatem; yet inaſmuch as they are not ſworn to give their Verdict according to the Truth, there is not any Command to give their Verdict according to Truth, and a Verdict is ſo called a Veredicto. Hill. 1650. *Williams's* Caſe, adjudged, and the Judgment given at the Seſſions at Newgate, reverſed accordingly for this Error; and then another Judgment was given accordingly, in an Indictment of Perjury ſhewed in a Caſe. Sty. 244. S. C. adjudged.

Fol. 767

(Q. a) *What* Thing ſhall be *Error in Verdicts.*

* Cro. Car. 426. pl. 17. Tyffin's Caſe, S. C. and Judgment affirmed. —— Jo. 367. pl. pl. 7. Tippen v. Fenton, S. C. and Judgment was affirmed according to the Book of 4 H. 7. 6. and 7. a. and 2 Eliz. Sir Cha. Howard's Caſe, but if Judgment had been given againſt Both, it had been Error. —— Ld. Raym. Rep. 601. Trin. 12 W. 3 Arg. cites ſame Caſes, and ſays it ſeems to be a ſettled Point, that where Treſpaſs is brought againſt ſeveral, and they plead Not Guilty, and then one of them dies, and a Venire and Diſtringas iſſue to try the Iſſue between the Plaintiff and the two Defendants, and a Verdict for the Plaintiff againſt both, the Plaintiff may ſurmiſe the Death of one of the Defendants, and ſhall have Judgment for the whole againſt the other, and good; and of this Opinion the whole Court ſeemed to be as to the dead Man.

† Fitzh Brief, pl. 185. cites S. C. —— See (S) ſupra, pl. 4. S. C. and the Notes.

1. IF A. brings an Ejectione Firmæ againſt B. and C. and after Iſſue joyned B. dies; and after upon a Habeas Corpora which mentions the Iſſue to be between A. of the one Part, and the ſaid B. and C. a Verdict is given againſt B. and C. that they are guilty, and Damages are given againſt them, but a Surmiſe thereof is made before Judgment, and ſo Judgment given only againſt C. this is not Erroneous, though the Verdict was againſt both, inaſmuch as the Judgment was againſt him only that is living. Mich. 11 Car. B. R. between * *Tiffin and Lenton*, adjudged in a Writ of Error upon a Judgment in B. and the firſt Judgment affirmed. Intratur Hill. 10 Car. Rot. 501. † 4. H. 7. 7. 3 H. 7. 6.

See tit. Damages (Q). per totum.

2. In an Action upon the Caſe for ſeveral Words ſpoke at ſeveral Times, and upon Not Guilty pleaded the Jury find for the Plaintiff, and give intire Damages; upon which a Verdict is given, if the Words ſpoke at one Day will bear an Action, and the Words ſpoke on another Day will not bear an Action, this is erroneous; for it ſhall be intended the Damages were given for the Words ſpoke at both Times. Mich. 13 Car. B. R. between *Alcock and Pargrave*, per Curiam adjudged in arreſt of Judgment.

See tit. Damages (Q) per totum.

3. But in an Action upon the Caſe for Words ſpoke at one Time, though Part of the Words are actionable and Part not, and the Jury find him guilty and tax Damages generally, this is a good Verdict, for it ſhall be intended that they gave the Damages for thoſe Words only which are actionable; this is the Common Practice. Co. 10. *Osborn's Caſe.*

The Declaration was, De placito debiti, and then ſhews the Sale of ſuch and ſuch Things at ſuch a Price, and concludes, that they attingunt to ſuch a Sum, and ſo demands the Sum, whereas in Truth the Sums were miſcaſt; It was inſiſted that this was erroneous; But the Court held it to be only the Miſpriſion of the Clerk, and no Error. The Reporter adds a Quære, if the Verdict had found, and the Jury had given Damages for the intire Sum miſcaſt, it ſeems that it would be Error. 2 Roll Rep. 45. Trin. 16 Jac. B. R. Hill v. Whittingham. —— Cro. J. 494. pl. 15. Whittingham v. Hill, S. C. but S. P. does not appear. — See tit. Miſcaſting (A) per totum.

4. In an Action upon the Caſe upon a Promiſe, if the Plaintiff declares that the Defendant was indebted to him for Wares ſold, ſcilicet, for ſuch Wares ſo much, for ſuch Wares ſo much, &c. in toto ſo much &c. and miſcaſts the total Sum, (putting more than the total Sum in Truth) and thereupon aſſumed &c. and the Defendant pleads the general Iſſue, and it is found for the Plaintiff, and Damages given, and Judgment, this is Error, becauſe by Intendment the Jury gave Damages according to the total Sum put, and not according to the Particulars. Mich. 14 Car. B. R. between *Milborne and Shaftoe* adjudged, and Judgment given in Newcaſtle reverſed accordingly. Intratur P. 14 Car. Rot. 325. and ſo adjudged. Paſch. 13 Car. B. R. between *Kellet and Aſhe* in Arreſt of Judgment.

5. But

5. But **if the Miſcaſting be** in a ſmall Sum as three Farthings more than is declar'd for in a great Sum, **and this not certain, this ſhall not be ſo minced as to make Error.** *Hobart's* **Reports,** *Laſtlow and Tomlinſon.* Hob. 88. pl. 115. Hill. 11 Jac. S. C. —— For De minimis non curat Lex.

——— Jenk. 287. pl. 22. S. C.

6. **In** Trover **and Converſion** for divers ſeveral Goods, **if the** Jury find him guilty for other Goods than thoſe in the Declaration, and give Damages for all, **and Judgment is given accordingly, this is Error. Paſch. 14 Car. B. R. between** *Griffith and Clark*, **adjudged in a Writ of Error upon a Judgment in Ireland, and this reverſed accordingly. Intratur Mich. 13 Car. Rot. 205.** In Treſpaſs, the Plaintiff declared of the taking of one Parcel of Cloth, containing 18 Yards, and of another containing 20 Yards, and of two other Parcels. The Jury found him Guilty as to five Parcels; And Judgment given in C. B. but was reverſed; becauſe it ſhall not be intended, one of the firſt Pieces containing ſeveral Yards contained diverſe Parcels, and then the Jury found him guilty of five Parcels, whereas the Plaintiff declared of four only. 2 Roll Rep. 415. Mich. 21 Jac. B. R. King v. Hoskins.

7. **In** Debt upon an Obligation, **if the** Defendant pleads non eſt Factum, **which is** found for the Plaintiff, **and the** Jury aſſeſs Damages occaſione intraſcripta, **this is good,** without ſaying occaſione detentionis debiti, **for this is tantamount. Paſch. 8 Ja. B.** *Alcock's Caſe*, **adjudged in Camera Scaccarii in a Writ of Error.** See (B. b) infra, pl. 29 S. C.

8. **In an Action upon the** Caſe, **if the** Plaintiff declares for Slander of his Title to certain Lands, and alſo for ſpeaking ſcandalous Words of his Perſon, **and** the Action is not well alleged as to the Slander of Title **to the Land,** but well as to the Slander of the Perſon, **and Not Guilty is pleaded, and it is** found for the Plaintiff, and intire Damages **given, this is Error; for it ſhall be intended that the Jury gave the Damages as well for Slander of the Title of Land, as to the Perſon. Trin. 15 Car. B. R. between** *Nevill and Nevill* **per Curiam; this being moved in arreſt of Judgment.** Fol. 768.

9 *Aſſiſe by two againſt one*, who *pleaded that the one of the Plaintiffs was not ſeiſed ſo that he might be Diſſeiſed*, and if &c. Nul Tort; *and againſt the other Feoffment of his Anceſtor whoſe Heir &c. with Warranty; Judgment if contrary to the Warranty* &c. And the *Jury gave Verdict, that the one was not ſeiſed ſo that he might be diſſeiſed, and found the Bar againſt the other*; And the Juſtices adjudged that the Plaintiffs ſhould prejudice nothing by their Writ; And the Plaintiffs brought Writ of *Error becauſe the Jury found the Plea to the Writ, and alſo inquired of the Bar*, and yet the Court adjudged that they ſhould take nothing by their Writ. And per Cur. this Judgment was well given, by which the Court was in Opinion to have given Judgment to affirm the firſt Judgment; Nota. Br. Aſſiſe, pl. 5. cites 28 H. 6. 9.

10. In *Treſpaſs* &c. the Plaintiff had a Verdict, and upon a Writ of Error brought by the Defendant he aſſigned for Error, that the Plaintiff had *declared to his Damage of* 40 *l.* and that the *Damages aſſeſſed by the Jury were* 35 *l. and Coſts encreaſed by the Court were* 6 *l. in all* 41 *l.* ſo that he had *recovered more than that whereof he declared*, for that was but for 40 l. but adjudged, that the Damages aſſeſſed by the Jury being leſs than he counted for, though the Coſts amount to more, it is not material. Cro. Eliz. 866. pl. 47. Mich. 43 & 44 Eliz. in Cam. Scacc. Comb v. Carew.

11. Judgment in *Aſſumpſit*, Error aſſigned was, for that the *Plaintiff had declared Ad Damnum* 10 *l.* and the *Jury gave him* 10 *l. Damages, and* 13 *s.* 4 *d. for Coſts, which is more than what he had declared for*; Sed non allocatur; For though the Entry is of Damages and Coſts by the Name of Damna, yet they are diſtinct, and though the Jury had Yelv. 70. Vale v. Egles S. C. held accordingly.

found more Damages than the Plaintiff had declared, and Judgment had been given, it had been Erroneous; but if they had found more Costs than the Damages had amounted to, it had not been Error; for it may be, that *the Costs of Suit by long depending might exceed the Debt.* Cro. J 69 pl. 11. Pasch. 3 Jac. B. R. Egles v. Vale.

Noy. 126. Brownlowe v. Littleton. S. C resolved upon search of Precedents that a Scire Facias does not lie against the Executor for the Damages.

12. In *Dower* there was a *Judgment by Default*, and a Writ of Seisin to the Sheriff &c. and also a *Writ of Inquiry, whether the Husband died seised, and of what Estate, whether in Fee, or in Tail*; the *Jury found, that the Husband died seised, but whether in Fee or in Tail ignorant*, and they found the Value of the Lands &c. and quantum Temporis elabitur &c. where upon Judgment was given that she recover &c. and her Damages to 60 l. A Writ of Error was brought, and after the Record removed the Widow died, whereupon the Plaintiff in Error brought a Sci. Fa. against her Executor Ad audiend, Errores, and upon 2 Nihils returned he assigned Error, (viz.) that there ought to be no *Judgment to recover Damages, because the Jury had not found any dying seised of any Estate of Inheritance* in the Husband, as the Writ supposed, for if he did not die seised of such an Estate, the Widow shall not be endowed; and this was adjudged Error. Yelv. 112. Mich. 5 Jac. B. R. Bromley v. Littleton.

13. In Trespass the *Entry* in the Record *was, Ad quem Diem A. B. and C. D. &c. of the principal Panel veniunt & jurati existunt, and because the rest did not appear, W. N. and J. N. de novo apponuntur qui ad veritatem de infra content' electi, triati & jurati dicunt* super Sacram' suum, *omitting these usual Words, (Simul cum aliis juratoribus prius impanellat')* so that this was the Verdict of the Tales only, and not by those with whom they were Sworn; And all the Judges and Barons being of this Opinion the Judgment was reversed. Cro. J. 207. pl 3. Pasch. 6 Jac. in Cam. Scacc. Kempton v. Bartell.

14. In *Detinue*, the Plaintiff *declared to his Damage of* 100 *l.* and the Jury *found the Damages to* 150 *l.* and Judgment for so much; But upon Error brought the Judgment was reversed; For where the Plaintiff counts of a certain Damage, he is to recover no more than he has counted for. 1 Bulst. 49. Mich. 8 Jac. Hoblins v. Kimble.

15. Error assigned was, because *two several Assumpsits* were laid, *whereof the one was void and the other good*, and *Verdict* was *for the Plaintiff, and intire Damages* given by the Jury. The Court agreed this to be clear Error and reversed the Judgment. 3 Bulst. 235. Mich. 14 Jac. Porter v. Chapman.

16. The *Original* in C. B. *concluded Ad Damnum* 40 *l.* and the *Declaration was Ad Damnum* 100 *l.* Upon Not Guilty pleaded, the *Jury gave* 12. *d. Damages*; and upon a Writ of Error brought, this Variance between the Writ and Declaration was assigned for Error; Adjudged, this had been a good Objection in the original Action upon a Demurrer to the Declaration, but it is not so after a Verdict, especially after the Jury had found 12 d. Damages; but if the Verdict had found more Damages than what was mentioned in the Writ, and less than in the Declaration, yet it had been ill, because there was no Writ to warrant such Damages; But when the Damages are less than they are in the Writ or Count it is otherwise, and therefore held by all the Justices to be well enough. Cro. J. 629. pl. 2. Hill. 19 Jac. B. R. Eardley v. Turnock.

17. Error upon a Judgment in B. R. in Ireland, where the *Jury gave* 10 *l.* 6 *d. for Damages and Costs*, and *the Judgment entred was, Quod recuperet Dampna sua per Juratores Assessa ad Valorem* 10 *l.* and *no Notice was taken of the* 6 *d. nor was that Part released*; and it was held naught, because Damages and Costs are all Dampna, and both included by that Word

Word in the Judgment; and Judgment was reverſed Niſi; Arg. 2 Show. 56. pl. 42. cites Mich. 30 Car. 2. B. R. Osborn v. Exton.

18. In Debt on an Obligation, the *Jury in aſſeſſing Damages ſay, pro Mis' & Cuſtag', omitting the Words, Circa ſeſtam expenditis*, and ſo it doth not appear for what the Coſts and Damages were aſſeſſed; the Judgment was ordered to be reverſed, Niſi. Sty. 164. Mich. 1649. Crible v. Orchard.

19. In Treſpaſs the *Iſſue was, De injuria ſua propria abſque tali cauſa*, and the Jury *found the Defendant Not Guilty generally*; Per Roll Ch. J. this is not good, becauſe it was not a direct finding the Iſſue, but only Argumentatively; and Judgment was reverſed, Niſi &c. Sty. 167. Mich. 1649. Hobbs v. Blanchard.

20. Error was brought upon a *Judgment by Default in Caſe* in C. B. and the Error aſſigned here was, that the *Jurors upon the Writ of Inquiry had aſſeſſed more Damages than were laid in the Declaration*, and the *Judgment being Quod recuperet Dampna ſua prædict' per Juratores præd' aſſeſſ'* &c. naught; And for this Error the Judgment was accordingly reverſed. Arg. 2 Show. 56, 57. cites Mich. 29 Car. 2. Webb v. Webb.

Ibid. The Reporter ſays Nota, that in this Caſe the *Plaintiff might between the Verdict and Judgment have releaſed the Surpluſage of the Damages* here meant, and ſuch Releaſe being entred upon the Record would have rendred the Judgment well enough.

21. Error on a *Judgment* in B. R. in Ireland which was *by Default*, and Writ of Inquiry; and the *Jury Aſſeſs* 100 *l. and* 6 *d. Coſts*, and the *Judgment is quod prædict' quereus recuperet Dampna ſua prædict ad cent' libras per Inquiſition' prædict' compert' & pro increment'* 7 *l.* &c. Agreed, That *if ad cent' had been left out*, it had been doubtleſs good; argued therefore, that the reſt ſhould be Surpluſage, or elſe Miſcounting, which will not vitiate the Judgment. However the Rule was quod reverſetur Jud' niſi &c. 2 Show. 88. 89. pl. 82. 31 & 32 Car. 2. Anger v. Brookhen.

But the Reporter ſays, Quære; for Dampna being a general Word for the Coſts and Damages it ſeems to be a compleat Judgment in that Quod recuperet Dampna ſua prædict', and the reſt coming after was Surpluſage, for if they had ſaid no more than this, Quod recuperet Dampna ſua prædict' & de Incremento &c. ad Requiſition &c. it would doubtleſs have been well enough. Ibid.

(A. b) *In Judgments.*

What Act or Thing ſhall be ſaid Error.

No Letter in Roll between (Q. a) and (A. b)

1. IF the Husband ſeiſed in Right of his Wife makes an Ejectment Leaſe, **and the** Leſſee brings an Action thereupon, and hath a Verdict, and Judgment, **it is not Error to** allege the Death of the Feme before Judgment, **by which the Intereſt of the Baron and Leaſe by him made to the Plaintiff determined, becauſe the** Feme nor her Husband are not Parties to the Action, **and this depends upon the Title of the Land, for the Plaintiff may ſay the Baron was ſeiſed in his own Right. Hobart's Reports, 8. between** *Wilks and Jordan* **adjudged.**

Hob. 5 pl. 10. S. C. — Cro J. 332. pl. 14. Jordan v. Wikes, S. C. but there it is that the Husband died after the Leaſe made, and before the Action brought; But the Court held, that in Regard the Feme had not entered after the Death of her Husband the Leaſe is not determined nor void after her Husband's Death, but voidable only. —— Jenk. 293. pl. 39. S. C. ſays the Writ does not abate; and the Plaintiff may have Judgment and a Writ of Execution.

2. If

Poph 192. the Earl of Shrewsbury's Caſe ſeems to be S. C. reſolv'd that no Writ of Error ſhould be allowed, nor any Superſedeas granted.

2. If a Man brings an Ejectione Firmæ in B. R. and there hath a Verdict for him upon a Trial at Bar, and after before Judgment he dies, and after Judgment is given for him the ſame Term, this is not Error, becauſe the Judgment relates to the Verdict. Mich. 15 Ja. between *Hide and Marker*, which concerned the Earl of *Shrewsbury*, per Curiam.

Roll Rep. 51. pl. 20. Jordan's Caſe, S. C. and per tot. Cur. the Judgment was reverſed, and it cannot relate to the Niſi Prius. ——— Sid. 143. pl. 22. Paſch. 15 Car. 2. B R. Anon. in a Nota ſays, the Death of one of the Parties between the Niſi Prius and the Day in Bank is Error, becauſe the Writ is thereby abated, though it cannot be pleaded. ——— *But by the Stat.* 17 *Car.* 2 *cap.* S. *S.* 1. *made perpetual by* 1 *Jac.* 2. *cap.* 17. *in all Actions Perſonal, Real, or Mixt, the Death of either Party, between the Verdict and the Judgment, ſhall not be alleged for Error, ſo as ſuch Judgment be entered within two Terms after ſuch Verdict.* ——— Though the Judgment be not entered on the Roll till after two Terms, yet if it be ſigned within two Terms it has been held within the Act, whence it appears that the Judgment is compleated; and ruled that Judgment be entered in the Roll, and the Execution to ſtand. Sid. 385. pl. 17. Mich. 20 Car. 2. B. R. Helie v. Baker.

3. If a Verdict paſſes againſt the Plaintiff at Niſi Prius, and after, before the Day in Bank he dies, and after Judgment is given againſt him, this is Error, inaſmuch as Judgment was given againſt a dead Perſon. Tr. 12 Ja. B. R. *Jurdan's Caſe* adjudged.

Br. Error, pl 123. cites S. C.

4. If the Tenant in a real Action dies, pending the Writ, and after Judgment is given againſt him, this is Error, becauſe it is given againſt a dead Perſon. 28 Aſſ. 17. adjudged.

Fitzh Judgment, pl. 193. cites, Mich 27 E. 3. 88. S P. [This is 27 E. 3. fol. 12. b. pl. 55. S. P.]

5 In an Action againſt Baron and Feme if the Feme be received and traverſes the Action, and this is found againſt her by Niſi Prius, and after the Baron dies before the Day in Bank, at which Day the Judgment is given, this is Error, becauſe the Judgment is given againſt a dead Perſon. 27 E. 3. 89.

4 Le. 15. pl. 55. Blaby v. Eſtwick, S. C. the Court cannot take Notice of ſuch Death judicially on the Allegation, nor hath any of the Parties Day in Court to plead it, but may have a Writ of Error. ——— Cro. E. 202. pl. 32. S. C. accordingly.

6. In an Aſſumpſit againſt two, after a Verdict againſt them at the Aſſiſes by Niſi Prius, if one of the Defendants dies before the Day in Bank, and after Judgment is given againſt both according to the Verdict, this is erroneous, though the Day of Niſi Prius and Day in Bank are one Day as to ſome Purpoſes, for the Judgment was given againſt a dead Perſon. Paſch. 32 El. B. R. dubitatur between * *Blady and Eaſtwigg.* Paſch. 12 Jac. B. R. between ‡ *Lee and Rowkely* per Curiam.

‡ Roll Rep 14. pl 18 Lee v. Rowkeley, S. C. in Ejectment the Court adviſed the Plaintiff to relinquiſh this Action, and only to enter the Verdict for Evidence, becauſe the giving Judgment againſt Both will be erroneous; Per Doderidge, and Mann Prothonotary; But it is there added, that Mich. 12 Jac. Coke ſaid, that the Plaintiff may make Allegation that the one is dead, and ſhall have Judgment againſt the other; and that ſo is the 44 E. 3. ——— Cro. J. 356 pl. 12. Rigley v. Lee & Ux' S. C. and becauſe the Action, which was an Ejectment, is in Nature of an Action of Treſpaſs, and the Feme is charged for her own Fact, it was adjudged that the Action continues againſt the Feme, and that Judgment ſhould be entered againſt her alone, becauſe the Baron was dead. ——— But if Judgment was given againſt the Survivor only upon a Surmiſe of the Death of the other, it had not been Error. Jo. 367. Tippen v. Fenton. ——— Cro. C. 426. pl. 17. Tyffin's Caſe, S. C. ——— See (S) pl. 4. and the Notes there.

7. If a Judgment be given againſt three Executors, where one was dead before the Judgment, yet this is not Error. Hill. 41 El. B. R. adjudged in a Writ of Error.

8. A *Verdict* was *againſt Husband and Wife in Ejectione Firmæ, after Trial by Niſi Prius, and before the Day in Bank the Husband died*; Adjudged the Action continued againſt the Wife, and Judgment was entred againſt her; For it is in the Nature of an Action of Treſpaſs, and ſhe is charged for her own Act. Cro. J. 356. pl. 12. Mich. 12 Jac. B. R. Rigley v. Lee.

Roll Rep. 14. pl. 18. Paſch. 12. Jac. B. R. Lee v. Rowkeley S. C. the Court adviſed the Plaintiff to relinquiſh the Action, and only to enter the Verdict for Evidence; For if Judgment be given againſt both, and one is dead at the time of the Judgment given, it will be erroneous; Per Dodderidge and Man Prothonotary But Mich. 12 Jac. Coke Ch. J. ſaid, that the Plaintiff might allege that the Baron is dead and have Judgment againſt the Feme, and that ſo is 44 E. 3.

9. If a *Verdict* be *given at Niſi Prius*, and the *Plaintiff or Defendant dies after the Beginning of the Term*, yet Judgment ſhall be entred, for that relates to the firſt Day of the Term; Agreed per Cur. Het. 157. Mich. 5 Car. C. B. Springall v. Tuttersbury.

10. Judgment was given againſt the Defendant, and he brings a Writ of Error, and aſſigns for *Error*, *that the Plaintiff was dead at the Time of the Judgment given.* The Plaintiff's Entry is, That the aforeſaid Plaintiff by A. B. his Attorney venit & dicit, that he is in Life, and Iſſue thereupon, and found for the Plaintiff in the Writ of Error that he was Dead; and Serjeant Maynard moved that the Judgment might be reverſed. Allen contra, becauſe there ought to have a Scire Facias againſt the Executors of the Party dead. It was adjourned. Raym. 59. Mich. 14 Car. 2. B. R. Dove v. Darkin.

Lev. 80. Darkin v. Done S. C. and by the Opinion of three Juſtices the Judgment was reverſed, but Forſter Ch. J. e contra, becauſe though it appears by the Verdict that the Plaintiff was dead yet it does not appear legally, the Verdict itſelf not being lawfully obtained. And it was argued that the Attorney who pleaded that he was living did it without authority; For he could not be Attorney to a dead Man.——Sid 93. pl 17. S. C reſolved accordingly; and ſaid that if the Executors in this Caſe are at any prejudice they may have Action on the Caſe againſt the Attorney if he appeared without Warrant. And Windham J. ſaid that his Brothers at Serjeant's Inn ſaid this was good, but that the ſure Way had been for the Attorney to have pleaded, Quod venit pro Magiſtro ſuo D. and not that D venit per Attornatum.——Keb. 413. pl. 119. S. C. and Judgment reverſed.

11. The *taking of Baron between the Niſi Prius and the Day in Bank* ſeems not to be Error, it being *only a Plea in Abatement.* Sid. 143. pl. 22. in a Nota. Paſch. 15 Car. 2. B. R. Anon.

12. 17. *Car.* 2. *cap.* 8. *S.* 1. *In all Actions perſonal, real or mixt, the Death of either Party between the Verdict and the Judgment ſhall not be alleged for Error, ſo as ſuch Judgment be entred within two Terms after ſuch Verdict.*

12. The Signing of the Judgment within two Terms is an entring of the Judgment ſo that by the Statute 17 Car. 2. cap. 8. it may be *entered on the Roll after the Death of the Party.* Sid. 385. pl. 17. Mich. 20 Car. 2. B. R. Helie v. Baker.

13. In Writ of Covenant Verdict was for the Plaintiff, but it being objected that it was a Miſtrial, for that the Venire Fac. was miſawarded, it being to an adjoining County; But after Argument the *Court ruled the Venire well awarded*; *But the Caſe having remained two or three Terms ſince the Poſtea was returned, and no Continuances entered, one of the Plaintiff's died*, and it was doubted whether Judgment could be now entred; And the Secondary ſaid, that they did enter up Judgments two Terms after the Day in Bank, without any Continuances; And of this Matter the Court would be adviſed. Vent. 58, 59. Hill. 21 & 22 Car. 2. in B. R. Criſpe and Jackſon v. Berwick Mayor and Commonalty.

Vent. 90. Trin. 22 Car. 2 in B R. S. C. And it was prayed notwithſtanding that Judgment might be entred, there being no Default in the Plaintiff, but a Delay which came by the Act of the Court, and that it was within the Statute of this King, that the Death of the Party between Verdict and Judgment ſhould not abate the Action, and that it was in the Diſcretion of the Court, whether they would take notice of the Death in this Caſe; for the Defendant has no Day in Court to plead, there being no Continuances entred after the Return of the Poſtea, and cites Leon. 187. Iſley's Caſe, Latch's Rep 92. [Farnel v. Tupper] And the

the Court were of Opinion, that Judgment ought to be entred, and there being no Continuances, it may be entred as if immediately upon the Return of the Poſtea.——Lev. 252 Mich. 20 Car. 2. B R. S C. adjornatur, but the Reporter ſays he heard that Judgment was afterwards given for the Plaintiff.——Mod. 36. pl. 88. S C. but adjornatur, to hear Counſel.——Raym. 173. S.C. but S. P does not appear.——Sid. 462. pl. 5. S. C. & S. P. and that Judgment was entred as in the Life of the Party, and that ſuch Entry is well Warranted both by the Common Law and by Statutes And that Twiſden J ſaid, that if the *Party had died in the Term before the Judgment entred*, and the ſame had been ſuggeſted to the Court, yet they would take no Notice of it, but ſhould proceed to Judgment, and as to the principal Caſe it was ſaid, there is no Reaſon that the Laches of the Court ſhould prejudice the Plaintiff

14. The *Plaintiff after Verdict for him at the Aſſiſes died*; It was moved, that notwithſtanding the Statute 17 Car 2. cap. 8 which enacts that the Death of either Party after Verdict, and before Judgment, ſhall not be alledged for Error, that the Defendant coming now before Judgment was entred, was out of the Statute; Sed Curia contra; For if it ſhall not be alledged after Judgment for Error by the Statute it was certainly *never intended that it ſhould be admitted a ſufficient Cauſe to ſtay Judgment.* Freem. Rep. 79. pl. Paſch. 1673. C. B. Bellamy v. Plaver.

Freem Rep. 532. pl. 716. S. C. adjudged in C B for the Plaintiff —— 2 Show. 177. pl. 173. S C. in B R. Sed adjornatur ——Raym. 463 S. C in B. R. and Judgment was agreed to be reverſed by the Opinion of three Juſtices againſt Dolben, who deſired Time to conſider.—— 3 Mod 249. Arg. cites S. C. that the Judgment could not be entred; but ſays it is true, that where ſo many are Defendants and one dies, the Action is not abated, but then it muſt be ſuggeſted on the Roll. ——8 & 9 *W.* 3. *cap* 11. *S.* 7. *Provides, that if there are two or more Plaintiffs or Defendants, and one dies, if the Cauſe of Action ſurvives to or againſt the ſurviving Plaintiff or Defendant, the Writ or Action ſhall not abate, but ſuch Death being ſuggeſted on the Record ſhall proceed.*

15. Writ of Error upon a Judgment in C. B. *in Trover againſt ſix, where after Verdict one of the Plaintiffs* comes and *ſuggeſts that his Fellow is dead, and prays that he as Survivor may have Judgment*, and had it there; but the Court here, viz. Pemberton Ch. J. Jones, Raymond, and Dolbin, were of Opinion that the Judgment ſhould be reverſed mainly upon the Reaſon in **Read and Redman's Caſe** 10 Rep. 134. Skinn. 39. pl. 7. Paſch 34 Car. 2. B. R. Wedgewood v. Bayly.

16. *Error in Fact* aſſigned, *that the Plaintiff died before the Judgment*, but the Judgment was affirmed Niſi &c. And Holt ſaid, he was not well ſatisfied with the Caſe of **Dove v. Darcen** Sid. 93. for there ſhould be a Scire Facias againſt the Executors or Adminiſtrators, and the Truth will appear upon the Sheriffs Return. Comb 320. Paſch. 7 W. 3. B. R. Proberts v. Edmunds.

17. 8 & 9 *W.* 3. *cap.* 11. *S.* 2. *If after Judgment for the Defendant, the Plaintiff or Demandant ſhall ſue a Writ of Error, and the Judgment ſhall be affirmed, or the Writ of Error diſcontinued, or the Plaintiff nonſuit therein, the Defendant or Tenant ſhall have Judgment to recover his Coſts, and have Execution for the ſame by Capias ad Satisfaciendum, Fieri Facias, or Elegit.*

Show. 76. S. C. but not S. P.

18. The *Husband joined in a Writ of Error*, yet it was ruled that *by his Death the Writ abated*; otherwiſe it is where the *Defendant in Error dies after in nullo eſt Erratum pleaded*, for there the *Court may proceed* to examine the Errors. Comb. 263. Trin. 6 W. & M. in B.R. Fitzgerald v. Clanrickard Counteſs.

(B. b) In Judgments.

Fol. 769.

What Things ſhall be Errors in Judgments.

1. IN an Indictment for not repairing a Common Highway, if the Defendants are found guilty, and a Fine impoſed & quod ſint in Miſericordia without a Capiatur, this is Error. Hill. 10 Car. B. R. between *the Inhabitants of Somerſham, in Comitatu Huntington, and the King* adjudged; and the firſt Judgment reverſed accordingly.

Upon every Conviction upon an Indictment the Judgment is, Quod capiatur, and the Omiſſion thereof is to the King's Prejudice, and for this Omiſſion a Judgment for the King upon an Indictment for Recuſancy was reverſed Cro. C. 504. pl. 6. Trin. 14 Car. B. R. the Marquis of Wincheſter's Caſe. —— Jo. 407 pl. 5. The King v. Ld. St. John, S. C. accordingly.

2 If the Judgment be quod the Plaintiff or Defendant capiatur where it ſhould not be, this is Error, for it is a falſe Judgment, and in Prejudice of the Party. Tr. 15 Ja. between *Wheateley and Stone*, per totam Curiam in a Writ of Error at Serjeant's Inn agreed. Dyer, 14 El. 315. 99. admit. Hob. 180. pl. 215. S. C.

3. So if the Plaintiff or Defendant be amerced by the Judgment where he ought not, this is Error. Dyer, 44 El. 315. 99. admitted. 6 E. 6. 75. 22.

4. So if the Judgment be not Quod capiatur where it ought to be ſo, it is erroneous. Mich. 16 Car. B. R. *Fridean's Caſe*, who was indicted for poiſoning J. S. but he did not die, and found guilty; and Judgment to pay ſo much for a Fine, and no Capiatur quouſque &c. and for this Cauſe reverſed per Curiam; contra 29 E. 3. 30. b. adjudged.

5. So if the Judgment be not quod ſit in Miſericordia, where it ought to be ſo, it is erroneous. Co. 8 *Beecher's Caſe* 49. reſolved, becauſe the Judgment is not perfect without it. Dyer, 14 El. 315. 99. admitted. 6 E. 6. 75. 22. Cro. J. 211. pl. 3. Beecher v. Shirley, S. C. adjudged.

6. In an Ejectione Firmæ, if Judgment be given upon a Demurrer, or by Default, or upon a Non ſum informatus for the Plaintiff to recover the Term, but awarded that there ſhall be a Writ of Inquiry of Damages, without ſaying quod capiatur this is erroneous; for it may be that he will never inquire of the Damages, or make Re- thereof, and then the Fine due upon the Capiatur will be loſt. Tr. 1651. between in a Writ of Error upon a Judgment in Banco; and the Judgment reverſed accordingly. Sty. 283. Giles v. Timberley, S. P. and ſeems to be S. C.

7. If the Judgment be quod capiatur where it ought to be quod ſit in Miſericordia, this is erroneous, for by this the Judgment is altered, and this is in Prejudice of the Party. Tr. 15 Ja. between *Whetely and Stone*, in a Writ of Error at Serjeant's Inn agreed per totam Curiam. Hob. 180. pl. 215. S. C —— Cro. E. 107. pl. 2. Mich. 30 & 31 Eliz. B. R. Bellicote v. Taylboys, S. P. adjudged, and the former Judgment reverſed.

8. So if the Judgment be quod ſit in Miſericordia where it ought to be quod capiatur, this is erroneous for the Cauſe aforeſaid. Co. 8. *Beecher* 59. P. 3 Ja. B. R. between *Rivers and Guynn* adjudged, and the firſt Judgment reverſed. P. 43 El. B. R. Tr. 14 Car. B. R. Cro. J. 211. pl. 3. Beecher v. Shirley S. C. and Judgment

reverſed accordingly.— Cro. E 84.

B. R. between *Margatrode and Beverly*, adjudged in a Writ of Error. Intratur P. 14. Rot. 168.

pl. 2. Hill. 30 Eliz. B. R. Crow's Caſe, S. P. and the firſt Judgment reverſed. —— Freem. Rep. 281. pl. (320. c.) S. P. and Judgment reverſed, cites Trin. 1673 B. R. Underwood v. Burlacy. —— Cro. J. 538. pl. 5. Trin. 17 Jac. B. R. Miller v. The King S. P. aſſigned for Error on a Judgment on a Penal Statute, and Judgment was reverſed.

9. If the Judgment be quod ſit in Miſericordia & quod capiatur, where it ought to be only in Miſericordia, this is Error. Mich. 8 Car. B. R. Intratur. Tr. 8 Car. Rot. 477. between *Kent and Fowkes* reſolved, and ſuch Judgment given in Lincoln reverſed.

10. And in theſe Caſes the Error is in the whole Judgment, and the Whole ſhall be reverſed for it, as well the Judgment of the Party as for the King. Co. 8. *Beecher* 59. reſolved. Tr. 15 Ja. between *Whetely and Stone*, in a Writ of Error at Serjeant's Inn agreed per totam Curiam. Quære Dyer, 14 El. 315.

11. In an Information againſt an Ingroſſer, upon the Statute of 5 Ed. 6. if the Judgment be againſt the Ingroſſer quod capiatur &c. without expreſſing in certain that he ſhall be impriſoned for the Time limited in the Statute, ſcilicet, per two Months; yet this is not Error in the Judgment, for this is the Common (*) Courſe of ſuch Judgments where a certain Time is limited for the Impriſonment, for the Word &c. ſupplies all. Tr. 16 Ja. between *The King and Curtis*. H. 15 Ja. B. R. between *Brown and Marſhal* adjudged; and it was ſaid by the Clerks, that this is the Common Courſe.

* Fol. 770.

Palm. 509. Gayer v. Goter, S. C. and Judgment affirmed Niſi &c. Jo. 171. pl. 4 Gofer v. Gregory, S. P. and ſeems to be S. C

12. In Debt upon an Obligation, if upon Non eſt Factum pleaded, it is found his Deed, upon which Judgment is given quod Defendant ſit in Miſericordia & quod capiatur; this double Judgment is erroneous, and this makes the whole Judgment erroneous. H. 3 Ja. B. R. between *Banks and Pembleton* adjudged in a Writ of Error. Mich. 8 Car. B. R. between *Kent and Fowkes* adjudged, and a Judgment given in Lincoln in an Action upon the Caſe, where the Judgment ſhould be quod capiatur reverſed accordingly. Intratur Tr. 8. Rot. 477.

and the firſt Judgment was affirmed.

13. In an Action upon the Caſe upon a Promiſe, if Judgment be given for the Plaintiff upon Demurrer, and a Writ of Damages awarded, and thereupon Damages taxed to 35 l. and upon this Judgment is given quod querens recuperet damna præd' ad 37 l. per juratores præd' aſſeſſa, yet this Judgment is not erroneous, becauſe the Judgment is perfect by the firſt Words, quod recuperet damna prædicta, without more, and therefore the ſumming thereof afterwards is but Surplus; and therefore this being miſtaken it does not vitiate the Judgment. H. 3 Car. B. R. between *Guier and Goter* adjudged in a Writ of Error upon a Judgment in the City of Pool in Southampton; which Intratur M. 2 Car. Rot. 247.

14. In an Action of Debt if the Defendant pleads Nil debet, and the Jury find it for the Plaintiff, and tax Damages to 12 d. and for Coſts 12 d. and thereupon Judgment is given quod querens recuperet debitum ſuum præd' & debita ſua præd' (inſtead of damna) this is erroneous, for the Word debita does not include damna. Mich. 11 Car. B. R. between *Morgan and Bayly* adjudged per Curiam, and ſuch Judgment given in Southwark reverſed accordingly in a Writ of Error. Intratur Tr. 9 Car. Rot. 895.

15. In

15. In Debt, if Judgment be given for the Plaintiff by Default of the Defendant, and the Judgment is quod recuperet debitum & damna occaſione detentionis debiti ad 13 s. 4 d. ex aſſenſu ſuo per Curiam de incremento adjudicat', this is a good Judgment, though no Mention of the Coſts; for Damages include Coſts. Mich. 11 Car. B. R. between *Pierce and Brown* adjudged in a Writ of Error to reverſe a Judgment given in the Hundred Court of Slaughter. Intratur P. 10 Car. Rot. 1335. but it was ſaid alſo in this Caſe that the Defendant ſhall not aſſign for Error the not giving of Coſts, becauſe it was for his Advantage.

16 In an Action upon the Caſe upon a Promiſe, if the Defendant pleads Non Aſſumpſit, and the Jury find for the Plaintiff, and tax Damages and Coſts, and upon this Judgment is given quod querens recuperet Damna & Cuſtagia per Juratores præd' aſſeſſa & 40 s. de incremento per Curiam, and does not ſay whether for Damages or Coſts, yet this is good, for it ſhall be intended for Coſts, becauſe the Court could not increaſe the Damages. Tr. 11 Car. B. R. between *Cooling and Lawrence* adjudged in a Writ of Error upon Judgment in the Court of Coventry. Intratur Tr, 10 Car. Rot. 1328. Co. Entries 22. *Snag's Caſe.*

17. In an Action of Debt, if upon Nil fiebet pleaded it be found that the Defendant owes the Plaintiff 5 l. Debt, and the Jury aſſeſs the Damages to 2 d. and the Coſts 2 d. and the Judgment is entered, that the Plaintiff ſhall recover debitum & Damna præd' to 2 d. and ſays nothing of the Coſts, the Judgment is erroneous, though the Damna generally comprehends as well Coſts as Damages; for in this Caſe it is limited but to 2 d. and ſo no Judgment for the other 2 d. Mich. 15 Ja. B. R. between *Homes and Twiſte* adjudged in a Writ of Error, and the Judgment reverſed.

18. In a Trover and Converſion of Goods, if the Defendant be found guilty of Part, and for Part not guilty, but no Judgment is given for thoſe of which he is found not guilty, ſcilicet, Quod eat inde ſine die, as it ought to be, this is erroneous. Hill. 13 Jac. B. R. between *Wood and Dr. Sutcliff* per Curiam.

Cro. J. 439. 440. pl. 2. Wood v. Suckling, S. C. and Judgment reverſed. —— Roll Rep. 293. pl. 8. S. C. adjudged. —— 3 Bulſt. 150, 151. S. C. but S. P. does not appear.

19. If a Man recovers Debt or Damages upon a Verdict, and Judgment is given thereof, and 2 s. de incremento generally, without ſaying in the Record as the Uſe is ex reſiquitione querentis, or ex aſſenſu partium, this Judgment is erroneous. Paſch. 15 Jac. B. R. *Hardye and Mayhew*; the Judgment reverſed for this. Mich. 15 Jac. B. R. between *Far and Loggins* per Curiam; the Judgment reverſed; which Intratur Mich. 12 Car. Rot. 259. Mich. 18 Jac. B. R. between * *Sarke and Yeomans* adjudged in a Writ of Error, and ſo the ſame Term adjudged between † *Concellor and Aier*, and no Diverſity where the Judgment is upon Nil dicit, and whereupon Verdict. Hi. 2 Car. B. R. between ‡ *Lawrence and Gad* adjudged an erroneous Judgment, which was Ideo ad petitionem querentis Conſideratum eſt quod querens recuperet &c. & Damna de incremento, ſo much becauſe the Petition was not in the right Place.

* Cro. J. 587. pl. 10. Sache v. Yeoman, S. C. and the firſt Judgment reverſed. † Cro. J. 587. in pl. 10 cites a like Judgment reverſed for this Cauſe, in Caſe of Cowſlaw v. Eyre, S. C. —— Palm. 148. Conſlade v. Ayres, S. C. and the firſt Judgment was reverſed. ‡ Poph. 211, 212. Good's Caſe, S. P. and ſeems to be S. C. adjudged accordingly. —— Lat. 177. Good v. Lawrence, S. C. and the firſt Judgment reverſed.

reverſed accordingly.— Cro. E 84.

B. R. between *Margatrode and Beverly*, adjudged in a Writ of Error. Intratur P. 14. Rot. 168.

pl. 2. Hill. 30 Eliz. B. R. Crow's Caſe, S. P. and the firſt Judgment reverſed. —— Freem. Rep. 281. pl. (320. c.) S. P. and Judgment reverſed, cites Trin. 1673 B. R. Underwood v. Burlacy. —— Cro. J. 538. pl. 5. Trin. 17 Jac. B. R. Miller v. The King S. P. aſſigned for Error on a Judgment on a Penal Statute, and Judgment was reverſed.

9. If the Judgment be quod ſit in Miſericordia & quod capiatur, where it ought to be only in Miſericordia, this is Error. Mich. 8 Car. B. R. Intratur. Tr. 8 Car. Rot. 477. between *Kent and Fowkes* reſolved, and ſuch Judgment given in Lincoln reverſed.

10. And in theſe Caſes the Error is in the whole Judgment, and the Whole ſhall be reverſed for it, as well the Judgment of the Party as for the King. Co. 8. *Beecher* 59. reſolved. Tr. 15 Ja. between *Whetely and Stone*, in a Writ of Error at Serjeant's Inn agreed per totam Curiam. Quære Dyer, 14 El. 315.

11. In an Information againſt an Ingroſſer, upon the Statute of 5 Ed. 6. if the Judgment be againſt the Ingroſſer quod capiatur &c. without expreſſing in certain that he ſhall be impriſoned for the Time limited in the Statute, ſcilicet, per two Months; yet this is not Error in the Judgment, for this is the Common (*) Courſe of ſuch Judgments where a certain Time is limited for the Impriſonment, for the Word &c. ſupplies all. Tr. 16 Ja. between *The King and Curtis*. H. 15 Ja. B. R. between *Brown and Marſhal* adjudged; and it was ſaid by the Clerks, that this is the Common Courſe.

* Fol. 770.

Palm. 509. Gayer v. Goter, S. C. and Judgment affirmed Niſi &c. Jo. 171. pl. 4 Gofer v. Gregory, S. P. and ſeems to be S. C and the firſt Judgment was affirmed.

12. In Debt upon an Obligation, if upon Non eſt Factum pleaded, it is found his Deed, upon which Judgment is given quod Defendant ſit in Miſericordia & quod capiatur; this double Judgment is erroneous, and this makes the whole Judgment erroneous. P. 3 Ja. B. R. between *Banks and Pembleton* adjudged in a Writ of Error. Mich. 8 Car. B. R. between *Kent and Fowkes* adjudged, and a Judgment given in Lincoln in an Action upon the Caſe, where the Judgment ſhould be quod capiatur reverſed accordingly. Intratur Tr. 8. Rot. 477.

13. In an Action upon the Caſe upon a Promiſe, if Judgment be given for the Plaintiff upon Demurrer, and a Writ of Damages awarded, and thereupon Damages taxed to 35 l. and upon this Judgment is given quod querens recuperet damna præd' ad 37 l. per juratores præd' aſſeſſa, yet this Judgment is not erroneous, becauſe the Judgment is perfect by the firſt Words, quod recuperet damna prædicta, without more, and therefore the ſumming thereof afterwards is but Surplus; and therefore this being miſtaken it does not vitiate the Judgment. H. 3 Car. B. R. between *Guier and Goter* adjudged in a Writ of Error upon a Judgment in the City of Pool in Southampton; which Intratur M. 2 Car. Rot. 247.

14. In an Action of Debt if the Defendant pleads Nil debet, and the Jury find it for the Plaintiff, and tax Damages to 12 d. and for Coſts 12 d. and thereupon Judgment is given quod querens recuperet debitum ſuum præd' & debita ſua præd' (inſtead of damna) this is erroneous, for the Word debita does not include damna. Mich. 11 Car. B. R. between *Morgan and Bayly* adjudged per Curiam, and ſuch Judgment given in Southwark reverſed accordingly in a Writ of Error. Intratur Tr. 9 Car. Rot. 895.

15. In

15. In Debt, if Judgment be given for the Plaintiff by Default of the Defendant, and the Judgment is quod recuperet debitum & damna occaſione detentionis debiti ad 13 s. 4 d. ex aſſenſu ſuo per Curiam de incremento adjudicat', this is a good Judgment, though no Mention of the Coſts; for Damages include Coſts. Mich. 11 Car. B. R. between *Pierce and Brown* adjudged in a Writ of Error to reverſe a Judgment given in the Hundred Court of Slaughter. Intratur P. 10 Car. Rot. 1335. but it was ſaid alſo in this Caſe that the Defendant ſhall not aſſign for Error the not giving of Coſts, becauſe it was for his Advantage.

16 In an Action upon the Caſe upon a Promiſe, if the Defendant pleads Non Aſſumpſit, and the Jury find for the Plaintiff, and tax Damages and Coſts, and upon this Judgment is given quod querens recuperet Damna & Cuſtagia per Juratores præd' aſſeſſa & 40 s. de incremento per Curiam, and does not ſay whether for Damages or Coſts, yet this is good, for it ſhall be intended for Coſts, becauſe the Court could not increaſe the Damages. Tr. 11 Car. B. R. between *Cooling and Lawrence* adjudged in a Writ of Error upon Judgment in the Court of Coventry. Intratur Tr, 10 Car. Rot. 1328. Co. Entries 22. *Snag's Caſe.*

17. In an Action of Debt, if upon Nil fiebet pleaded it be found that the Defendant owes the Plaintiff 5 l. Debt, and the Jury aſſeſs the Damages to 2 d. and the Coſts 2 d. and the Judgment is entered, that the Plaintiff ſhall recover debitum & Damna præd' to 2 d. and ſays nothing of the Coſts, the Judgment is erroneous, though the Damna generally comprehends as well Coſts as Damages; for in this Caſe it is limited but to 2 d. and ſo no Judgment for the other 2 d. Mich. 15 Ja. B. R. between *Homes and Twiſte* adjudged in a Writ of Error, and the Judgment reverſed.

18. In a Trover and Converſion of Goods, if the Defendant be fonnd guilty of Part, and for Part not guilty, but no Judgment is given for thoſe of which he is found not guilty, ſcilicet, Quod eat inde ſine die, as it ought to be, this is erroneous. Hill. 13 Jac. B. R. between *Wood and Dr. Sutcliff* per Curiam. Cro. J. 439. 440. pl. 2. Wood v. Suckling, S. C. and Judgment reverſed. —— Roll Rep. 293. pl. 8. S. C. adjudged. —— 3 Bulſt. 150, 151. S. C. but S. P. does not appear.

19. If a Man recovers Debt or Damages upon a Verdict, and Judgment is given thereof, and 2 s. de incremento generally, without ſaying in the Record as the Uſe is ex reſiquitione querentis, or ex aſſenſu partium, this Judgment is erroneous. Paſch. 15 Jac. B. R. *Hardye and Mayhew*; the Judgment reverſed for this. Mich. 15 Jac. B. R. between *Far and Loggins* per Curiam; the Judgment reverſed; which Intratur Mich. 12 Car. Rot. 259. Mich. 18 Jac. B. R. between * *Sarke and Yeomans* adjudged in a Writ of Error, and ſo the ſame Term adjudged between † *Concellor and Aier*, and no Diverſity where the Judgment is upon Nil dicit, and whereupon Verdict. Hi. 2 Car. B. R. between ‡ *Lawrence and Gad* adjudged an erroneous Judgment, which was Ideo ad petitionem querentis Conſideratum eſt quod querens recuperet &c. & Damna de incremento, ſo much becauſe the Petition was not in the right Place. * Cro. J. 587. pl. 10. Sache v. Yeoman, S. C. and the firſt Judgment reverſed. † Cro. J. 587. in pl. 10 cites a like Judgment reverſed for this Cauſe, in Caſe of Cowſlaw v. Eyre, S. C. —— Palm. 148. Conſlade v. Ayres, S. C. and the firſt Judgment was reverſed. ‡ Poph. 211, 212. Good's Caſe, S. P. and ſeems to be S. C. adjudged accordingly. —— Lat. 177. Good v. Lawrence, S. C. and the firſt Judgment reverſed.

See pl. 18. S. C. and the Notes there.

20. **In a** Trover **and Converſion, if the Defendant** be found guilty of Part, and not guilty of the Reſt, **upon which** Judgment **is given** for that for which he is found guilty, and no Judgment **is given** quod eat inde ſine die for the Reſidue, it is erroneous. **M. 15 Jac. B. R. between** *Wood and Sutcliffe*, **this was moved for an Error, but not reſolved, but the Judgment reverſed for other Error.**

* Cro. J. 278 pl. 53. S. C. adjornatur. —— Ibid. 386 pl. 17. Robins v. Sanders, S. C. and to make good this Entry divers Precedents were cited in the Precedents of Ld. Coke; but it was anſwered, that it was a Miſpriſion of the Printer. ——— 3 Bulſt. 92 S. C. and the Judgment agreed to be erroneous.

21. **If a Man** recovers in **an Action upon the** Caſe, **and the** Judgment **is entered** Ideo conceſſum eſt quod querens recuperet, **where the uſual Word is Ideo** conſiderarum eſt **&c. this is erroneous,** though conceſſum **be equivalent to the Word** conſideratum, **becauſe the uſual Form ought to be obſerved. Mich. 13 Jac. B. R.** 42 **between** * *Robins and Sambin*. **Dubitatur Hill. 11 Car. B. R. between** ‡ *Dalamore and Heskins* **adjudged in a Writ of Error, and the Judgment given at Bath reverſed accordingly. Intratur Tr. 11 Car. Rot.** 900.

‡ Cro C 442. pl. 13. Slocomb's Caſe, S. P. ruled accordingly, and ſeems to be S. C. —— Lit. 76 in a Nota, S. P. and Judgment was reverſed. ——— Ibid. 83. Hill. 22 Jac Hern v. Warden, S. P. and Judgment reverſed. ——— Noy 77. Heene v. Warden, S. C. accordingly. ——— Ibid. 188. Mich. 2 Car. Cook v. Williams, S. P. and Judgment reverſed. ——— Noy 77 cites Cooper v. Williams, S. C. and Judgment reverſed accordingly. —— S. P. Bulſt. 125, 126. Paſch. 9 Jac. B. R. Fuller v. Righteous, in a Judgment given at Lynne, and the whole Court were of Opinion, that Conceſſum eſt is not good, and as to the Judgment in 1 Rep. 83 in Corbet's Caſe, and 119. in Chudleigh's Caſe, being Ideo conceſſum eſt quod &c. Cur. theſe Judgments are falſe printed, and Mann Secondary informed the Court that the Roll was right, viz. Ideo conſideratum eſt; Quod Nota. —— But ſee tit. Amendment (P). —— But ſee Hob. 17 pl. 28. at the End of the Caſe of Read v. Hawke. And Ibid. 19. pl. 34. Fitzhughes's Caſe. And ibid 194 pl. 245. at the End of the Caſe of Winchcomb v. Pulleſton, in which Caſes is the Word Conceſſum.

* Lat. 177. Good v. Lawrence, S. C. and ruled to be Error; and ſaid, if they were not tied up to Form there never would be an End of new and ſenſeleſs Words, and perhaps at laſt it would be neceſſary to have one Judgment to expound another. ——— Poph. 211, 212. Good's Caſe, S. C. and the firſt Judgment was reverſed.

22. **If the** Judgment **be** Ideo conſideratum, conceſſum & adjudicatum eſt quod querens recuperet **&c. though the Words** conceſſum & adjudicatum **are more and more than neceſſary, yet this makes the Judgment erroneous, becauſe the** Term of Judgments ought to be obſerved, **which is conſideratum only. Hill. 2 Car. B. R. between** * *Laurence and Gad* **adjudged in a Writ of Error. Paſch. 8 Car. B. R. Rot.** *Bauntſey's Caſe*, **a Judgment in an Indictment of Barrety reverſed, becauſe the Judgment was Ideo conceſſum eſt quod &c.**

Lat. 211. Strand v. Blunden, S. C. and Judgment reverſed.

23. **If the** Judgment **be** Ideo conſideratum eſt quod querens recuperet, **for** recuperet, **this is erroneous. Trin. 3 Car. between** *Strowd and Blundell* **adjudged in B. R. in a Writ of Error upon a Judgment given in Baſingſtoke in Hampſhire. Mich. 14 Car. between** *Pickill and Rotherford* **adjudged in a Writ upon a Judgment in Newcaſtle. Intratur Hill. 13 Rot.** 1093.

Sty. 183. Mich 1659. Spry v. Mill, S. P. and Roll Ch. J. ſaid it was a good Exception for the Uncertainty of the Words. —— Comb. 479. Paſch. 10 W. 3. B. R. Hall v. Jackſon, S. P. and held to be fatal.

24. **If a Judgment be Ideo** conſideratum fuit **for** conſideratum eſt, **it is erroneous. Trin. 3 Car. B. R. between** adjudged **in a Writ of Error upon a Judgment given in Lincoln.**

Roll Rep. 44. pl. 11. S. C. and the Judgment was affirmed.

25. **If an Action of** Debt **be brought** againſt Two by one Original with ſeveral Præcipes upon one Obligation in which they are obliged jointly and ſeverally, and ſeveral Declarations are made againſt them, and ſeveral Judgments given, **but theſe Words** are not put in the Judg-

Judgment, as the Uſe is, ſcilicet, (Unica tantum fiat Executio) yet the Judgment is not erroneous, becauſe theſe Words are uſed to be entered for the Direction of the (*) Clerks, and are of Form only, for though the Words are not entered, yet he ſhall have but one Execution. Trin. 12 Jac. B. R. between *Banks and Chamberlain* adjudged.

* Fol. 772.

26. In an Ejectione Firmæ, if the Judgment be found Guilty for Part and for Part Not Guilty, the Judgment is Quod Defendens ſit quietus, this is erroneous, for it ought to be Quod eat inde ſine die. Trin. 12 Jac. between *William Morris and Cadwallader*, dubitatur.

Roll Rep. 51. pl. 22. S. C. Coke, Crooke, and Doderidge, ſeemed to incline that the Judgment was erroneous, but Haughton e contra; but the Court ordered Precedents to be ſearched.

27. In a Quare Impedit againſt the Ordinary, Metropolitan and others, if the Ordinary and Metropolitan plead that they plead nothing but as Ordinary, upon which the Plaintiff prays Judgment againſt them, and Judgment is entered that he ſhall recover againſt them, but it is not alſo entered quod ceſſet Executio, till the Plea of the others is determined as the uſual Courſe is, yet if no Execution be awarded till the Plea of the others is determined, it is not erroneous. Paſch. 14 Jac. B. R. Trin. 14 Jac. B. R. between *Grange and Denny* adjudged in a Writ of Error.

Roll Rep. 363. pl. 17. S. C. & S. P. held accordingly by Coke Ch. J. but he ſaid, that if Execution had been ſued before the laſt Judgment it ſhould be Error. —— Ibid. 397. pl. 24. S. C. & S. P. by Coke Ch. J. and the Judgment was affirmed. — 3 Bulſt. 174 S. C. & S. P. held accordingly by Coke Ch. J. and notwithſtanding this and other Exceptions the Judgment was affirmed. —— Jenk 323. pl. 36. S. C. the ſaid Omiſſion was not erroneous, becauſe it was after Judgment, and if it be Error, it is Error in Executione Judicii, and in this Caſe no Writ of Execution was ſued out againſt them

28. In an Action of Debt in Banco, if Judgment be Quod querens recuperet debitum, and ſo much pro damnis occaſione detentionis, though it be not Nec non pro Miſis & Cuſtagiis, as the Uſe in Banco Regis, yet it is good, for this is the Uſe in Banco. Mich. 22 Jac. B. R. between *Broad and Nurſe* adjudged in a Writ of Error.

2 Roll Rep. 470. S. C. but a Difference was taken where the Plaintiff has a Verdict for him, there the Judgment is Quod recuperet debitum & damna, and Coſts aſſeſſed by the Jury, and farther de incremento per Curiam; but where the Judgment is upon Non ſum Informatus, Demurrer or Nil dicit, the Judgment is Quod recuperet debitum & damna, which includes Coſts, but in the laſt Caſe in B. R. the Entry is more ſpecial, viz. Tam occaſione detentionis &c. quam pro miſis & cuſtagiis; and Judgment was affirmed.

29. In Debt upon an Obligation the Defendant pleads Non eſt Factum, which is found for the Plaintiff, and the Jury aſſeſs Damages occaſione infraſcripta, this is good, without ſaying occaſione detentionis debiti, for this is tantamount. Paſch. 8 Jac. B. R. *Alcock's Caſe* adjudged in Camera Scaccarii in a Writ of Error.

30. In Ejectione Firmæ, if upon Non ſum informatus pleaded, Judgment be given Quod def. remaneat indefenſus, without ſaying againſt Plaintiff, it is good. Paſch. 12 Jac. B. R. between *Friget and Mallory* per Curiam.

31. In an Action if the Defendant pleads in Bar, upon which there is a Demurrer, and Judgment is entered in this Manner, Quia videtur to the ſaid A. and B. ſcilicet, the Mayor and Recorder (who were the Judges of the Court) Juſticiaris Dom' Regis that the Plea is not good, Ideo conſideratum eſt &c. this is good, becauſe the naming them Juſtices is but Surplus. Hill. 8 Car. B. R. between *Greenhill*

Greenhill and King adjudged in a Writ of Error upon a Judgment in Linn. Intratur Trin. 7 Rot. 1572.

Ideo conſideratum eſt, without ſaying per Cur. is no Error in any of the *Great Courts* as the Courts here, the Courts of Wales, the Courts of Counties Palatine, tho' otherwiſe in Inferior Courts. Sid. 147. pl. 5. Trin. 15 Car. 2 B R Smith v. Smith —— Lev. 105. S. C. adjudged —— Ibid. 143. pl. 21. Paſch. 15 Car. 2. B. R. Anon. S. P. —— Saund. 74. Paſch. 19 Car. 2. S P.

32. If the Judgment be entered in an Inferior Court held before the Steward, Ideo conſideratum eſt per Seneſchallum quod querens recuperet, this is good, for this is all one as if it had been ſaid Ideo conſideratum eſt per Curiam. Trin. 14 Car. B. R. between *Stretch and Parker* adjudged in a Writ of Error. Intratur Mich. 13 Car. Rot. 21. in a Writ of Error out of Alceſter Court. Trin. 13 Car. B. R. between *Mill and Maurie* adjudged good in a Writ of Error upon a Judgment in Exeter, where it was Ideo conſideratum eſt * ad eandem Curiam by the Mayor and Bayliffs (who were the Judges) quod querens recuperet, and did not ſay per Curiam. Mich. 15 Car. B. R. between *Mapowder and Lippingcot* it was adjudged in a Writ of Error there. Intratur Paſch. 15 Car. 95. Mich. 23 Car. B. R. between *Robinſon and Barns* adjudged upon a Judgment in Exeter.

* Sty. 182, 183. Mich. 1649. in Caſe of Spry v. Mill, S P. aſſigned for Error, and that it ſhou'd have been Per eandem Curiam, but nothing as to this Exception ſaid by the Court. —— Ibid. 194. Hill. 1649. Peiſe v. Mabley, S. P. and upon this and another Exception Judgment was reverſed.

* Mar. 15. 16. pl. 37. Meade v. Axe, ſeems to be S. C. but does not mention in what Court the Action was, nor ſay any Thing of Per Seneſchallum; bus the Court was clear that the Judgment ſhould be reverſed. —— S P. by Roll Ch. J. Sty. 430. Hill. 1654. in Caſe of the Protector v. Richardſon.

33. But if it be Ideo conſideratum eſt, and it is not ſaid per Cur. nec per Seneſchallum, this is erroneous in other Judgments. Mich. 14 Car. B. R. between *Brown and Clag* adjuuged in a Writ of Error, and the Judgment given in the new Court of Marſhalſea reverſed accordingly. Intratur Paſch. 14 Car. Rot. 325. Trin. 15 Car. B. R. between * *Moop and Axe* adjudged in a Writ of Error upon a Judgment in Exeter. Intratue Mich. 14 Car. Rot. 213. Trin. 14 Car. B. R. (†) between *Cook and Lewis* adjudged in a Writ of Error upon a Judgment in Wenlock Court, and this reverſed accordingly. Intratur Trin. 13 Car. Rot. 542. Mich. 14 Car. B. R. between *Guy and Cannon* adjudged in a Writ of Error upon a Judgment in the Marſhalſea, and this reverſed accordingly. Intratur Hill. 13 Rot. 824.

(†) Fol. 773.

S. C. cited by Name of Wotlock v. Cowle by Pemberton J. 2 Show. Rep. 89. Hill. 31 & 32 Car. 2. B. R. and that (attingent') is all one with (ad) and (ad) with (attingent') and whether the (ad) do hit the Sum right or no is but miſcounting, for if more or leſs it were good. Scrogs ſaid, The Jury here give Particulars, and the Judgment is but for one of thoſe particular Sums. Jones ſaid, Dampna prædict' is enough, and all the reſt naught and ſurpluſage; and is as much as attingent' for its Meaning elſe has no Senſe; it will be hard to make the Word (ad) reſtringent, when the Court ought to give Judgment for the Whole; Ad is the uſual Word in all Judgments, and reaches the Whole, and it was the Intent of the Court to give all; where they intend but Part, they ſay Quoad; in C. B. they ſay, Dampna ſua prædict' ad then comes the Increment', and after that the Quæ quidem &c.

34. In an Action upon the Caſe upon a Promiſe and Verdict for the Plaintiffs, and Damages and Coſts given, and the Judgment is quod querens recuperet Damna ſua ad 61. per Juratores prædictos in Forma prædicta aſſeſſa, and the Damages and Coſts are miſtaken, not amounting to ſo much; yet this is not erroneous, for this is only a miſcaſting, and Damna præd' intends only thoſe which were aſſeſſed, and ſo the Judgment is not for more. Trin. 15 Car. B. R. between *Moorecock and Hooles* per Curiam adjudged good, and the firſt Judgment affirmed accordingly in a Writ of Error. Intratur Paſch. 15 Car. Rot. 416.

35. If

35. If a Judgment be given in Banco, Ideo conſideratum eſt quod querens or defendens recuperet &c. and it is not conſideratum eſt per Curiam, yet this is good, for this is the uſe de Banco & de B. R. Mich. 14 Car. B. R. between *Elvyn and Prime* adjudged in a Writ of Error. Intratur Paſch. 14 Rot. 134.

36. If a Judgment in Banco be Ob quod conſideratum eſt, where it ſhould be Ideo conſideratum eſt by the uſual Courſe, yet this is good in Banco, for this is all one in Effect. Mich. 15 Car. B. R. between *Drury and Young* adjudged in a Writ of Error. Intratur Trin. 15 Car. Rot. 46.

37. In an Action upon the Caſe upon a Promiſe, if the Defendant Nihil dicit, per quod the Judgment is to be given by Nihil dicit, and the Judgment is entered quod querens recuperet Damna ſua, ſed quia neſcitur quæ Damna &c. a Writ of Inquiry is awarded where the uſual Courſe of Entry is quod querens recuperare debeat Damna &c. and not recuperet, yet this is good in Banco, for it is all one in Effect. Mich. 15 Car. B. R. between *Drury and Young* adjudged in a Writ of Error. Intratur Trin. 15 Car. Rot. 46.

38. In *Treſpaſs for taking away Goods* &c. the Jury found the Defendant *Guilty as to the taking Part* of the Goods, *and as to the reſt Not Guilty*; and the *Judgment was, that the Plaintiff ſhould recover his Damages for Part, Et quod defendens capiatur, and that yet the Plaintiff ſit in miſericordia pro falſo clamore ſuo* againſt the Defendant *pro reſiduo tranſgreſſionis*, and this was aſſigned for Error; for the Judgment ought to have been Quod querens nihil capiat per Billam pro reſiduo tranſgreſſionis; Sed non allocatur; and the Judgment was affirmed. Mo. 692. pl. 956. in Cam. Scacc. Palmer v. Sherwood.

39. Error on a *Judgment in Debt againſt Husband and Wife, upon a Bond made by the Wife dum ſola fuit*; The *Judgment was, that the Huſband be in Miſericordia, and that the Wife capiatur.* This was held Error, and the Judgment was reverſed; for it ſhould be, that the Huſband and Wife Capiantur. Mo. 704. pl. 982. Hill. 37 Eliz. in Cam. Scacc. Burdolph v. Perry & Ux'.

40. *Judgment* was given *in Debt* in C. B. *upon a Non ſum Informatus*, and Error was brought and moved for Error; 1ſt, Becauſe there is *no Imparlance.* 2dly, Becauſe the *Entry was Quod defendit vim et injuriam*, when it is not uſual that ſuch a Judgment ſhall be given upon a Non ſum Informatus; Yet notwithſtanding that Judgment was affirmed. Noy. 36. Mich. 42 & 43 Eliz. B. R. Loyd v. Twyford.

41. In *Debt upon an Obligation* the Defendant *pleaded Non eſt Factum, and after Relicta Verificatione confeſſed the Action* The Judgment was, Quod ſit in *Miſericordia*, and this was aſſigned for Error, for that it ought to be *Quod capiatur.* But the Court held it no Error, becauſe *a Fine is not due*, but where the Party denies his Deed which is found againſt him; and then it is due for his falſe Plea, and for the troubling the Jury and the Court; and Judgment affirmed. Cro. J. 64. pl. 2. Paſch. 2 Jac. B. R. Davis v. Clerk.

Noy. 4. vage v. Ba- Clark, S. C. held accordingly, and that the ſame Rule is ſo uſed in B. R and C B though Dyer 67. is contrary, and cites 33 H. 6. 54. 34 H. 6. 20 41 E. 3. 42. and 45 E. 3. 10.

42. Error of a *Judgment in Debt* was aſſigned, becauſe it *was in the Disjunctive*, As Quod Querens *recuperet Dolium Ferri vel Valorem* ejuſdem ad Damna &c. whereas it ſhould be, Quod recuperet Dolium Ferri, & ſi non, Valorem inde; Adjudged Error. Yelv. 71. Trin. 3. Jac. B. R. Paler v. Hardyman.

Brownl 87. S. C. ſeems only a Tranſlation of Yelv.

43. The *Judgment* was, *Quod querens & plegii ſui ſint in Miſericordia pro falſo clamore*, whereas it ought to have been *Quia non proſecuti ſunt*; for it ought not to be Pro falſo clamore but where the Judgment is af-

ter Verdict, or upon Demurrer, and for this Matter it was held manifeſt Error, and the Judgment was reverſed. Cro. J. 213. pl. 7. Mich 6 Jac. B. R. Anon.

44. Judgment given *againſt au Infant* was *Quod capiatur.* Error was brought, and the whole Court agreed that it is a clear Error, and therefore Judgment was reverſed. Bulſt. 171. Trin. 9 Jac. Daby v. Holbrook.

45. Error of a Judgment in C. B. upon an *Information for buying Cattle, and ſelling them again in the ſame Market Contra Forman Statuti*, the Judgment was entred, Quod ſit *in Miſericordia*, when it ought to be *Quod capiatur*, being upon an Information; For it is a Contempt, and puniſhable by Impriſonment; And per tot. Cur. Judgment was reverſed. Godb 349. pl. 443. Trin 21 Jac. B. R. Pye v. Bonner.

46. Error of a Judgment in Debt, becauſe Judgment was given for the Defendant, *Quod querens nihil capiat per breve.* It was aſſigned, that the *Action* was brought there by an Attorney, by *Bill of Privilege*, and not by *original Writ*; ſo the Judgment ought to be *nihil capiat per Billam*, and not *per breve*; But the Court doubted of it, becauſe it was in the Judgment which was by the Court, and would adviſe of it. Cro. C. 580. pl. 5. Paſch. 16. Car. B. R. Raymond v. Burbridge.

47. T. and three others were *convicted of a Riot upon View* of two Juſtices of Peace and the Sheriff of the County, contra Formam Statuti 13 H. 4. cap 7. and they were fined by the Juſtices; and upon a Writ of Error brought the Errors aſſigned were, 1ſt, It does not appear that the Defendants were convicted by View of the Juſtices, 2dly, That the Sheriff did not join in ſetting the Fine, whereas the Statute ſays, that the Sheriff ſhall be joined with the Juſtices in the whole Proceedings; and for theſe Errors the Judgment was reverſed. Raym. 316. Trin. 32 Car. 2. B. R. The King v. Tempeſt & al'.

48. *Judgment* was awarded *in an Inferior Court by the Mayor and Bailiffs, without ſaying per Cur.* and this aſſigned for Error; But becauſe *it was ſaid in eadem Curia*, the Court held it well enough and over-ruled the Exception. Comb. 5. Mich. 1 Jac. 2. B. R. Salter v. Bellamy.

49. Writ of Error of a Judgment in a *Recognizance* upon a Sci. Fa. was, *Quia in adjudicatione executionis ſuper Judicium præd'*, inſtead of ſuper *recognitionem præd'*, and was for that quaſhed. 12 Mod. 371. Paſch. 12 W. 3.

50. In Debt, if the *Original* be *recited* to be *Attachiat'*, *inſtead of Summonit'*, yet we cannot reverſe the Judgment becauſe it is only a Recital; Per Holt Ch. J. 12 Mod. 513. Paſch. 13. W. 2. Anon.

See tit. Amendment and Jeofails (K) &c. the ſeveral Statutes with the Notes. And tit. Amercement.

(C. b) Judgment.

What Judgment ſhall be *given upon* the *Reverſal.*

See Falſe Judgment (F)

1. IF the Defendant pleads abatement of the Writ, and this is awarded a good Plea, by which the Writ abates, if the Judgment is reverſed, becauſe this was not a good Plea, the Plaintiff ſhall be reſtored to his Original, and ſhall not be enforced to a new Original. 9 H. 6. 38. b. Br. Error, pl. 7. cites S. C.

2. So if an erroneous Judgment be given upon a Proceſs againſt the Demandant, and it is after reverſed for Error in the Proceſs, the Demandant ſhall be reſtored to his Original, and the Tenant ſhall anſwer to it. 21 Aſſ. Placito 17. If Formedon abates by Judgment, and Writ of Error thereof brought in B. R. and Judgment reverſed, immediately upon this Writ the Tenant ſhall plead de Novo, and ſhall anſwer upon the Declaration there. Br. Error, pl. 132. cites 1 H. 7. 12. and ſays that it is affirmed accordingly in the next Caſe there, that the Writ is revived, and that the Tenant ſhall anſwer.

3. But if an inſufficient Plea in Bar be adjudged a good Plea, and the Judgment after reverſed for this Cauſe by Writ of Error the Demandant ſhall not be reſtored to the ſame Original. 9 H. * 9. 38. b. Br. Error, pl. 7. cites 9 H 6. 38. S. C. * This is miſprinted for (6)——In Debt the Defendant pleaded in Bar, to which the Plaintiff demurred. The Plea was adjudged good; But upon Error brought the Bar was adjudged inſufficient. The Court at firſt doubted what Judgment ſhould be given; but at laſt it was awarded that the Plaintiff ſhould recover his Debt and Damages. Le 33. pl. 41. Hill. 28 Eliz. B. R. Taylor v. Moore.

4. But in this Caſe he ſhall be reſtored to his Action. 9 H. 6. 38. b. Br. Error, pl. 7. cites S. C.

5. In an Aſſiſe by an Infant, if the Tenant pleads in Bar upon which the Aſſiſe is awarded at large to inquire of the Circumſtance, becauſe the Plaintiff is an Infant, and the Inqueſt find for the Plaintiff without inquiring of the Matters alleged in Bar, by which the Plaintiff hath Judgment, and it is reverſed in a Writ of Error; the Plaintiff at his Election ſhall be reſtored to his Original, and ſo attach the Tenant thereupon. 31 Aſſ. 22. adjudged. Br. Error, pl. 126. cites 31 Aſſ. pl. 18. 22. S. C.

6. And the Judgment ſhall be, that he ſhall have a new Original at his Election. 31 Aſſ. 22. adjudged. Br. Error, pl. 36. cites 31 Aſſ. pl. 18. 22. S. C.

7. If the Tenant in an Action makes Default and an Eſſoin is caſt for him, which does not lie, and notwithſtanding upon Challenge thereof by the Demandant, and Prayer by him of Seiſin of the Land upon the Default, Judgment is given againſt the Demandant for not counting that he ſhall take nothing by his Writ, if he brings a Writ of Error and it is reverſed for this Cauſe, the Judgment ſhall be, that he ſhall recover Seiſin of the Land upon the Default, becauſe the inferior Court ought to have given this Judgment. 21 E. 3. 46. 62. 21 Aſſ. Placito 17. adjudged. Fol. 774

8. *Such Judgment* ſhall be given in Writ of Error *as ought to have been given in the firſt Court* which err'd, quod nota. Br. Error pl. 64. cites 21 E. 3. 45.

(D. b)

See Tit. Judgment (U)

(D. b) *How Judgment* ſhall be given *upon* the *Reverſal of the firſt* Judgment.

Cro C 442. pl. 12. Slocomb's Caſe. S. P. and ſeems to be S. C. adjudg'd accordingly.— S. C. cited Vent. 28.

1. IN an Action upon the Caſe, if the Plaintiff being *Delamore*, declares, that whereas there was a Suit in Bath between the Defendant and S. and Iſſue thereupon was joined, and at the Trial thereof in Aula there the Plaintiff was ſworn as a Witneſs, and ſhewed his Oath, and after the Defendant having Communication with the Wife of S. of the ſaid Trial and Oath, ſaid theſe Words of the Plaintiff, Your Brother Delamore (innuendo the Plaintiff exiſtentem fratrem of the ſaid Wife) took a Falſe Oath againſt me in the Hall, (innuendo &c.) I would not take ſuch an Oath for all the World; After Not Guilty pleaded, and a Verdict for the Plaintiff, yet Judgment being there given againſt the Plaintiff quod nihil capiat &c. becauſe the Declaration is not good, becauſe it is not averred that the Plaintiff was Brother to the Wife of S. to whom the ſaid Words were ſpoken, but only in the Innuendo which is not ſufficent; Though this Judgment given there be reverſed in Banco Regis in a Writ of Error for the Inſufficiency in the Judgment, this being ideo Conceſſum eſt for conſideratum eſt, yet the Court de B. R. ought to give the ſame Judgment which ought to have been given at Bath, ſcilicet, quod querens nil capiat per Billam. Hill. 11 Car. B. R. between *Delamore and Heskins* adjudged. Intratur Trin. 10 Car. Rot. 900.

Cro C. 509. pl. 2. Ceely v. Hopkins. S. C the firſt Judgment was reverſed, and Plaintiff recovered.

2 In an Action upon the Caſe for Words, if Judgment be given againſt the Plaintiff, that the Words are not actionable, upon which the Plaintiff brings a Writ of Error, and thereupon the firſt Judgment is reverſed becauſe the Words are actionable; the Court after Reverſal of the firſt Judgment, ought to give Judgment that the Plaintiff ſhall recover, for this Court ought to give the ſame Judgment that the firſt Court might have done. Mich. 14 Car. B. R. between *Hekins and Chele* adjudged. Intratur Hil. 13 Car. Rot. 696.

Cro. C. 511, 512 pl 6. Mulcarry v. Eyres S. C. reſolv'd that there ſhould be a Writ directed to the Chief Juſtice in Ireland to reverſe the Judgment, and commanding him to award Execution —— S. C cited per Curiam. 2 Saund. 256, 257. Mich. 22 Car. 2 in Caſe of Green v. Cole. —— Ibid. 319 S. P. and cites Roll's Abr. 774.

3. In an Ejectione Firmæ, upon Not Guilty pleaded. Iſſue is join'd and a Special Verdict is found, and upon this Verdict Judgment given againſt the Plaintiff; and after the Plaintiff brings a Writ of Error, and in this the Judgment is reverſed, the Plaintiff ſhall have Judgment and recover his Term, his Declaration being good, and the Law being for him upon the Special Verdict; for the Court that reverſes the firſt Judgment ought to give the ſame Judgment which ought to have been given in the firſt Suit. Mich. 14 Car. B. R. between *Omulcarrie and Ayres*, adjudged in a Writ of Error upon a Judgment in Ireland. Intratur Mich. 13 Car. R. 332.

Cro. J. 206. Paſch 6 Jac. Faldoe v Rudge, S. C. adjudged,

4. F. brought *Treſpaſs* againſt R. in B. R. And *upon Demurrer* upon Plea of the Defendant it was *adjudged for the Defendant.* F. brought Error in Cam. Scacc. and there the *Judgment in B. R was reverſed, but no Writ of Inquiry of Damages could be awarded out of the Exchequer Chamber,*

Chamber by the Stat. 27 *Eliz. cap.* 8. And now F. *ſues a Writ of Inquiry out of B. R.* and well; For the firſt Judgment being reverſed is not a Bar. Noy 129. Falder v. Ridge.

and that the Plaintiff ſhould recover the Damages found; For though the Stat. 27 Eliz. mentions only the Returning the Record, yet it muſt be intended, that all ſhall be done that is neceſſary in order thereto.——Yelv. 74. 76. S. C. adjudged.

5. Where the Plaintiff *brings Error* and the Court reverſe, they give a *new Judgment*; otherwiſe where the Defendant brings Error. 1 Salk. 262. pl. 2. Mich. 4 W. & M. in B. R. Parker v. Harris.

6. In *Replevin, if the Judgment for the Plaintiff be reverſed*, ſuch *new Judgment* muſt be given as the Court ſhould have given before, which cannot be for the Avowant, unleſs upon the Merits of the Avowry, and if that be naught, it *muſt only be Nil cap. per billam.* Comb 398. Mich. 8 W. 3. B. R. Bret v. Bagill.

7. If in Error a Releaſe is pleaded and found for the Plaintiff, yet if there is no Error, the Court cannot reverſe the Judgment, and if the *Releaſe* were *found for the Defendant*, a Different Judgment muſt be given according as the Error aſſigned is ſufficient or not; For if *it is a good Error* the *Judgment muſt be, that the Plaintiff be barred* of his Writ of Error, and not that the Judgment be affirmed; if it be not a good Error, the Judgment be that the firſt Judgment be affirmed; Per Curiam. 2 Ld. Raym. Rep. 1005, 1006. Hill. 2 Ann. B. R. in Caſe of Carleton v. Mortagh.

(E. b) In what Caſes *the whole* Judgment ſhall *be reverſed, or only Part.*

See tit. Fines (L. b) and Judgment. (X)

1. IN a Formedon de uno Croſto de Meſſuagio &c. if the Demandant recovers, and in a Writ of Error it is adjudged that a Formedon does not lie of a Croft, the Judgment for the Reſidue ſhall be reverſed alſo, becauſe the Writ is not good, inaſmuch as there cannot be a good Judgment upon a bad Writ. Paſch. 12 Jac. B. R. adjudged. Fol. 775.

214 Ellis v. Wallis S. C. adjudged. ——S. C. cited All. Roll Rep. 2. pl. 2. Anon. S. C. adjudged. ——2 Bulſt. 74.

2. In an Action of Treſpaſs againſt three, if one dies pending the Writ, and yet Judgment is given againſt all three, in a Writ of Error upon this Judgment the whole Judgment ſhall be reverſed, becauſe it is intire, though the Writ by the Death abates but againſt one. Trin. 14 Car. B. R. between *Scudamore and Scriven.* Per Curiam, ſuch Judgment reverſed. Intratur Mich. 13 Car. Rot. 507. S. C. cited by Roll All. 74. and denied the 5 E. 4. to be Law. ——S. C. cited Arg. Ld. Raym. Rep 600.

3. If A. brings an Action upon the Caſe againſt B. for Words, and alſo for that he cauſed him to be indicted; upon which Indictment he was acquitted, and all this is found by Verdict, and Damages ſeverally given for them; but intire Coſts, and one intire Judgment given for all, ſcilicet, ideo Conſideratum eſt quod querens recuperet Damna & Cuſtagia in forma prædicta aſſeſſa &c. and in a Writ of Error it is adjudged the Action does not lie for the Words, the Judgment ſhall be reverſed only for the Words, and Damages for them Roll Rep. 24. pl. 2. S. C. adjudged. ——Cro. J. 343. pl. 9. S. C. adjudged. ——Hob. 6. pl. 12. Miles v. Jacob.

S. C. says the Judgment for the Indictment, together with the Damages, was affirmed alſo for all the Coſts, becauſe there was juſt Cauſe of Suit, which warranted the Coſts, though Part of the ſuit was without Cauſe.——All. 75. is a Nota, that Hoddeſdon Prothonoſary told the Reporter, that the Caſe of Miles v. Jacob in Hobart was not Law.——

* This Caſe denied, and a Rule laid down, that where the Judgment is Part by the Common Law, and Part by the Statute, it may be reverſed in Part; For that which is a Judgment at Common Law will remain a Judgment, and be compleat without the other. 1 Salk. 24. Cutting v. Williams.——11 Mod 25. pl. 2. S. C. and the Court denied the Authority of Miles v. Jacob in Hobart 6 For a Judgment intire cannot be reverſed in Part.——2 Ld. Raym. Rep. 825. in Caſe of Williams v. Cutting, and Holt Ch. J. ſaid, that the Caſe of Jacob and Miles in Hob. and Mo. 728. Reymer v. Grimſton were not ſupported by any ſubſequent Authority.

them, and ſhall ſtand for the Reſidue, and the Coſts ſhall ſtand intirely. Paſch. 12 Jac. By Reports between * *Jacob and Mills*, in Camera Scaccarii adjudged. Same Caſe Hobart's Rep. 8.

4. If A. brings an Action upon the Caſe againſt B. upon two Promiſes, and declares that he ſold certain Tallow to the Defendant, and upon this the Defendant aſſumed to pay ſo much as it was worth, and that he alſo at another Day ſold other Tallow, and the Defendant made ſuch Promiſe for it, if the Defendant pleads, that after the firſt Aſſumpſit, the Defendant ſatisfied the Plaintiff for the ſaid firſt Tallow ſold to him, upon which Iſſue is taken; and as to the other Promiſe, the Defendant pleads non Aſſumpſit, upon which they are at Iſſue alſo, and the Jury find as to both Iſſues, that the Defendant aſſumed and promiſed Modo & forma prout' &c. and aſſeſs ſeveral Damages, and thereupon Judgment is given for the Whole for the Plaintiff; In this Caſe, though there were ſeveral Damages tared, and the Plaintiff might have relinquiſhed his Damages for the firſt, which was not well found, and took Judgment for the ſecond which was well found; yet when one Judgment is given for both, the Judgment is erroneous. Paſch. 8 Car. B. R. between *Cretall and Murfield*, adjudged in a Writ of Error upon a Judgment in Canterbury. Intratur Hill. 6 Car. B. R. Rot. 1128.

F. N. B. 98 (P) S. P. and the Engliſh Editions cite 21 E. 3. 20 5 E. 4. 6. 17 E. 3. 31. Diſceit, 37. and Ibid. in the new Notes there (a) cites 7 H. 4. 44.——S. P. Arg. Cro. E. 469. (bis).——S. P. per Curiam, Obiter. Jo. 374 pl. 11. Mich. 11 Car. B. R.

5. If a Fine be levied of Land, of which Part is Guildable, and Part is ancient Demeſne, and as to that which is antient Demeſne, the Fine is reverſed by Writ of Diſceit, yet the Fine ſhall ſtand for the Reſidue; for a Mark ſhall be made on the Fine, in the Nature of a Cancelling of that which is antient Demeſne only. 17 H. 7. Kelloway 43.

S. C. cited by Roll. All. 74. Trin. 24 Car. B. R.——S. C. cited by Roll J. Sty. 125. * Fol. 776.

6. In an Action of Debt upon a Bill, and upon a Contract upon an Emiſſet, if the Defendant pleads non eſt Factum as to the Bill, and nil debet as to the Contract, and both are found by Verdict againſt the Defendant, and Judgment againſt the Defendant quod capiatur for denying his Deed; and it is not alſo quod ſit in Miſericordia as to the Contract, as it ought to be, and intire Damages given; and a Writ of Error is brought for this, the whole Judgment ſhall be reverſed, ſcilicet, as well the Judgment upon the Bill, as for the Contract. * Trin. 11 Car. B. R. between *Eltonhead and Deereman* reſolved, and a like Judgment given in the Marſhalſea reverſed accordingly. Intratur Hill. 10 Rot. 876.

Sty. 290. Trin. 1651. S. P. cited by Roll Ch. J. to have been adjudged accordingly.——S. C. cited by Roll,

7. In a Writ of Dower if the Plaintiff recovers by Default, and upon this a Writ is awarded to the Sheriff or Bailiff, where the Recovery is to deliver to the Plaintiff tertiam partem per Metas, and to enquire of the Value of the Year, and how much Time is paſt after the firſt Demand of Dower, and what Damages the hath ſuſtained; and upon this the Sheriff or Bailiff returns, that he had deliver'd the third Part of the Lands, and the Value found by the Jury to 30l. per

per Ann. and that two Years are paſt after the firſt Demand, and Damages 50 l. **and thereupon** Judgment is given accordingly, to hold in Severalty the ſaid third Part, and to recover the ſaid Damages. **In this Caſe, though the Judgment is not good as to the Damages, maſmuch as it is** not averred that the Husband of the Plaintiff died ſeiled, **(as the Uſe is)** nor **is it** ſo found **by the Jury**, nor **was it ſo** commanded by the Writ to be inquired, **by which the Judgment as to this is erroneous, yet it ſhall be reverſed only as to this, and ſhall ſtand as to the Recovery of the third Part of the Land. Trin. 13 Car. B. R. between** *Tie and Adkins*, **adjudged per Curiam in a Writ of Error, upon ſuch a Judgment given in** *Ipſwich*. **Intratur Hill. 12 Car. B. R. Rot.** 759.

All. 75. as adjudged. — See (B. a) pl. 1. — and See (M.c) pl. 9 S.C.

8. **Co. 5.** *Specot's Caſe*, 58. **b. 59. adjudged** in a Quare Impedit, the Judgment to have a Writ to the Biſhop, **being the Judgment at the Common Law,** ſhall not be reverſed in a Writ of Error, though the Judgment **given** by the Statute **of W. 2.** for the Damages be **erroneous and** reverſed.

9. **In a Writ of Error upon a Judgment** in Treſpaſs **againſt** ſeveral, **if the** Judgment **be** erroneous becauſe one of the Defendants was within Age, and appeared by Attorney, **the Judgment ſhall be reverſed in toto againſt all. Paſch. 9 Jac. B. R. Rot.** 302. **between** * *Bird and Bird*. **Contra** *Orms and his Wife* **in Treſpaſs Quare clauſum fregit & herbam conſumpſit.**

* Cro. 289. pl. 6. S. C. it was mov'd for the Plaintiffs in Error, that the Judgment being intire for Damages againſt both, it ſhall not be reverſed for one only, but for both, and for this was vouched, that in Ejectment in Cheſter this very Term Error was brought by two for the Nonage of one, and Rule was given for Reverſal thereof, but the Court ſaid, they did not remember any ſuch Rule given, and that they would well adviſe thereof, and cited 20 E. 4. 7. 28 H. 6. 9. 19 Aſſ. 8. ——— S. C. cited and S. P. adjudged, All. 74, 75. Trin. 24 Car. B. R. in Caſe of Oates v. Aylett. ——— Sty. 121. Aylet v. Oates, S. C. adjornatur. Ibid. 125. S. C. & S. P. adjudged. ——— S. C. cited Ld. Raym. Rep. 600. ——— S. P. by Roll Ch. J. Sty. 406. Hill. 1654. Anon. ——— Error of a Judgment in Ejectione Firmæ, becauſe there were two Defendants, and one of them was within Age and appeared by Attorney where it ought to have been by Guardian, and Damages and Coſts were given intire; Adjudged Error, and the Judgment reverſed againſt both. Cro. J. 303. pl. 5 Trin. 10 Jac. B. R. King v. Marborough. ——— S. C. cited Ld. Raym. Rep. 600.

10. **If an** Action **be brought** againſt A. as a Feme Sole, where ſhe is Covert Baron, and againſt B. and C. **and they** all plead to Iſſue, and A. as a Feme Sole, **and after Judgment is given againſt them all accordingly, in this Caſe** the Baron of A. with A. B. and C. may join in Error, and aſſign for Error the Coverture of A. **and thereupon the Judgment ſhall be reverſed for all, becauſe it is intire. Trin. 1651. between** *Hayward and Williams* **adjudged. Intratur H. 1649. Rot. 824.**

Sty. 254. S. C. but that is of a Writ of Error brought by the Baron alone; Adjornatur. —— Ibid. 280. S. C. but it is there ſtated as of a Fine brought by the Baron and Feme, without joining with the others, and S. P. does not appear.

11. **In an Action of** Account, **if** Judgment **be** given quod computet, **and after** Auditors are aſſigned, **and upon his Account** Judgment is given againſt him **alſo,** and Damages and Coſts, **and after a Writ of Error is brought upon both Judgments, and thereupon the** laſt Judgment is only erroneous. **In this Caſe the laſt Judgment only ſhall be reverſed, and not the firſt Judgment, but this ſhall ſtand in Force, for** theſe are two diſtinct Judgments **and perfect, for the firſt Judgment is** *ideo Conſideratum eſt quod computet & Defendens in Miſericordia. Hill. 43 El. B. R. between Williams and White* **in a Writ of Error upon a Judgment in Briſtol, adjudged.**

Cro. E. 806. pl. 7. S. C. and becauſe there was not Error found in the firſt Judgment it was affirm'd. — Win. 5. White v. Williams, but S. P. does not fully appear. ——— S. C. cited by Roll Ch. J. Sty. 290. Trin. 1651.

12. If

12. If a Judgment be given againſt Executors in an Action of Debt, and after a Scire Facias a Judgment is given againſt them to have Execution of their proper Goods, and a Writ of Error is brought upon both Judgments, in this Caſe, if the firſt Judgment be good, and the laſt erroneous, the laſt Judgment only ſhall be reverſed, and the firſt Judgment ſhall ſtand. Co. 5. *Pettifer* 32. adjudged as it ſeems; But it is not alleged that the Writ of Error was upon both Judgments, but only in redditione Executionis.

S. C cited 2 And. 129. —— Noy 117 cites 14 E. 3 Scire Facias 122 as cited by Crooke in in the Argument of Boſwell's Caſe.

13. The Counteſs of Kent was *endowed in Chancery by the King*, and *among other Things there was aſſigned a Rent reſerved by Patent to the King and his Succeſſors upon Grant of a Fair to the Prior of B and his Succeſſors*; upon which Aſſignment *ſhe brought a Sci. Fa.* in the Exchequer, and there had *Judgment to recover the Rent, and the Arrearages and Damages*; Whereupon Error was brought in Cam Scacc. and *the Judgment reverſed as to the Rent and Damages*; becauſe ſhe could not have Judgment of the Rent being the King's Inheritance, nor of the Damages in the Sci. Fa. but as to the Arrearages the Judgment was affirmed, becauſe it was her Right to have it, and as to this ſhe was privileged to ſue in the Exchequer. Mo. 565. pl. 11. cites 14 E. 3. The Counteſs of Kent's Caſe.

14. If *a Fine was good before the Proclamations*, and the *Proclamations were ill*, and erroneouſly made, this *ſhall not take away the Force of the Fine* which was good before the Proclamations; and adjudged that the *Proclamations ſhall be reverſed, and the Fine ſtand in Force.* Pl. C. 266. a. Mich. 4 & 5 Eliz. B. R. Fyſhe v. Brocket.

Cro. E. 560. pl. 17 S. C. & S. P. and Judgment reverſed.

15. In Caſe, Error was aſſigned that the *Damages* were *aſſeſſed intirely for divers Things which would ſupport an Action, ſome of them being uncertainly and inſufficiently alleged*; for he preſcribed to have Omnia bona Foriſfacta, which could not be without Charter, alſo to have de Fugatione quicquid accidere poſſit, which was alſo uncertain, ſo that when Damages for thoſe Things intirely are aſſeſſed with other Things, and Judgment given, the Judgment is erroneous; and for that Cauſe the Judgment was reverſed. Mo. 706, 707. pl. 987. Paſch. 33 Eliz. B. R. and 36 Eliz. B. R. Berkley v. Pembroke.

16. A Writ of Error is Quaſi a Commiſſion, and *may reverſe for Part and affirm for Part*, and is not abateable, becauſe the Fine is good for Part. Mo. 366. pl. 499. Paſch. 23. and Mich. 36 & 37 Eliz. in Caſe of Barton v. Lever.

Eight Defendants in Treſpaſs appear by Attorney, whereof two are Infants and Judgment was given for the Plaintiff; but on Error brought the Judgment was reverſed againſt all. Lev 294 Trin 22 Car. 2. B. R. Grell v. Richards.

17. Error was aſſigned of a Judgment in C. B that the *Action* was brought *againſt three Perſons, one of whom was within Age*, and that they *all appeared by Attorney*, whereas he within Age ſhould have appeared by Guardian, and ſo the Judgment being Joint was erroneous againſt all; And Roll Ch. J. was of the ſame Opinion, and ſo it was reverſed. Sty. 430. Hill. 1653. Bocking v. Symons.

2 Keb 506. pl. 80. Keeling Ch. J. ſaid, that the Judgment is ſufficient, but Twiſden inclined e contra.—Ibid. 535. pl. 52. S. C Judgment reverſed Niſi &c.

18. Error to reverſe a *Judgment* given *in an inferior Court* where an Aſſumpſit was brought, and the *Plaintiff declared upon three ſeveral Promiſes*, and the *Jury found two for him, and the other Non Aſſumpſit*; and *Judgment was given for the two*, that he ſhould recover, *but no Judgment for the third*, that he ſhould be amerced Pro falſo clamore, or that the Defendant Eat inde ſine Die; And for this Cauſe Error was aſſigned. The Court ſaid, the Judgment was altogether Imperfect; and ſo were inclined to reverſe it, but gave further Time Vent. 39, 40. Trin. 21 Car. 2. Gregory v. Eades.

(F. b) *What* Judgment ſhall be *reverſed by Conſequence*, by the Reverſal of others.

Fol. 777.

1. AFTER a Recovery in Rediſſeiſin, if the firſt Judgment be reverſed, **the Judgment upon the Rediſſeiſin ſhall be reverſed alſo.** * 43 E. 3. 3. Co. 8. *Doctor Drury* 143. 11 H. 6. 17. cites 4 E. 4. 29. * Br. Error, pl. 23. cites S. C. —— Br. Error, pl. 157.

2. So **if a Man recovers** in Debt upon a Judgment, **if the firſt Judgment be reverſed, the ſecond Judgment ſhall alſo.** * 43 E. 3. 3. 11 H. 6. 17. b. * Br. Error, pl. 23. cites S. C. —— Per Doderidge the Reverſal of the firſt does not reverſe the ſecond, but defeats it ſo, that the Plaintiff ſhall not have any Fruit by it, but it ought to be intended upon both in the ſame Court; But if in divers Courts, the ſecond Judgment ought to be avoided by Plea, or Audita Querela. Palm. 187, 188 Trin. 19 Jac. B. R. in Caſe of Apſley v. Geve —— And by Chamberlain J. if one has Judgment in C. B. for Debt, and brings Debt upon this Judgment, (as he may in B. R. and has Judgment here; yet if the firſt Judgment be revers'd, it has been adjudg'd, that the ſecond Judgment ſhall be reverſed alſo. Palm. 303. Mich. 20 Jac. B. R. in Caſe of Apſley v. Geve, in an Audita Querela brought by the Plaintiff. —— Sid. 253. pl. 2 Paſch. 17 Car. 2. in Cam. Scacc. it was doubted that it could not be remedied in Cam Scacc. but that the Party ought to move in B. R for an Audita Querela, and ſo to be reliev'd. But they took Time to adviſe whether the Judgment in B. R. be not by the firſt Reverſal Ipſo Facto void.

3. So **by reverſal of the original Judgment, the** Outlawry **depending thereupon ſhall alſo be reverſed.** * 11 H. 4. 6. b. † 7 H. 6. 44. * Fitzh. Error, pl. 64. cites S. C. —— † Fitzh. Error, pl. 18 cites S. C. —— Br. Error, pl. 70 cites S. C.

4. But by **the** Reverſal of the Outlawry **the** original Judgment ſhall not be reverſed. 7 H. 6. 44 b. Br. Error, pl. 70. cites S. C.

5. **If a Man** recovers in an Annuity and in a Scire Facias thereupon **afterwards, and** the Judgment upon the Scire Facias is after affirmed in a Writ of Error, **yet if the firſt Judgment of the Annuity be reverſed, the other ſhall be alſo.** 11 H. 4. 48. Br. Error, pl. 46. cites 11 H. 4. 4. 47 S. C. —— Fitzh. Error, pl. 63. cites 11 H. 4. [and the Caſe is continued at fol. 47 b. 48 a. pl 22] —— Jenk. 73, 74 pl. 40. S. C. For the principal Judgment in the Annuity being reverſed, all that depends upon it falls to the Ground. Sublato Fundamento cadit Opus. The Judges in B. R. by reverſing this Judgment ex Obliquo reverſe the ſaid Judgment in C. B upon the Scire Facias, and alſo their own Judgment in Error upon the ſaid Scire Facias. —— S. P. Br. Error, pl. 170. cites 13 E. 4. 4.

6. **If a Man** recovers upon an Original, and **hath another Judgment** in a Scire Facias, **if the firſt Judgment be reverſed, the other ſhall be alſo reverſed.** Co. 8. *Doctor Drury*, 143.

7. **If a Man** recovers in a Quare Impedit, and hath a Writ to the Biſhop in a Quare non Admiſit, **and after** the Judgment in the Quare Impedit is reverſed, **the Judgment in the Quare non Admiſit ſhall be alſo reverſed by this, though this was for the Contempt to the King.** 26 E. 3. 75. b.

8. **If a** Judgment **be given** in an inferior Court againſt A. and **after** another Judgment againſt B. his Pledge there, **and** B. **upon this** is taken in Execution **upon the Judgment**; and after the principal Judgment is reverſed **in a Writ of Error a ſpecial Writ may be awarded** Br. Error, pl. 134. cites S. C.

awarded to deliver him, because it appears by the Record that he was Pledge. 1 H. 7. 12. b. adjudged.

9. If the Demandant recovers against the Tenant, and the Tenant against the Vouchee, if the Heir of the Vouchee reverses the Judgment of the Value, because the Vouchee was dead at the Judgment rendered, this shall reverse the Judgment against the Tenant also. Quære, 18 E. 3. 38.

10. If the Principal be outlawed of Felony, and the Accessory attainted and executed; and after the Principal reverses the Outlawry, and is indicted and found not guilty of the Felony; by this Reversal and Acquittal the Attainder against the Accessory is annihilated, for his Heir may have a Mortdancester it seems, because he hath no Remedy by Writ of Error or otherwise to reverse it, for this depends upon the Principal. Tempore, E. 1. Mortdancester 46. Co. 9. *Lord Sanchar.* 119. b.

11. A Man may defeat two Records by one and the same Writ of Error, for if a Man *recovers in Assise, and after* recovers *by Rediſſeiſin*, and brings Writ of Error of the Judgment in the Assise, and reverses it, by this the other Recovery is reversed also. Br. Error, pl. 23. cites 43 E. 3. 3. per Finch.

12 *So* where a Man recovers *Damages in Waste or other Action*, and *brings Debt of the Damages recovered*, and recovers, *and after the first Judgment is reversed by Error*, there by this the last Judgment is reversed also, though it be upon two Originals; for the one depends upon the other. Ibid. Per Finch quod non negatur.

Br Attaint, pl. 125. cites S. C. —— Br. Voucher, pl 48. cites S C.

13. B. brought Writ of *Error against E. who vouched to Warranty T.* and the *Voucher counter-pleaded*, and *passed for the Demandant*, and he recovered, and the *Vouchee brought Writ of Error, and had Scire Facias returnable now, at which Day the Tenant brought another Writ of Error of the same Judgment*, and assigned Error, and prayed Scire Facias and had it; notwithstanding that the Vouchee had brought Writ of Error, and this for Doubt that the Vouchee was faintly prosecuted, and yet by the Reversal by the one, the other shall be restored; and it was held there that the Vouchee shall assign Error between the Demandant and the Tenant, and so may the second Vouchee do. Br. Error, pl. 39. cites 8 H. 4. 3.

14. *And* that if he in *Reversion reverses Judgment by Error*, the Tenant for Life shall be restored. Ibid.

15. *And if Tenant by Resceit* reverses Judgment by Error, the Tenant for Life shall be restored. Ibid.

16. If *Error* be *in the Original*, then *as well the Process* of Outlawry *as the Original* shall be reversed. Br. Error, pl. 47. cites 11 H. 4. 6. Per Gascoine and Huls.

S. P. Br. Error, pl. 193. cites 6 E. 4. 9 10. *And* that by the Reversal *of Assise* the *Rediſſeiſin and the Execution upon it is also reversed.*

17. If the first Judgment be reversed the *Rxecution depending upon it* is defeated eo Facto. Br. Error, pl. 70. cites 7 H. 6. 44. Per Hals. Nestburie and Paston.

18. If the Outlawry be reversed by Writ of Error, yet *the first Judgment remains for the Party*; Per Cheiney, which Brooke says seems to be Law. Br. Error, pl. 70. cites 7 H. 6. 44.

19. In Audita Querela it was agreed, that by *reversing of the first Judgment* by Error, *the Execution* upon it is also reversed. Br. Error, pl. 193. cites 6 E. 4. 9. 10.

20. *And* by the Reversal *of Assise* the *Rediſſeiſin and the Execution upon it is also reversed.* Ibid.

21. In Deceit it was admitted clearly, That in Writ of Error the Plaintiff shall recover *the Land and the Issues and Profits incurred in the Mesne*

Meſne Time, quod nota, and it was doubted if ſo in Deceit. Br. Error, pl. 174. cites 18 E. 4. 11.

22. Where *Error* is *in the Judgment in* Writ of Debt, and *another Error* is *in the Outlawry upon Capias ad Satisfaciendum* and exigent upon it, *a Writ of Error* ſhall not ſerve to reverſe both Judgments; Per Huſſey; But Fairfax contra; and that 11 H. 4. 4. *in Rediſſeiſin* a Man was *outlawed for the Damages*, and both Judgments were reverſed by one and the ſame Writ of Error, and the principal Caſe was that the Writ of Error was brought *de Redditione Judicii in* Writ of *Delt, and in Promulgation of the Outlawry in it*; and ſo ſee that Writ of Error lies as well of Error in the Outlawry as in the Execution upon it; For this Outlawry was upon the Capias ad Satisfaciendum, and exigent for the Execution after the Judgment. Br. Error, pl. 150. cites 8 H. 7. 9. 10.

23. A *Quod ei deforceat* is brought in Wales, and proſecuted in the Nature of a Writ of Right, according to the Courſe there; by Force of the Statute of 12 E. 1. The *Tenant joins the Miſe upon the mere Right*, and afterwards *makes Default*; and *without a Petit Cape* awarded, *Judgment final is given againſt him*; the *Tenant brings a Writ of Right*, againſt the *Demandant*, who had Judgment ut ſupra and Execution; he *pleads the firſt Judgment* in Bar; And *Judgment is given that it is a good Bar*; the *Plaintiff*, who was the Tenant *againſt whom the firſt Judgment was given, brings a Writ of Error upon this laſt Judgment*; and *aſſigns for Error, that a Petit Cape was not awarded before the firſt Judgment*; non allocatur; the firſt *Judgment was affirmed*; For although it be erroneous, yet it is in Force until it be reverſed; and this Writ of Error is not to reverſe the firſt Judgment, but the ſecond Judgment; the ſecond Judgment was affirmed in Error. A Writ of Error ſhould have been brought to reverſe the firſt Judgment, and if had been reverſed, yet it had not reverſed the ſecond Judgment; for the *ſecond Judgment was collateral and independant*, and it is executed. Jenk. 259. pl. 56. cites 5 Rep. 85. b. 38 Eliz. Penryn's Caſe.

24. A *Plaintiff in Debt recovers and has Execution*, and the *Sheriff ſuffers the Defendant to eſcape*. The *Plaintiff recovers againſt the Sheriff*, and afterwards the *Judgment for the Original Debt is reverſed*, yet the Judgment againſt the Sheriff is not reverſed. Jenk. 259. pl. 56.

25. *So where a Defendant is taken in Execution on a Judgment* upon a Recognizance, and the Sheriff ſuffers him to eſcape. Jenk. 259. pl. 56.

26. *But where the latter Judgment depends upon the former*, as Rediſſeiſin upon an Aſſiſe or a Sci. Fac. to execute a Judgment in Debt, it is otherwiſe. Jenk. 259. pl. 56.

27. A *Judgment* was given *in Dower for the Demandant*, and *another Judgment that ſhe ſhall recover her Damages*, and this *ſecond Judgment* for the Damages *was reverſed* by a Writ of Error, *becauſe ſhe did not aver that her Husband died ſeiſed*, in which Caſe ſhe is to have no Damages; yet the firſt Judgment for the Dower ſtood unreverſed. Sty. 290. Trin. 1651. Spittlehouſe v. Farmery.

(G. b) In what Cases *Collateral Things* shall be *reversed by Reversal of others.*

Things *executed.*

Br. Error, pl. 66. cites S. C. —— (*) Fol. 778. S. C. cited 5 Rep. 90. b. in Hoe's Case per Curiam. —— 8 Rep. 142. b. 143. b. cites S. C.

1. IF the Conusee of a Statute recovers in Detinue **by erroneous Judgment** against the Garnishee, and sues Execution; if the Garnishee **in a Writ of Error** reverses the Judgment **given in the Detinue, yet the** Execution is not reversed (*) **by this, because it is a Collateral Thing executed.** 7 H. 6. 42. **Co.** 8. *Doctor Drury* 142. b.

S. P. 3 Mod 325. Mich. 2 W. & M. B. R. per Curiam, Gold v. Strode.

2. A. in Execution for Debt on erroneous Judgment escapes, *Debt is brought against the Sheriff on* the *Escape*, and *Plaintiff has Judgment and Execution*; afterwards the *first Judgment is reversed*, yet the *Judgment against the Sheriff*, upon this Collateral Matter being executed, *stands good.* 8 Rep. 142. b. Pasch. 8 Jac. in Drury's Case cites 7 H. 6. 42. a.

3. If *a Man is tried Frank in Trespass to the Damage of* 10 *l.* and the *Defendant brings a Writ of Error* or Attaint, and *pending this the Plaintiff brings Debt on the Recovery of the* 10 *l. and recovers, no Protestation being taken of the Villeinage*, the *first Judgment is reversed* by Error or Attaint, the Defendant shall not be estopped of the Villeinage by the Recovery in the Action of Debt; For *by the Reversal of the first Action all that depended upon it is reversed.* Br. Estoppel, pl. 197. cites 18 E. 4. 6

4. If one to whom another is indebted be *outlawed*, and the *Debtor pays the Money to the Queen*, and afterwards the *Outlawry is reversed*; now the Creditor shall recover the Debt against him. 5 Rep. 90. b. cites 7 E. 4. 2.

5. So if the *Goods of an outlawed Person are sold by the Sheriff* upon a Capias Utlagatum &c. and after the *Outlawry is reversed by Writ of Error* the Defendant shall have Restitution of his Goods. *But* if the Sheriff by Force of a *Fieri Fac.* sells Goods, and after the Judgment is reversed in Writ of Error, the Defendant shall not have Restitution of his Goods, but the Value of them that they were sold for. And there are two *Reasons of this Diversity*, 1st, that if the Sale of the Sheriff by Force of a Fi. Fa. shall be avoided by subsequent Reversal of the Judgment, no one will buy, and consequently no Execution will be made. 2dly, In the Case of Fi. Fa. the Sheriff is compellable to levy the Debt of the Goods of the Defendant, and therefore there is great Reason that it shall stand; But in the Case of Cap. Utlag. the Sheriff or Escheator is not compellable to sell them, but may keep them to the King's Use. 5 Rep. 90. b. Trin. 42 Eliz. in Scacc. in Hoe's Case.

6. *Recompence in Value upon Voucher once lawfully executed* shall not be divested, though the *Title of the Demandant to the Land*, which he recovers, be *afterwards disaffirmed and evicted.* 5 Rep. 90. b. 91. a. cites 3 E. 3. 51.

(H. b) Judgment. Reſtitution.

See (R) pl. 2. in the Notes.

1. IN an Aſſiſe if the Tenant loſes by Verdict, he ſhall be reſtored to the Lands, if it be reverſed in a Writ of Error. 8 H. 6. 2.

2. So if the Tenant in an Aſſiſe loſes by Verdict, he ſhall be reſtored to the Meſne Iſſues, if it be reverſed in a Writ of Error. 8 H. 6 2.

3. So if the Tenant loſes in a Writ of Entry ſur Diſſeiſin, and after it is reverſed for Error, he ſhall be reſtored to the mean Iſſues. Contra 1 E. 3. 22 but Quære.

4. Where an *erroneous Recovery* is had *againſt Tenant for Life*, he in Reverſion and the Tenant ſhall have ſeveral Writs of Error, and Judgment for one of them, and Execution ſhall reveſt their Eſtates. Jenk. 69. pl. 31. cites 9 R. 2. Error.

5. By Reverſal of the Judgment *by the Vouchee*, him in *Reverſion*, *Tenant by Reſceipt* &c. *by Error, or Attaint*, the *Tertenant ſhall be reſtored*. Br. Reſtitution, pl. 6. cites 8 H 4 3.

Br. Error, pl. 39. cites S C.

6. Upon a *Fi. Fa.* the *Sheriff ſold a Term* for Years, by Virtue of the Writ Venditioni Exponas, and paid the Money in Court to the Plaintiff; afterwards the Judgment was reverſed for Error. The Queſtion was, if the Term ſhould be reſtored or only the Money? Manwood, Dyer, and Wray, thought the Defendant ſhould not be reſtored to the Term, (it being lawfully Sold in Default of the Party) but that he ſhould have only the Money for which it was ſold. D. 363. pl. 24. Trin. 20 Eliz. Anon.

S. P. Reſolved accordingly 8 Rep. 96. b Trin 7. Jac. C. B. the third Reſolution in Matthew Maning's Caſe.—D 363. Marg. pl. 24. cites it as adjudged accordingly 26 Eliz. But if the Term be *extended upon an Elegit*, and Judgment reverſed for Error, the Termor ſhall be reſtored to the ſame Term and not to the Value of it. Paſch. 17 Jac. B. R. Bathurſt's Caſe.

7. If an erroneous Judgment be reverſed, *as to the mean Profits, it ſhall have relation until the Time of the firſt Judgment given*, for it is to favour Juſtice, and to advance the Right of him who hath Wrong by the erroneous Judgment; But if any *Stranger hath done a Treſpaſs upon the Land in the mean Time, he who recovereth, after the Reverſal, ſhall have an Action of Treſpaſs*, and if the Defendant pleads that there is no ſuch Record, the Plaintiff ſhall ſhew the ſpecial Matter, and ſhall maintain his Action, for as he is to anſwer the mean Profits to the Perſon who hath Judgment of Reſtitution, ſo the Law gives him a Remedy againſt all Treſpaſſes in the Interim. 13 Rep. 21. Hill. 27 Eliz. in Canc. Anon.

8. An *Attaint* was brought *in C. B of a Verdict in B. R. If Execution had been awarded in C. B. and the Verdict had been afterwards diſaffirmed*, the Court of C. B. might have awarded a Writ of Reſtitution, though if the Verdict had been affirmed they could not have awarded Execution, becauſe they had only Tenorem Recordi. Cro. Eliz. 371, 372. pl. 10. Hill. 37. Eliz. B. R. York v. Allen.

9. A Term of Years appriſed by a Jury upon an *Elegit* to an 100 l. and *delivered in Execution to the Plaintiff himſelf* at the ſame Value was denied per tot. Cur. to be reſtored, though the Surmiſe of the Sci. Fa. was that the Plaintiff had levied the 100 l. of the Profits of the Land demiſed; *But* if *at the Time of Appriſment* and *before the Delivery*, he had tendered the 100 l. en Pais, or *after in Court*, he ſhould have

A Term ſold to J. S. in truſt for the Plaintiff, was decreed to be re-conveyed, the

Term being alledged to be of much greater Value

Audita Querela. Mo. 813. pl. 1216. Hill. 11. Jac. C. B. Comyn v. Brandlyn.

N. Ch. R. 143. Gaſcoign v. Stuft.—Where the Sale was to the Party himſelf, Reſtitution was granted but otherwiſe in caſe of a *Stranger*. Yelv. 180. Goodier v. Ince cites Robotham's Caſe and Worrel's Caſe.

It is no more than a bare Delivery *in Specie*, and ſo ought to attend the Fate of the Execution, and if that be reverſed to be reſtored in Specie again. Yelv. 180. S. C.——The *Difference* is between this Sale and Delivery upon *Elegit to the Party himſelf*, and a *Sale to a Stranger upon a Fi. Fa.* For the Fi. Fa. gives Authority to the Sheriff to ſell, and bring the Money into Court, and ſo ſhall not be reſtored on Reverſal of the Execution, becauſe the Stranger comes to it duly by Act in Law. But the Sale and Delivery of the Leaſe to the Party himſelf upon an Elegit is no Sale by Force of the Writ delivered in Extent, which being reverſed the Party ſhall be reſtored to the Term itſelf. Cro. J. 246. Goodyer v Ince. S. C.

10. Debt was brought by A. *as Adminiſtrator where he was Executor*, and 82 l. recovered; if the *Money is levied* A. may well retain it; Per Doderidge. Cro. J. 394. pl. 6. Hill. 13. Jac. B. R. Slingsby v. Lambert.

Palm. 324. S. C. the Defendant ought not to be anſwered for Profits from the Time of the firſt Judgment, becauſe no Execution was had againſt him till a Year after,

11. A Judgment was reverſed, and a *Writ of Reſtitution awarded to enquire what were the Profits of the Land a tempore Judicii Prædicti*, which was wrong, for *it ought to be what Profits* &c. *the Plaintiff had taken Colore Judicii*, and thereupon a new Writ of Reſtitution was awarded, and upon the Return thereof an Exception was taken to the Writ, that it ought to be what Profits he had taken after the Execution ſued, but adjudged that the Writ was good, becauſe upon the Reverſal of the Judgment the *Defendant is to be reſtored to all that he had loſt*, and what the Plaintiff in the Judgment had taken by Colour thereof after the Judgment. Cro. J. 698. pl. 5. Mich. 22 Jac. B. R. Sympſon v. Juxon.

but he ought to have a ſpecial Sci. Fac. in ſuch Caſe, and the former Writ was quaſhed, and a ſpecial Writ awarded.——If Writ of Reſtitution upon erroneous Judgment reverſed be of Profits taken 4 Auguſt, (the Day when the firſt Judgment was given) it is ill, but it ought to be *Virtute*, or *Occaſione Judicii*; For if he received the Profits by any other way, thoſe ſhall not be reſtored. 2 Roll Rep. 475. Mich. 22 Jac. B. R. Simmonds's Caſe, and ſeems to be S. C.

12. *Reſtitution is of Duty*, But *Re-Reſtitution is of Grace*; Per Twiſden and Kelyng Juſtices. Raym. 85. Mich. 15 Car. B. R. The King v. Burgeſs, on Judgment of Forcible Entry.

13. In Caſe *Judgment* be *reverſed* on a Writ of *Error*, a Sci. Fa. lies on Suggeſtion of a Payment of the *Money condemned* by the firſt Judgment, and upon 2 Nihils returned then Reſtitution lies, and a Writ of Execution, though the Party Plaintiff in the firſt Action knows nothing of the Matter, and the Caſe of **Weeks v. Long** in the Court was agreed to be ſo. 2 Show. 210. pl. 217. Trin 34 Car. 2. B. R. Pigg. v. Gardiner.

Show 261. S. C. & S. P. by Holt Ch. J. and that if it did it muſt be by Scire Facias, and that ſo it was in 1 Cro. 328.

14. Writ of Reſtitution lies not againſt any that are *not Parties* to the Record. 2 Salk. 587. pl. 1. Trin. 3 W. & M. in B. R. The King and Queen v. Leaver.

15. Writ of Reſtitution will not lie againſt *Diſſeiſor* or *Feoffee of Recoveror in Ejectment* after Reverſal of the Judgment, becauſe they are *Strangers* to the Record; Per Holt Ch. J. Pemberton aſſenting. 2 Salk. 587. pl. 1. Trin. 3 W. & M. in B. R. The King and Queen v. Leaver.

16. If a *Feme* recovers Damages and then Marries, and the *Judgment is reverſed*, Reſtitution lies againſt her and her Husband; Per Holt Ch. J. 2. Salk. 587. pl. 1. Trin. 3 W. & M. in B. R. The King and Queen v. Leaver.

17. By

17. By Virtue of a *Fi. Fa.* on a Judgment in Debt *Sheriff ſold Cattle*, it was moved on Reverſal of the Judgment to bring the Money for which the Cattle were ſold into Court, for the Benefit of the Defendant who was then a Priſoner, but it was diſallowed; Then it was moved to pay Defendant as much Money as the Cattle were ſold for, but that was denied likewiſe becauſe they might be *ſold for leſs than the real Value*, and if the Defendant brings *Treſpaſs* he will *recover the full Value*, and therefore the Plaintiff muſt agree with him to prevent ſuch Action. 4 Mod. 161. Hill. 4 & 5 W. & M. in B. R. Weſtern v. Creſwick.

(I. b) *To what* Thing he ſhall be *reſtored* after Reverſal.

To a *Collateral Thing executed.*

1. IF a Man recovers Damages, and hath Execution by Fieri Facias, and upon the Fieri Facias the Sheriff ſells to a Stranger a Term for Years of Land of the Party, and after the Judgment is reverſed, he ſhall be reſtored only to the Money for which the Term was ſold, and not to the Term itſelf, becauſe the Sheriff had ſold it by the Command of the Writ of Fieri Facias. Co. 8. *Doctor Drury.* 143. *Matthew Manning* 19. b. Co. 5. *Hoe* 90. b. Dyer 20 El. 363. 24.

There is a *Diverſity between mean Acts done in execution of Juſtice, which are compulſary and voluntary Acts*, and therefore if an erroneous Judgment is given in Debt, and the Sheriff by Force of a Fieri Facias ſells a Term of the Defendant's, and the Judgment is afterwards reverſed by Writ of Error the Party ſhall never be reſtored to the Term, but to the Money for which they were ſold; But where a Man is outlawed, and a Capias is directed to the Sheriff to take the Body & Bona, & Catalla quæ per inquiſitionem venerint in manus noſtras; if in ſuch Caſe the Sheriff ſells the Goods, and the Outlawry is afterwards reverſed, the Party ſhall be reſtored to his Goods, becauſe the Sheriff was not commanded by the Writ to ſell them; Per Curiam. 8 Rep. 143. a. Paſch. 8 Jac. in Dr. Drury's Caſe.——5 Rep. 90 b. Trin. 42 Eliz. in the Exchequer in Hoe's Caſe. S. P.———Goldsb 130. pl. 9. Gawdy Serjeant cited the Caſe of Hanmer v. Luddington, 20 Eliz in which Caſe he was of Counſel, and that S. P. was adjudg'd therein accordingly.———But if the Term be extended on Elegit, and Judgment reverſed for Error, the Term itſelf ſhall be reſtored. Dy. 363. Marg. pl. 24. cites Paſch. 17 Jac. B. R. Bathurſt's Caſe.

2. If the Goods of an outlawed Man are ſold by the Sheriff upon a Capias Utlegatum, and after the Outlawry is reverſed by Writ of Error, he ſhall be reſtored to the Goods themſelves; becauſe the Sheriff was not compellable to ſell theſe Goods, but only to keep them to the Uſe of the King. Co. 5. *Hoe's* Caſe 90. b. 2 Vern. 313. S. C. cited.

3. If a Man recovers Damages in a Writ of Covenant, as the particular Caſe was againſt B. and hath an Elegit of his Chattels, and of the Moiety of the Lands, and the Sheriff upon this Writ delivers a Leaſe for Years of Land, which B. had to the Value of 50 *l.* to him that recovered, per rationabile pretium & extentum, (as the Words were) to have as his own Term in full Satisfaction of 50 *l.* Part of the Sum recovered; and after B. reverſes the ſaid Judgment, he ſhall be reſtored to the ſame Term, and not to the Value; for though the Sheriff might have ſold the Term upon this Writ, yet here is no Sale to a Stranger, but a Delivery of the Term to the Party that recovered by way of Extent, without any Sale, and therefore the Owner ſhall be reſtored. Paſch. 16 Jac. B. R. between *Buckhurſt and Mayo*, adjudged per Curiam; for the Sheriff is not bound by this Writ to ſell the Land, as he is in a Fieri Facias;

Facias; Quære this Caſe, for this is a Sale, the whole Term being delivered to the Party according to the Value in Groſs, not yearly.

4 The Law would be the ſame, if Perſonal Goods were delivered to the Party per rationabile pretium & extentum, upon the Reverſal of the Judgment he ſhould be reſtored to the Goods themſelves, for the Cauſe aforeſaid. Paſch. 16 Jac. in the Caſe between *Buckhurſt and Mayo*, agreed per Cur.

5. If a Man recovers by erroneous Judgments, and *preſents to a Benefice, or enters into the Perquiſite of his Villein*, and after the Judgment is reverſed by Writ of Error, theſe being Collateral Things ſhall not be deveſted. 8 Rep. 142. b cites it as ſo held in 4 H. 7. 11.

6. If an *Advowſon comes to the King by Forfeiture upon an Outlawry*, and the *Church becoming void the King preſents*, and then the *Outlawry is reverſed for Error*, yet the King ſhall enjoy that Preſentment, becauſe there it came to the King as a Profit of the Advowſon; Per. Cur. Mo. 269. pl. 421. Mich 30 & 31 Eliz. Beverley v. Cornwall.

7. *But if* a Church be *void at the Time of the Outlawry*, and the Preſentation is thereby forfeited as a Chattel principally and diſtinct of itſelf, and then *the Outlawry is reverſed*; *the Party ſhall have Reſtitution of the Preſentation*; Per Cur. Mo. 269. pl. 421. in S. C.

8. M. the *Husband ſeiſed in Fee levied a Fine*, and *afterwards* 1 Mariæ *was outlawed of Treaſon*; the *Conuſee conveyed the Land to the Crown*, and afterwards the Daughter and *Heir of the Husband reverſed the Outlawry*, *The Wife of M. ſued to have Dower* within the five Years after the Outlawry reverſed, but long Time after the five Years after the Fine levied. In this Caſe it was reſolved, that ſhe was not barred by the five Years after the Fine, but *ſhe might have five Years after the Outlawry reverſed.* Mo. 639. pl. 879. 27 Eliz. in Canc. Menvil's Caſe.

9 A. ſeiſed of Land in Fee was *attainted of High Treaſon*, and the *King granted the Land to B.* and afterwards *A. committed Treſpaſs upon the Land*, and afterwards *by Parliament A was reſtored, and the Attainder made void, as if no Act had been*, and ſhall be as availble and ample to A. as if no Attainder had been; and afterwards *B. brings Treſpaſs* for the Treſpaſs meſne; and it was adjudged in 10 H. 7. fol. 22. b. That the Action of Treſpaſs was not maintainable, becauſe that the Attainder was diſaffirmed and annulled ab initio. 13 Rep. 20. Hill. 27 Eliz. in Canc. Menvil's Caſe.

10. *And* in 4 H. 7. 10. it was holden, That *after Judgment reverſed in a Writ of Error, he who recovered* the Land by erroneous Judgment *ſhall not have* an Action of *Treſpaſs for a Treſpaſs mean.* 13 Rep. 20. in S. C.

11. When *a Man recovers* any Poſſeſſion or Seiſin of Land in any Action *by erroneous Judgment*, and afterwards *the Judgment is reverſed*, the Plaintiff in the Writ of Error ſhall have a Writ of Reſtitution, and that Writ recites the firſt Recovery; and the Reverſal of it in the Writ of Error is that *the Plaintiff in the Writ of Error ſhall be reſtored to his Poſſeſſion and Seiſin Una cum exitibus thereof from the Time of the Judgment* &c. Per Curiam. 13 Rep. 21. Hill. 27 Eliz. in Canc. in Menvill's Caſe.

12. The *Sheriff ſells a Term upon a Scire Facias*, and afterwards the *Judgment is reverſed*; Reſolved the Party ſhall not be reſtored to the Term, but to the Money for which it was ſold, if the Sale be without Fraud. Mo. 573. pl. 788. Mich. 41 & 42 Eliz. B. R. Anon.

13. Where

13. When an erroneous Judgment is given, and the Judgment is afterwards reverſed by Writ of Error, *Collateral Acts executory are barred* by it; But *otherwiſe it is of Things executed*; Per Curiam. 8 Rep. 142. b. Paſch. 8 Jac. in Drury's Caſe.

14. *As* if an Action of *Eſcape* be brought *againſt the Sheriff*, and the Judgment is revetſed by Writ of Error the Action is gone, and *he may plead Nul tiel Record*. *But if* Judgment and *Execution be had* againſt the Sheriff before the Reverſal the ſame remains in Force. Ibid. cites 34 H. 6. 2. b. and 21 E. 4. 23. b.

15. But there is a *Diverſity between a Recovery by prior Title, and a Reverſal of a Judgment by Writ of Error*; as if a Woman has Judgment and Execution in Dower in Ancient Demeſne, and it is after reverſed in a Writ of Falſe Judgment; and becauſe ſhe had held the Lands for two Years between the firſt Judgment and Reverſal, the Value of the Land is inquired, and taxed at 20 Marks in a Scire Facias againſt her, ſhe cannot plead a Recovery in a Writ of Right Cloſe in Nature of a Cui in Vita. 8 Rep. 143. a. b. per Curiam, cites 20 E. 3. Scire Facias 123. in Herbert's Caſe.

16. No Reſtitution of Goods taken on an erroneous Execution *for which Damages had been* already *recovered in an Action of Treſpaſs*. Raym. 74. Paſch. 15 Car. 2. B. R. Sumer v. Felgate. 2 Sid. 125. S. C. but S P. does not appear. — Lev. 95.

S. C. related by Twiſden J. but S. P. does not appear.

17. The Defendant in Error recovered 100l. Damages in Debt in C. B. and there *had an Elegit into the County of W. reciting that another Elegit iſſued into London*, and was *returned Nihil*. And *upon a Teſtatum eſt it was commanded to extend all the Goods and Lands*; whereupon the *Sheriff returned, that he took a Leaſe for Years of Tithes, which he delivered to him, ut Bona & Catalla ſua, for the ſaid Debt.* The Writ being with a Teſtatum, whereas there was not any Writ before awarded into London, was held to be Error; And it was reſolved, That *the Sale and Delivery of the Leaſe to the Plaintiff himſelf upon an Elegit was no Sale*, by Force of the Writ delivered in Extent, which being reverſed, the Party ſhall be reſtored to the Term itſelf. Cro. J. 246. pl. 4 Trin. 8 Jac. B. R. Goodyere v. Ince. Brownl. 107. Goodier v. Jounce, S. C. accordingly. But it had been *otherwiſe if the Sale had been to an Eſtranger* by the Sheriff of the Term for an 100l. according to the Opinion of 28 Eliz Dy. for it is the Party's Folly that he does not pay the Judgment; and if ſuch Sales ſhould be made void, none ſhould buy Goods of the Sheriff, by Reaſon whereof many Executions would remain undone; and this by the Opinion of the whole Court.

(K. b) In Judgments and Executions.

Fol. 779.

1. IF A. recovers in a baſe Court within the County Palatine of Cheſter, and upon this a Writ of Error is brought there before the Chief Juſtice, and upon this the firſt Judgment was reverſed; and by the Cuſtom in ſuch Caſes, he at whoſe Suit it is reverſed ought to have Coſts; and there upon the Reverſal Judgment is given that the Party ſhall be reſtored to all that he had loſt, but no Judgment is given upon the Roll certified in the Writ of Error in B. R. that any Judgment was given for the Coſts, and yet a Scire Facias is certified for levying the Coſts, adjudged this is Error. Trin. 9 Car. B. R. between *Foden and Maddock*, per Cur. Intratur Paſch. 8 Car. Rot.

Rot. 397. But at another Day upon Examination of the Record it appeared to be well.

2. If Judgment be given againſt the Bail, and after a Scire Facias is brought againſt the Bail, and a Judgment againſt them, and alſo Judgment given againſt them for Coſts de incremento, this is erroneous; becauſe no Coſts ought to be given in a Scire Facias. Hill. 11 Car. B. R. between *Hardy and Browne*, adjudged per Curiam in a Writ of Error upon ſuch Judgment in Rippon Court. Intratur Trin. 10 Car. Rot. 979.

Cro. C. 471. pl. 3. Goodier v. Platt. S. C. but not exactly S. P.— See tit. Judgment (X) pl. S. S. C.

3. In a Formedon in diſcender, if the Demandant demands one Meſſuage, one Garden, ten Acres of Meadow, and ten Acres of Paſture; and the Tenant as to the Meſſuage, Garden, two Acres prati & Paſturæ, Parcel of the ten Acres prati, and ten Acres Paſturæ, pleads a Feoffment of the Father of the Demandant with Warranty and Aſſets, and as to the Reſidue he traverſes the Gift &c. to which the Demandant as to the firſt Plea takes Iſſue upon the Aſſets, and this is found for the Demandant, upon which Judgment is given, that the Demandant ſhall recover Seiſin of the ſaid Meſſuage, Garden, and two Acres prati & Paſturæ; and as to the Reſidue the Demandant relinquiſhes his Iſſue. This Judgment is erroneous, becauſe it does not appear how much of the two Acres was Meadow, and how much Paſture; ſo that the Sheriff knew not of what Thing to give the Demandant Seiſin. Paſch. 13 Car. B. R. between *Prat and Goodier*, adjudged in a Writ of Error upon ſuch Judgment in Banco, and this reverſed accordingly. Intratur Hill. 11 Car. Rot. 349.

Cro. C. 481. pl 4. South v Griffith. S. C. all the Juſtices præter Hobart held, that both in C. B. and B. R. a Capias

4. In an Action in Banco, if Judgment be given againſt the Principal, and after a Scire Facias is brought againſt the Bail, and upon this Judgment is given againſt the Bail; yet if there be not any Capias of Record ſued againſt the Principal before the Scire Facias brought, this is erroneous. Paſch. 14 Car. B. R. between *Griffith and South*, adjudged in a Writ of Error upon ſuch Judgment, and Judgment againſt the Bail was reverſed accordingly. Intratur Hill. 13 Car. Rot. 559.

againſt the Principal ought to be taken forth and return'd Non eſt inventus, otherwiſe no Scire Facias ought to be againſt the Bail. ——— Jo. 596. pl. 4. S. C. but S. P. does not appear. ——— Error *by the Bail, for that Judgment was given againſt him upon a Scire Facias where no Capias was awarded againſt the Principal* before the Scire Facias awarded againſt him. And it was held, that the Writ of Error well lay in this Caſe for the Bail. And *the Judgment in the Scire Facias was reverſed*; and the like Writ was allowed between Coles *and* Babington. Cro. E. 733. pl. 65. Mich. 41 & 42 Eliz. in Cam. Scacc. Price v. Price. ——— Cro. E. 730. pl. 69. in Cam. Scacc. Cockeyn v. Lady Hawkins. S. P held that the Writ well lay, for that the Suit againſt the Bail is within the Intent of the Statute of 27 Eliz. and is in the Nature of an Action of Debt, and Judgment was affirm'd. ——— Same Caſes of Cro. E. cited Comb. 325. Paſch. 7 W. 3. B. R. but Holt Ch. J. ſaid, he did not approve thoſe Caſes, but preferr'd the latter Authority of Barrock v. Thompſon, which ſee at (G. a) ſupra, pl. 2. ——— See tit. Bail (B) pl. 1. S. C. and the Notes there.

5. If the *Sheriff makes Execution in the Franchiſe* this is good; for he is Officer immediate to this Court. Br. Error, pl. 153. cites 11 H. 4. 9. per Hill

6. *But* per Norton, if *Bailiff of the Franchiſe makes Execution in the Guildable*, this is Error, quod non negatur. Ibid.

7. After *Recovery* in Debt *of* 400 *l. a Fi. Fac. iſſued, upon which* 100 *l. was levied and returned*, afterwards a *Ca. Sa. iſſued for the whole* 400 *l.* and thereupon the Defendant was outlawed. It was aſſigned for Error that the Ca. Sa. *ought to have been only for* 300 *l.* and the Judgment of Execution was reverſed, becauſe the levying of the 100 l. was returned of Record upon the Fi. Fa. Mo. 598. pl. 819. Mich. 34 & 35 Eliz. Wells v. Denny.

(L. b) *What* Act will *aid an Error.*

Appearance.

1. IF a Summons be not well made, if he appears of Record, this takes away the Error, for the Summons is affirmed. 42 E. 3. 30.

Br. Error, pl. 25. cites S. C. — Br. Faux Judgment, pl. 4. cites S. C.

2. If a Man was never ſummoned, yet if he appears it is not Error. 46 E. 3. 30.

Br. Error, pl. 25. cites S. C. — Br. Faux Judgment, pl. 4. cites S. C.

3. If an Omiſſion be made of any Writ or Proceſs, or one Writ awarded in Lieu of another; yet if the Judgment be not given thereupon, but after the Party appears and pleads to Iſſue, and Judgment is given upon the Verdict; this is not (*) erroneous, becauſe he had not taken Advantage of this before pleading to Iſſue. 3 H. 6. 9. for he had Day by the Roll, and ſo no Diſcontinuance. 29 E. 3. 31. b.

(*) Fol 780

4. If a Man in Banco brings a Bill upon his Privilege, but hath no Writ of Attachment of Privilege, yet if the Defendant after appears and pleads, this ſhall be helped by the Appearance. Trin. 13 Jac. B. R. between *Havert and Gibbons.*

Roll Rep. 205. pl. 7. S. C. & S. P. accordingly, per Coke Ch. J. quod fuit conceſſum per Haughton J. —— 3 Bulſt 61. S. C. but as to this Error Curia adviſare vult.

5. If a Man be indicted, and no Addition is given to him as ought, yet if the Defendant appears and pleads to Iſſue, and this is found againſt him; this is helped, for the Addition is ordained by the Statute, for that the Party which is to be outlawed ought to have Notice of it, and here he hath Notice, & conſtat de Perſona by the Appearance. Hill. 18 Jac. B. R. *Johnſon's Caſe* adjudged, this being moved in arreſt of Judgment.

Cro. J. 609. pl. 5. S. C. adjudged. — 2 Roll Rep. 225 S. C. adjudged per totam Curiam. — See tit. Additions, (P) per totum.

6. In Debt if a Capias be the firſt Proceſs, and not a Summons, as ought to be by the Law, though the Defendant appears and pleads to Iſſue, and this is found againſt him, upon which Judgment is given, yet this miſawarding of the Proceſs is erroneous and not helped by the Appearance. Paſch. 3 Jac. B. R. between *Banks and Pembleton* adjudged in a Writ of Error. Paſch. 5 Jac. B. R. between *Cook and Ballard* adjudged, which Intratur Trin. 4 Jac. Rot. 681. Hill. 4 Jac. B. R. between *Moile and Catchnud* adjudged, which Intratur Trin. 4 Jac. Rot. 1609. Contra Paſch. 11 Jac. B. R. between *Inch and Goodfield* adjudged.

See Infra, (G. c) pl. 4. — See tit Cuſtoms, (I 2) pl 11. and tit. Proceſs, (D) pl. 1, 2. and the Notes there.

7. If a Man be ſummoned to appear in an Inferior Court, and the Defendant does not appear, and notwithſtanding the Plaintiff puts in a Declaration and declares againſt him, and after the Defendant appears, and after makes Default, by which Judgment is given againſt him by Default, the Appearance hath helped the putting the Declaration before Appearance, and ſo it is not erroneous. Trin. 15 Jac. B. R.

B. R. between *Harris and Goodale* in a Writ of Error upon a Judgment in Ipſwich adjudged, and the Judgment affirmed per Curiam. But Houghton ſaid, that this was neither a Diſcontinuance nor Diſcontinuante; but Montague and Doderidge ſaid, that this was a Diſcontinuance.

8. If in Treſpaſs for an Aſſault and Battery in an Inferior Court, if there be a Plaint entered, and a Declaration before any Appearance of the Defendant, and after the Defendant appears without Proceſs and pleads to Iſſue, and this is found for the Plaintiff, and Judgment accordingly, this is erroneous, and not helped by the Appearance or Pleading, inaſmuch as there was a Declaration againſt no Body, the Defendant not being then in Court. Mich. 14 Car. B. R. between *Brown and Clagg* adjudged in a Writ of Erroc upon ſuch Judgment in the Court of Marſhalſea; and the Judgment reverſed accordingly. Intratur Paſch. 14 Car. Rot, 325.

(G. c) pl. 23. S. C.

9. If an Action be brought in an Inferior Court againſt J. S. if the Plaintiff declares againſt him in Cuſtodia of the Serjeant and Miniſter of the Court, and it does not appear that the Serjeant had any Proceſs or Precept to arreſt him, and the Defendant appears and demurs for this Cauſe upon the Declaration, and upon this Judgment is given againſt the Defendant, this is erroneous, for upon his Appearance he pleaded this Matter. Trin. 1649. between *Lawe and Doddeſworth* adjudged in a Writ of Error upon a Judgment in York, (as it ſeems) and the Judgment reverſed accordingly.

Br. Faux Judgment, pl. 4 cites S. C.

10. He who appears *at the Summons, or is eſſoined upon the Summons*, ſhall not ſay after that the Summons wanted Form, or that there is falſe Latin, or that he was not ſummoned &c. Br. Error, pl. 25. cites 46 E. 3. 30.

4 Le. 28. pl. 145. Savage v. Knight, S. C. in totidem verbis; but adds that it was ſaid, that after the Defendant appeared a Plaint was entered; but it was anſwered that this did not help the Matter; For there ought to be a Plaint out of which Proceſs ſhall iſſue, as in the Sovereign Courts, out of Original Writs.

11. Error was brought of a *Judgment* given *in an Inferior Court, becauſe there was no Plaint entered, and upon the Record nothing was entered but that the Defendant Summonitus fuit* &c where *the firſt Entry ought to be, A. B. queritur verſus C. D.* &c. and the Summons ſo entered is not any Plaint; and for that Cauſe Judgment was reverſed. Le. 185. pl. 260. and 302. pl. 415. Mich 29 & 30 Eliz. Knight v. Savage.

12. In Error on a *Judgment in Account* it was aſſigned (amongſt others) That *the Writ* of Account *was brought in Norfolk*, and the *Cap' ad Computandem was awarded to London*; whereas it ought to have been to the Sheriff of the County where the Action was brought. Coke ſaid it was helped by the Statute of Jeofails, and he appeared upon this Proceſs, and ſo had made it good; and Error in Proceſs cannot be alleged after In Nullo eſt erratum pleaded; for if it had been alleged the other Party might have alleged Diminution; the Judgment was affirmed. Cro. E. 83. Hill. 30 Eliz. B. R. in Caſe of Robſert v. Andrews.

13. A *Capias* was directed *to the Sheriff of B.* and it was *returned by one who was not Sheriff*, and this was held a manifeſt Error; but becauſe the Defendant had appeared after, and pleaded, it was held not material, and that his *Appearance had made it good.* Cro. E. 582. pl. 6. Mich. 39 & 40 Eliz. B. R. Thoroughgood v. Scroggs.

14. Error of a *Judgment in Debt*, becauſe the *Original Writ had not the Sheriff's Name to the Return* thereof; But in Regard the Defendant had appeared, and pleaded Nul tiel Record, it was holden nat material although the Writ had not been returned, and after Appearance he

he ſhall never take Advantage of the *miſawarding of the mean Proceſs*; the Judgment was affirmed. Cro. E. 767. pl. 6. Trin. 42 Eliz. B. R. Dabiton v. Thorp.

15. The Appearance of the Defendant *will help* and ſalve *a Miſcontinuance of Proceſs*, *but* there is no Caſe in the Law to prove that any Appearance will help and ſalve a Diſcontinuance of Proceſs; Per Williams J. and the whole Court agreed clearly in this, *that no Appearance will help* and ſalve *a Diſcontinuance* of Proceſs. Bulſt. 143. Trin. 9 Jac. in Caſe of Bradley v. Banks.

The Appearance of the Party will help Miſcontinuance of Proceſs; Per Roll Ch. J Sty. 237. Mich. 1650.

16. Error aſſigned was, that the *Writ was in Debt for* 40 *l.* and *the Capias and all the Proceſs to the Return of the Pluries Capias accordingly*; and *then the Entry was*, *that Querens obtulit ſe in Placito Debiti* 40 *s.* and upon Default of the Defendant an *Exigent was awarded*, and the *Defendant after appeared and pleaded and confeſſed the Action*; and this was held no Error, being helped by the Appearance; for as an Appearance ſaves Defaults in mean Proceſs, ſo it ſaves the Default of the Continuance by an Obtulit ſe; the Judgment was affirmed. Cro. J. 311. pl. 10. Mich. 10 Jac. B. R. Lovelace v. Jeniper.

Jenk. 341. pl. 99. S. C.

17. A *Judgment in a Second Deliverance* given in C. B. was reverſed, becauſe there *was not any Writ of Second Deliverance certified*, although it was awarded upon the Roll, and the Parties appeared and pleaded to it. Cro. J. 424 pl. 8 Paſch. 15 Jac. B. R. Newman v. More.

18. In Error of a *Judgment in Dower* it was aſſigned, that there *was not any Original Writ nor Warrant of Attorney for the Defendant*. But upon Diminution alleged *the Writ was certified*; but for the *Warrant of Attorney*, *becauſe it was not aſſigned of Record that Diminution might be alleged*, *it was held that it was now aſſignable*. Cro. C. 351. pl. 16. Hill. 9 Car. B. R. Wickham v. Enfield.

19. *Audita Querela was brought*, *and a Scire Facias thereupon bearing Date before the Audita Querela*, and the *Defendant appears*, and for this Cauſe demurs. The Court held that this Fault is cured by the Appearance; for Audita Querela is more properly a Commiſſion than a Writ, and *if the Party be in Court*, *the Matter ought to be examined without inquiring into the Nature of the Proceſs* by which he was brought in, for it might be that he appeared without Proceſs. Sid. 406. Hill. 20 & 21 Car. 2. B. R. Vaughan v. Loyd.

Vent. 7. S. C and the Demurrer diſallowed But it was ſaid that if an *Original bears Date on a Sunday* or the like, the Appearance of the Party would not help it.

20. *But* it was agreed that a *Scire Facias upon a Judgment differs*, and that a Fault therein will not be cured by Appearance, becauſe the Sci. Fac. *is in Nature of a Declaration*. Sid. 406. in S. C.

Vent. 7 S. C. & S. P. agreed per Cur for there the Sci. Fac. is the Foundation and Quaſi an Original, and the Judgment is given upon it; but here the Sci. Fac. is only to bring in the Party to anſwer, and in the Nature of a meſne Proceſs, and the Judgment is given upon the Aud. Quer.

21. If an *Inferior Court awards a Capias where no Summons was firſt returned*, as there ought to have been, yet this Fault in the Proceſs is aided by Appearance, and is not aſſignable on a Writ of Error; Per Hale Ch. J. Vent. 220. Trin. 24 Car. 2. B. R. in Caſe of Read v. Wilmot.

Vent. 249. Mich. 25 Car. 2. B. R. Anon. S. P. ruled accordingly. —— S P. per Cur. for by Appearance all Defaults are ſaved, though it be in an Inferior Court, and ſo Wylde ſaid it had been of late conſtantly ruled, contrary to Cro. J. 108. Pratt v. Dixon. Freem. Rep. 468. pl. 642. Trin. 1678. Wheeler's Caſe.

22. In Error of a Judgment out of an Inferior Court an Exception was taken, that the *firſt Proceſs was a Capias*; ſed non allocatur; becauſe it was cured by Appearance. 2 Lutw. 953. Mich. 3 Jac. 2. Buſzard v. Bull.

23. In Error to reverſe a *Judgment in an inferior Court*, it was aſſigned, *that the Proceſs of Attachment was returned* thus, *Nihil habet ubi ſummon' poteſt &c. and thereupon a Capias awarded*, which was irregular, for an Alias Attachment ſhould have been awarded, and there was *not any Cuſtom returned to warrant the Uſage of a Capias in Proceſs*, for that is given by Statute, which extends not to inferior Courts; But the Court held both theſe Errors to be cured by the Appearance of the Defendant. Carth. 206. Hill. 3 W. & M. Boſon v. Phyler.

24 Appearance helps only when the Party comes and *pleads to Iſſue*, not when the Party comes in and *challenges the Proceſs* upon the Account of its Defect; Per Eyre J. 1 Salk. 59. pl. 2. Trin. 6 W. & M. in B. R. in Caſe of Wilſon v. Laws.

25. A *Summons* in Treſpaſs out of the Court of *Ely* was *returnable generally the ſame Day*, and a Return the ſame Day of a Summoneri, and an Attachment and Return the ſame Day of a Nil, and then a *Capias returnable the ſame Day*, and thereupon brought in in Cuſtody, Declaration, Plea, Demurrer and Judgment, and Writ of Inquiry executed and returned, and Judgment final, all in one Day; Reſolved, that the *bare Appearance upon the Capias* being compulſory did not help this Error, becauſe it was what the Defendant *could not avoid*. 12 Mod. 523. Trin. 13 W. 3. Biddolph v. Veal.

26. A *Writ of Error* was *executed the ſame Day with the Return of the Pone*, and ſo might be before any Pone iſſued out, and Judgment was reverſed for this Error; For no Appearance and Pleading can help that. 12 Mod. 524 Trin. 13 W. 3. Biddolph v. Veal.

What Defects are aided by Appearance, See Tit. Default, (E. 2)

(L. b. 2) Aided by Intendment.

1. SHeriff returned upon a Capias *Cepi Corpus*, and the *Record is that he always appeared by Attorney*, and per Cur. this is not Error; For it ſhall be now intended that it was by Aſſent of the Parties, and then no Error; Quod Nota. Br. Error, pl. 184. cites 21 E. 4 77.

2. Error upon Outlawry *of Felony upon Indictment*, which was, *that Preſentation was before A. B. and C. D. Juſtices of Peace, that J. S.* &c. *ſuch a Day* &c. and *did not ſpeak of Commiſſion of Oyer and Terminer of Felonies*; And per Huſſey and Jenny the Omiſſion of it is Error; But Fairfax contra; For it ſhall be *intended by theſe Words, Juſtices of Peace*, that they have Commiſſion; But Huſſey ſaid, No; For where *Mayor, Steward*, or the like, *is Coroner, Indictment taken before A. B. Mayor* or Steward ſuper viſum Corporis, *is not good without this Word, (Coroner.)* Br. Error, pl. 186. cites 22 E. 4. 12.

(M. b) Pleading *abateable.*

What Act *will help* an Error.

1. IF in Treſpaſs of Charters taken, the Plaintiff does not count of the Quantity of the Land compriſed in the Charters, (admitting that he ought) yet if the Defendant does not take Advantage thereof, but pleads, and Judgment is given againſt him, this helps the Error, and he ſhall not aſſign it for this. 20 Aſſ. 3. Br. Error, pl. 119. cites S. C. but S. P. does not appear. — F. N. B. 21. (E) S. P. accordingly, but adds, tamen Quære. —— See (P. b) pl. 12.

2. If a Feme Sole brings Treſpaſs, and recovers, and a Writ of Inquiry of Damages is awarded, and before the Return thereof the Plaintiff takes Husband, and after the Writ is returned, and Judgment given thereupon without any Exceptions taken by the Defendant, he ſhall not have Advantage of this in a Writ of Error, becauſe the Writ was only abateable by Plea. Mich. 40, 41 Eliz. B. R. between *Smith and Odyham* adjudged.

3. If an Action be brought againſt Sir Francis Forteſcue Militem, & Baronettum, and he appears and pleads to Iſſue, and a Verdict and Judgment is given for the Plaintiff, the Defendant in a Writ of Error ſhall not have Advantage to ſay, that he was a Knight of the Bath, not ſo named, inaſmuch as he had appeared to the other Name and pleaded, and ſo had concluded himſelf. Paſch. 16 Jac. B. R. between *Markham and Sir Francis Forteſcue* adjudged. Cro. J. 482. pl. 15. Forteſcue v. Markham. S. C. adjudg'd. — Roll Rep. 450 pl. 12. S. C. & S. P. adjudg'd accordingly. —— See (F. c) infra, pl. 5. S. C. —— And ſee tit. Eſtoppel (L) pl. 12. S. C.

4. Upon a Trial between a Peer of the Realm and another, the Sheriff does not return any Knight as he ought; if the Peer does not challenge the Array, but the Jury gave a Verdict he ſhall not have Advantage thereof afterwards. Paſch. 9 Car. between the *Lord Powis and Kirtman*, adjudged in a Writ of Error upon a Judgment in Banco, for he may waive his Priviledge and the Trial be without any Knight.

5. It is a good Rule that *where any Matter may be pleaded in Abatement it ſhall never be aſſigned for Error.* Per Holt Ch. J. Carth. 123. cites 2 Saund. 212. and 48 E. 3. 10. b. 3 H. 4. 6.

(N. b) What Act will *help* an Error, *where the Error appears of Record.*

1. IF a Man be indicted for a Conſpiracy, and no Year or Place alleged of the Conſpiracy, though the Defendant did not take Exception to it, but pleaded Not-Guilty, and Judgment is given againſt him, this Pleading ſhall not help the Error. 24 E. 3. 35. b. 36. adjudged.

2. So if a Man be indicted as of a Conſpiracy, where the Matter ſhewed it was Extortion and not Conſpiracy, though the Defendant pleaded Not-Guilty, and a Judgment is given againſt him, yet this ſhall not help the Error, for this appears upon the Record. 24 E. 3. 36. adjudged.

FH
MVSEVM
BRITANNICVM